

LEGAL FRAMEWORKS FOR COMBATING SEXUAL EXPLOITATION OF CHILDREN

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CHAPTER 1. INTRODUCTION

Respect for human dignity is the foundation of human rights. Sexual exploitation of children is a gross violation of their right to respect for their human dignity and physical and mental integrity. Fulfilment of States' human rights obligations under international law requires effective protection for all children from all forms of sexual exploitation.

The Convention on the Rights of the Child (CRC), adopted in 1989, builds on the foundation of the International Bill of Rights.¹ The CRC affirms the status of all children as equal holders of human rights and empowered actors in the realization of their rights. It includes explicit rights to protection from all forms of violence and exploitation, including sexual exploitation.

Recognition of the scale and extent of sexual exploitation of children and the need for legislation to challenge it accelerated during the 1990s with two events: the appointment by the Commission on Human Rights of the Special Rapporteur on the sale of children, child prostitution and child pornography (1990) and the Commission's adoption of a Programme of Action (1992). The first and second World Congresses against Commercial Sexual Exploitation of Children (Stockholm 1996 and Yokohama 2001) gave further global visibility, reaffirming the human rights-based goal of universal protection of children from all forms of sexual exploitation.

Since Yokohama, there have been important developments in international human rights standards, including the adoption of new international instruments. One of two Optional Protocols to the Convention on the Rights of the Child, adopted by the General Assembly in 2000, provides detailed definitions of sale of children, child prostitution and child pornography; it entered into force in January 2002. It requires ratifying States to criminalize these actions as offences and provide support for child victims. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), supplementing the UN Convention against Transnational Organized Crime, contains the first agreed, internationally binding definition of trafficking in persons and of child trafficking. It was adopted in 2000 and came into force in December 2003.

Many other international instruments are relevant to challenging and eliminating sexual exploitation of children. These include the two International Covenants – on Civil and Political Rights and on Economic, Social and Cultural Rights – and the Convention to End All forms of Discrimination against Women. (A consolidated list of instruments is provided in the annex.)

Two ground-breaking, detailed conventions have been adopted by the 47-member State Council of Europe, on trafficking in human beings and on the protection of children against sexual exploitation and sexual abuse. These are open for accession

¹ It consists of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights.

under certain conditions to non-Member States. The two conventions build on and raise the standards of existing international instruments.

A range of new United Nations and UN-related guidelines and policies have been adopted to promote good practice, including in the implementation and enforcement of legislation and the protection of child victims and witnesses.

In addition, States made further commitments to the protection of children from sexual exploitation at the UN General Assembly Special Session on Children (2002) and at the World Summit (2005). There are also detailed and developing commitments in successive annual resolutions on the rights of the child at the UN General Assembly and at the Commission on Human Rights and its successor body, the Human Rights Council. The report of the UN Secretary-General's Study on Violence against Children, submitted to the General Assembly in October 2006, provides detailed recommendations and a further impetus for State action to prevent and respond, with a human rights-based approach, to all forms of violence against children, including sexual exploitation.

The purpose of this paper is to take stock of international and national legislative progress since Yokohama in terms of:

- Development and application of international and regional human rights standards;
- Development of national legal frameworks, in conformity with international human rights obligations to protect children from all forms of sexual exploitation, to act as a foundation towards elimination of child sexual exploitation;
- Implementation and enforcement of existing laws and identification of the need for additional legislation to challenge newly identified forms of exploitation.

The paper concludes with recommendations, based on these reviews, for urgent action to consolidate legislation and implement it effectively, building on progress.

CHAPTER 2. DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS STANDARDS AND GLOBAL COMMITMENTS SINCE 2001

There has been substantial consolidation and development of international human rights standards relevant to protection of children from sexual exploitation in the period since the Yokohama Congress in 2001. This has included the adoption of new international and regional instruments, set out below.

Core International Instruments (Before 2001)

Convention on the Rights of the Child

Both the first and second World Congresses reaffirmed the CRC as the core instrument in the fight against sexual exploitation of children and its monitoring body, the Committee on the Rights of the Child, as a key catalyst for progress. The Committee, now enlarged to 18 internationally elected members, meets three times a year in Geneva. Its primary task is examining States' reports on their progress towards recognizing and realizing children's rights.

In 1996, during the early stages of the drafting process of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, the Committee underlined that the CRC does not only provide specific provisions against sexual exploitation of children. It also sets up "a holistic approach for the consideration of the human rights of children... 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 be seen not simply in isolation, but in the broader context of the realization of children's rights and taking into consideration the international obligations arising from the Convention".²

Since the Committee started to examine States' reports under the CRC in 1993, it has paid particular attention to the rights of children to be effectively protected from sexual exploitation. It has also promoted implementation of the recommendations of the two World Congresses in its country-specific Concluding Observations. Furthermore, the Committee itself produced detailed proposals on eliminating sexual exploitation, arising from two days of General Discussion on violence against children, in 2000 and 2001.³ Following these, the Committee recommended to the UN General Assembly that the Secretary-General be requested to initiate a comprehensive global study on violence against children. The proposal was accepted, and the Secretary-General appointed Paulo Sérgio Pinheiro as an independent expert to lead the study, reporting to the General Assembly in 2006 (see below, page 25).

² Committee on the Rights of the Child, Report on the 11th Session, January 1996, CRC/C/50, p. 45

³ For recommendations arising from the Committee's General Discussions, see www2.ohchr.org/english/bodies/crc/index.htm

In its Concluding Observations on States' successive reports under the CRC, the Committee consistently recommends that they (1) conduct a comprehensive study on the causes, nature and extent of sexual exploitation and abuse of children and (2) develop a national plan of action, covering legislative and other matters, to prevent and combat them.⁴ It has identified particular risk factors and particular groups of children at additional risk of exploitation, including gender issues concerning both girls and boys, children with disabilities, children affected by armed conflict, and refugee and internally displaced children.

Since 2001, the Committee has issued a number of relevant General Comments (authoritative interpretations of the CRC), some of which are directly relevant to combating sexual exploitation of children.⁵

In General Comment No. 5, on general measures of implementation for the CRC, the Committee provides guidance on the legislative, administrative and other steps States must take to ensure respect for children's rights guaranteed by the CRC, including their right to protection from all forms of violence, abuse and exploitation. These steps include:

- Development of a framework of national legislation fully in compliance with the CRC (which is the topic of this paper);
- Development of a comprehensive national strategy for implementation of the Convention (into which plans of action to eliminate sexual exploitation should be integrated);
- Establishment of a permanent institution or structure within government with overall responsibility for promoting implementation and appropriate coordination between different sectors and levels of government, and with civil society, children and others;
- Child impact assessment and evaluation;
- Data collection;
- Identification and analysis of budgets for children;
- Training and capacity building;
- Dissemination of information on the rights guaranteed by the CRC to adults and children alike.⁶

The Committee also consistently advocates the establishment of independent national children's rights institutions – children's ombudspersons or commissioners, or focal points within national human rights commissions or general ombudsperson offices. These institutions, which should comply with the Paris Principles,⁷ have been established in more than 60 States. They can play an important role in the independent monitoring of governments' responses to sexual exploitation and by advocating for

⁴ For all documents relating to the reporting process under the Convention on the Rights of the Child, including the Committee's Concluding Observations, see <http://www2.ohchr.org/english/bodies/crc/index.htm>

⁵ For the Committee's General Comments, see <http://www2.ohchr.org/english/bodies/crc/index.htm>

⁶ General measures of implementation for the Convention on the Rights of the Child 2003 No. 5, CRC/GC/2003/5

⁷ The Paris Principles provide guidelines on the disarmament, demobilization and reintegration of children associated with armed groups.

effective legal frameworks and enforcement.⁸ The Committee provides detailed advice on the formation and operation of these institutions in its General Comment No. 2.⁹

General Comment No. 6, on the treatment of unaccompanied and separated children outside their country of origin, notes: “Unaccompanied or separated children in a country outside their country of origin are particularly vulnerable to exploitation and abuse. Girls are at particular risk of being trafficked, including for purposes of sexual exploitation.”¹⁰ The Committee emphasizes that the CRC requires States to shield children from trafficking and from sexual and other forms of exploitation, abuse and violence. Necessary measures include identifying unaccompanied and separated children; appointing guardians for them; regularly inquiring as to their whereabouts; and conducting information campaigns that are age appropriate, gender sensitive and in a language and medium that is understandable to the child.

Adequate legislation should also be passed and effective mechanisms of enforcement established with respect to labour regulations and border crossing: “Risks are also great for a child who has already been a victim of trafficking, resulting in the status of being unaccompanied or separated. Such children should not be penalized and should receive assistance as victims of a serious human rights violation.” (paras. 50 to 53). The office of the United Nations High Commissioner for Refugees (UNHCR) also highlights the special vulnerability of refugee and asylum-seeking children and discrimination in protection of their rights. Various UNHCR guidelines address these issues (see below, page 28)

The Committee’s General Comment on HIV/AIDS and the rights of the child notes: “Girls and boys who are deprived of the means of survival and development, particularly children orphaned by AIDS, may be subjected to sexual and economic exploitation in a variety of ways, including the exchange of sexual services or hazardous work for money to survive, support their sick or dying parents and younger siblings, or to pay for school fees. Children who are infected or directly affected by HIV/AIDS may find themselves at a double disadvantage – experiencing discrimination on the basis of both their social and economic marginalization and their, or their parents’, HIV status.” The Committee concludes: “States parties must take bold action to protect children from sexual and economic exploitation, trafficking and sale and, consistent with the rights under article 39, create opportunities for those who have been subjected to such treatment to benefit from the support and caring services of the State and non-governmental entities engaged in these issues.”¹¹

In 2006, the Committee issued a General Comment on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment.¹² The Comment emphasized that eliminating violent and humiliating

⁸ The Paris Principles: Principles relating to the Status of National Institutions, GA resolution 48/134, 1993.

⁹ The role of independent national human rights institutions in the protection and promotion of the rights of the child, CRC/GC/2002/2

¹⁰ Treatment of unaccompanied and separated children outside their country of origin 2005 No. 6, CRC/GC/2005/6

¹¹ HIV/AIDS and the rights of the child 2003 No. 3, CRC/GC/2003/3, para. 36

¹² The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28.2 and 37, inter alia), 2006 No. 8, CRC/C/GC/8

punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties. It noted: “Addressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other settings, is not only an obligation of States parties under the Convention. It is also a key strategy for reducing and preventing all forms of violence in societies.” (paras. 3 and 22) Prohibiting all corporal punishment asserts children’s equal right to full respect for their human dignity and physical integrity. It also challenges traditional views of children as objects or possessions, an essential element in the challenge to sexual exploitation.

The Committee highlights the special vulnerability of children with disabilities in its General Comment on the rights of children with disabilities: “The Committee has often expressed grave concern at the growing number of child victims of child prostitution and child pornography. Children with disabilities are more likely than others to become victims of these serious crimes. Governments are urged to ratify and implement the Optional Protocol on the sale of children, child prostitution and child pornography (OPSC) and in fulfilling their obligations under the Optional Protocol, States parties should pay particular attention to the protection of children with disabilities, recognizing their particular vulnerability.”¹³

Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography

Attention to sexual exploitation of children by the Committee on the Rights of the Child has intensified as it has started to examine States’ initial reports under the Optional Protocol on the sale of children, child prostitution and child pornography. This Optional Protocol, adopted 25 May 2000, came into force soon after the Yokohama Congress, on 18 January 2002, three months after the tenth ratification. By October 2008, it had been ratified by 129 States. The first report to be considered by the Committee under the Protocol was that of Norway, on 3 June 2005 (39th session). By the end of the 49th session, in October 2008, the Committee had considered 30 reports under the Optional Protocol.¹⁴

The Optional Protocol requires prohibition of the sale of children, child prostitution and child pornography and obliges States to criminalize “offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation of the child..., offering, obtaining, procuring or providing a child for child prostitution ... [and] producing, distributing, disseminating, importing, exporting, offering, selling or possessing ...child pornography” (article 3). It includes provisions on jurisdiction (article 4) as well as extradition (article 5) for these criminal offences.

States are required to afford each other “the greatest measure of assistance” in connection with investigations or criminal or extradition proceedings, including through treaties or arrangements on mutual legal assistance (article 6). They are also required to protect the rights and interests of child victims and witnesses and to provide for rehabilitation, access to procedures to seek compensation and prevention measures to protect children from sexual exploitation (articles 8 and 9). International

¹³ The rights of children with disabilities, 2006 No. 9, CRC/C/GC/9, para. 75

¹⁴ All documents relating to the reporting process under the Optional Protocol are at <http://www2.ohchr.org/english/bodies/crc/index.htm>

cooperation for the “prevention, detection, investigation, prosecution and punishment of those responsible” (article 10) is also called for.

The Optional Protocol has a monitoring mechanism that requires States to submit an initial report to the Committee on the Rights of the Child two years after ratification, “providing comprehensive information on the measures it has taken to implement the provisions of the Protocol” (article 12). Thereafter, information on implementation of the Protocol is to be included in the periodic reports submitted to the Committee under article 44 of the CRC. In cases where the State party is not a party to it but is a party to the Optional Protocol (i.e. the United States of America), the State party is required to submit reports on the implementation of the Protocol every five years.

BOX

Rights-based language on abuse and exploitation of children

The international legal framework, including in particular the Convention on the Rights of the Child and its Optional Protocol on the sale of children, child prostitution and child pornography, provides terminology and definitions for different forms and manifestations of sexual exploitation of children. Since the adoption of these instruments, the understanding of child exploitation as a form of violence against children has advanced further. A discourse is called for which emphasizes that sexual exploitation and abuse of children, in all its forms and manifestations, is a criminal act under international law. This can be underlined by using rights-based terminology wherever possible:

- Instead of ‘child prostitution’, use ‘sexual exploitation of children in prostitution’;
- Instead of ‘child pornography’, use ‘sexual exploitation of children in pornography’, and refer to ‘representations of sexual abuse’.
- Instead of ‘child sex tourism’, use ‘sexual exploitation of children in travel and tourism’, and refer to ‘travelling sex offenders’.

END BOX

In January 2002, the Committee adopted guidelines for preparation of initial reports under the Protocol. These were subsequently revised in September 2006 (after just twelve reports had been reviewed) to “better understand the kind of information and data it considers necessary to understand and evaluate the progress made by States parties in implementing their obligations and to enable it to provide them with appropriate observations and recommendations.”¹⁵ The revised guidelines place more emphasis on data collection and general measures of implementation. Subsequent sections concern prevention of the sale of children, child prostitution and child pornography; prohibition and related matters; protection of the rights of child victims; international assistance and cooperation; and other relevant provisions of national or international law. The revised guidelines are substantially longer and include a seven-page annex that elaborates on some issues.

The Concluding Observations of the Committee on initial reports from States Parties are subdivided into three sections: introduction, positive aspects and principal areas of

¹⁵ Committee on the Rights of the Child, Revised Guidelines regarding initial reports to be submitted by States Parties under article 12, paragraph 1 of the OPCS

concern and recommendations. The first two sections are generally quite succinct, welcoming the submission of the report, appreciating the dialogue with the governmental delegation and noting the adoption of relevant laws, programmes and plans of actions. The majority of the document focuses on the areas of concern and the recommendations.

Although the provisions of the Optional Protocol are less precise than those of the more recent Council of Europe conventions, the Committee endeavours to ensure that recent advances and challenges are taken into consideration during the examination of State party reports. In its Concluding Observations, the Committee has begun requesting that European States ratify the Council of Europe conventions.

Since the two World Congresses, new legislation prohibiting the sale of children, child prostitution and child pornography has been adopted in many countries. The Concluding Observations note the need for clear definitions and recommend that States amend existing legislation or adopt new legislation to bring it into line with the Optional Protocol. In addition, the Committee has identified weak legislation, shown by low rates of identification and prosecution of cases. The Concluding Observations also highlight the difficulties in extraditing and prosecuting crimes committed outside a State's territory due to the requirement in many States for 'dual criminality'¹⁶ (see chapter 3, page 39). The Committee systematically recommends abolishment of this requirement.

In its Concluding Observations, the Committee regularly points to the need for data to be disaggregated, particularly by sex, region, age and nationality and ethnicity but also by vulnerable children, socio-economic background and children in need of special protection. The Committee highlights the need to pay particular attention to vulnerable groups who are at a higher risk of being exploited. These include children living in poverty, children living or working on the street, working children, migrant and foreign-born children, children who are internally displaced, children with disabilities, children belonging to indigenous groups or ethnic minorities, and children living in difficult family situations.

The lack of research in States to identify the root causes, nature and extent of the problem is a common concern. The main root causes of sexual exploitation identified by the Committee are poverty, underdevelopment and cultural attitudes. The Concluding Observations also highlight the need to prevent sale of children, child prostitution and child pornography by addressing socio-economic causes, developing public awareness campaigns and educating parents and children on preventing and reducing the risks of trafficking and sexual exploitation.

Other Core Human Rights Instruments

The treaty bodies monitoring compliance with other core human rights instruments also play an important role in monitoring the development and implementation of legislation relevant to the protection of children from sexual exploitation. The Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture and the Human Rights Committee regularly welcome or

¹⁶ Meaning the activity must be a crime in both countries in order to be prosecuted.

recommend ratification of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. CEDAW has expressed concern at criminal codes that provide for criminalization of women and girls in prostitution. Both CEDAW and the Committee on Migrant Workers expressed concerns at restrictive definitions of trafficking in legislation – for example, definitions that only cover trafficking for prostitution, not for other forms of sexual exploitation, or that cover girls but not boys. These committees, along with the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights, have all welcomed or recommended the inclusion in national criminal legislation of child exploitation in prostitution, pornography, sex tourism and trafficking. Some treaty bodies have made more detailed recommendations on required legal measures, including extraterritorial application.¹⁷

In December 2000, an Optional Protocol to the Convention on the Elimination of Discrimination against Women came into force. States that have ratified this Optional Protocol (92 by 2008) recognize the competence of CEDAW to receive complaints from individuals or groups of individuals alleging breaches of their rights under the Convention. This procedure could be used, for example, to submit complaints concerning girls' rights to protection from sexual exploitation.¹⁸

Palermo Protocol

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, was adopted in 2000 and came into force in December 2003. By August 2008, it had been ratified by 123 States and accepted by the European Community.

The Palermo Protocol contains the first detailed and internationally binding definition of “trafficking in persons” and of child trafficking, including for the purpose of sexual exploitation. “Trafficking in persons” is defined 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”. The Protocol lists the forms of exploitation covered; these include, as a minimum, “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

Consent by a victim of trafficking is regarded as irrelevant where force, deception or coercion has been used or threatened. The Protocol establishes that it is sufficient to know that a child (a person under 18 years) has been recruited and moved for the purposes of exploitation, including sexual exploitation, for them to be considered a victim of trafficking. Thus it must be emphasized that persons under 18 years old cannot consent to being trafficked; an apparent “consent” is not recognized as a justification for any form of child exploitation.

¹⁷ Documents relating to all the UN human rights Treaty Bodies are at <http://www2.ohchr.org>

¹⁸ <http://www2.ohchr.org/english/law/cedaw-one.htm>

ILO Convention 182 on the Worst Forms of Child Labour

The Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention 182) requires States “as a matter of urgency” to prohibit and eliminate the worst forms of child labour, which are defined to include various forms of sexual exploitation. The Convention came into force in November 2000. By September 2008, it had been ratified by 169 States – 90 per cent of ILO Member States.

The Convention recognizes the “use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances” as a worst form of child labour, requiring immediate prohibition and elimination as a matter of urgency. The Convention defines a child as any person under the age of 18 years; there are no exceptions.

The Convention, accompanied by Recommendation No. 190, reflects a global consensus for “immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.” Commercial sexual exploitation is recognized as a category of worst forms of child labour separate from the category of slavery-like practices – which includes trafficking – and separate from the category relating to the use of children in illicit activities. This clarifies that commercial sexual exploitation of children under 18 years – without exception – is unacceptable even if not a form of forced labour and even if prostitution per se is not outlawed in a particular country.

The Convention supports the policy and operational aspects of the fight against child sexual exploitation. It requires ratifying States to design and implement programmes of action to eliminate it as a priority and establish or designate appropriate mechanisms for monitoring implementation. It also calls for time-bound measures for prevention; support for the removal of children from sexual exploitation and their rehabilitation; ensuring access to free basic education or vocational training for all children removed; identification of children at special risk; and ensuring account is taken of the special situation of girls.

The Convention also calls for international cooperation or assistance in efforts to ensure the effective implementation of its provisions, including support for social and economic development, poverty eradication and education. International cooperation is of particular significance to those worst forms of child labour that are transnational, such as the trafficking of children for the purpose of sexual exploitation.

Under the ILO Constitution, Member States have to report every two years on the application of conventions to which they are parties, including the “Worst Forms of Child Labour” convention. In relation to Convention 182, ILO’s Committee of Experts on the Application of Conventions and Recommendations has emphasized in its comments to States that they must take the necessary measures to prohibit and criminalize the use of a child up to the age of 18 for prostitution or pornography, irrespective of the age of consent in the State’s law.¹⁹

¹⁹ ILO CEACR, 2007, 78th session

Optional Protocol on Children in Armed Conflict and Related Resolutions

In the period since the Yokohama Congress, a second Optional Protocol to the CRC, on the involvement of children in armed conflict, has come into force. The intensified risk of sexual exploitation for children affected by armed conflict, and in particular of children recruited into armed forces, was highlighted in the Graça Machel 1996 report, *Impact of Armed Conflict on Children*.²⁰ The report included 12 country studies on sexual exploitation of children in situations of armed conflict and specific recommendations for dealing with this problem. In 1997, the UN Secretary-General appointed a Special Representative for Children and Armed Conflict. (The current Special Representative, Ms Radhika Coomaraswamy, was appointed in 2006.) Successive Special Representatives have continued to highlight the horrific exploitation, including sexual exploitation, of children recruited into armed forces or affected by situations of armed conflict.

The increased visibility of these issues has led to a succession of Security Council resolutions. The first – resolution 1261 (1999) – affirmed the protection of children as a peace and security issue and initiated the progressive consideration of children in armed conflict by the Council. In resolution 1379 (2001), the Security Council recommended that the Secretary-General list parties recruiting and using children in armed conflict. In 2003 the Council called on parties to prepare and implement concrete, time-bound action plans for the cessation of all violations against children. Action plans now provide a mechanism to engage parties in practical steps to fulfil their obligations in regard to children as a result of resolution 1460 (2003). The Council has established a monitoring and reporting mechanism and the Working Group on Children and Armed Conflict in resolution 1612 (2005). By August 2008 the Working Group had considered 19 country reports, making specific recommendations and public statements.²¹

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict was adopted in May 2000 and came into force in February 2002. By September 2008, it had been accepted by 122 States. The Protocol requires ratifying States to ensure that no person under the age of 18 is recruited compulsorily into their armed forces and to “take all feasible measures” to ensure that under 18-year-olds in the armed forces do not take a direct part in hostilities. States must also take all feasible measures to prevent children under 18 from being recruited and used in hostilities by armed groups. The Committee, in Concluding Observations on States’ reports, raises deep concerns about the recruitment of children, mostly girls, as sex slaves and recommends appropriate treatment and rehabilitation for victims under article 39 of the Convention and article 6 of the Optional Protocol.²²

Rome Statute of the International Criminal Court

²⁰ UN General Assembly, A/51/306

²¹ For all Security Council documents, see <http://www.un.org/Docs/sc/index.html>

²² For all documents relating to the Optional Protocol on children and armed conflict, see <http://www2.ohchr.org/english/bodies/crc/index.htm>

The prosecution of crimes against children has advanced significantly in the period since Yokohama. The International Criminal Court has provided a vital tool to address impunity by codifying grave violations against children, including widespread and systematic sexual abuse, as crimes against humanity and as war crimes. Ugandan and Congolese commanders have been charged with recruiting and using children in hostilities, including for sexual purposes.

The Rome Statute of the International Criminal Court, adopted in 1998, came into force in July 2002, having jurisdiction over war crimes and crimes against humanity. By September 2008, it had been ratified by 107 States. Article 7 states: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Enslavement [(7)(1)(c)], which means [(7)(2)(c)] “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;”
- “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;” [(7)(1)(g)];
- “War crimes” means inter alia [(8)(2)(b)(xxii)]: “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f) enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.”

The Court’s outreach programmes have included speaking to over 4,500 pupils in Uganda in 2008, making presentations on the mandate of the Court and giving special emphasis to the Court’s position on the non-prosecution of persons below the age of 18 who are alleged to have committed crimes, and on the role children can play before the Court.²³

Hague Convention on Intercountry Adoption

The Hague Convention on Intercountry Adoption is designed to ensure that inter-country adoption takes place only in the best interests of children and with respect to the child’s rights as recognized in international law, including the CRC, thus combating exploitation in adoption. The Convention was concluded in 1993 and came into force in 1995. By September 2008 it had been adhered to by 76 States. It is clear that the Hague Convention and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography are mutually supportive.

In fact the Optional Protocol requires States to criminalize “improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption” and requires States to take all appropriate legal and administrative measures “to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments” (articles

²³ For all documents relating to the International Criminal Court, see <http://www.icc-cpi.int/home.html&l=en>

3(1)(c)(ii) and (3)(5). The risks of all forms of abuse and exploitation are intensified for children involved in such adoptions, in particular where financial gain is the goal of those involved.

New International Instruments (Since 2001)

The following new international conventions with relevance to combating sexual exploitation have been adopted and/or have come into force in the period since the Yokohama Congress:

Protection of Migrant Workers

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families establishes international standards for protection of the human rights of migrants. It also prohibits them from being held in slavery or servitude or subjected to forced labour, which includes forms of sexual exploitation of children. It was adopted in 1990, came into force in 2003 and by September 2008 had been ratified or acceded to by 39 States. The Committee established to monitor implementation of this Convention started to examine States' initial reports in 2006. By September 2008, it had examined six reports. In its Concluding Observations the Committee has generally urged States to step up their efforts to counter migrant-smuggling and trafficking in persons, especially women and children.

Rights of Persons with Disabilities

Research in States in various regions, highlighted by the Committee on the Rights of the Child, has suggested that children with disabilities are particularly vulnerable to sexual exploitation and abuse. The Convention on the Rights of Persons with Disabilities, adopted by the General Assembly in December 2006, provides specific obligations to protect children with disabilities from all forms of violence and exploitation. The Convention came into force in May 2008 and by September 2008 had been ratified by 40 States. Article 16 requires States parties to "take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects".

States Parties are also required to take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers. This includes provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States must ensure that protection services are sensitive to age, gender and disability status and that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

States must also take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse "in an

environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs”.

States must put in place effective legislation and policies, including legislation and policies focused on women and children, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Protection from Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the General Assembly in 2006. The Convention will come into force following ratification or accession by 20 States; by September 2008, it had been ratified by five States. Upon ratification, States parties commit to criminalize all forms of enforced disappearance. Article 25 requires measures to prevent and punish the wrongful removal of children of disappeared persons or the tampering with documents giving their true identity. Where these children have been adopted, States must have legal provisions in place to review and to annul the child’s adoption or placement if it originated in an enforced disappearance and if it is in the child’s best interests to uphold their rights to identity; the child’s views must be given due weight. Among the many risks associated with enforced disappearance, including when it is combined with illegal inter-country adoption, is that of sexual exploitation. Notably, the new International Convention, like the CRC, gives weight to the participation of children in proceedings affecting them.

Developments in Regional Human Rights Instruments

Africa

The African Charter on Human and Peoples’ Rights (adopted 1981, entered into force 1986) is a general instrument requiring States to “ensure the elimination of every discrimination against women and also to ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions” (article 18).

The African Charter on the Rights and Welfare of the Child was adopted in 1990, one year after the CRC. It entered into force in 1999 and by September 2008 had been ratified by 43 States. It defines the child as every person below the age of 18 without exception (the CRC adds “unless, under the law applicable to the child, majority is attained earlier”). Article 27 requires States to undertake to protect the child from all forms of sexual exploitation and sexual abuse and in particular 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.”

It also requires that “Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an

official registry compulsory” (article 21(2)). Article 29 requires States to take appropriate measures to prevent “abduction, the sale of, or traffick in children for any purpose or in any form, by any person including parents or legal guardians of the child”. The monitoring body for the Charter, the African Committee of Experts on the Rights and Welfare of the Child, has adopted Rules of Procedure and Guidelines for Initial Reports. In November 2008 it starts to examine States’ reports under the Charter.

The African Youth Charter (defining ‘youth’ as everyone between the ages of 15 and 35) was adopted in 2006 and by February 2008 had been ratified by three States. It requires States to enact and enforce legislation to protect girls and young women from all forms of violence, including sexual exploitation.

Europe: Council of Europe

The Council of Europe, an inter-governmental organization with 47 Member States, has adopted two groundbreaking conventions. They are also open for accession by non-Member States that participated in their elaboration and by other States under certain conditions. These are the Council of Europe Convention on Action against Trafficking in Human Beings (in force 2008) and the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (adopted 2007; not yet in force; it will come into force following ratification by five states including at least three Member States of the Council of Europe). In addition, the Convention on Cybercrime, which came into force in 2004, provides special measures to combat child pornography involving use of a computer system.²⁴

Because of their international significance as the most detailed instruments defining standards for combating sexual exploitation and trafficking of children, these recent Conventions are summarized in detail below.

Convention on Cybercrime: The Council of Europe Convention on Cybercrime was adopted in 2001, came into force in 2004 and by September 2008 had been ratified by 23 States including one non-Member State, the United States of America. Although developed by the Council of Europe, the Convention increasingly serves as a global guideline for preparation of national legislation and as a framework for international cooperation against cybercrime, including to combat sexual exploitation of children. The Convention defines child pornography as encompassing pornographic materials that visually depict: a minor engaged in sexually explicit conduct, a person appearing to be a minor engaged in sexually explicit conduct and realistic images representing a minor engaged in sexually explicit conduct. The definition is thus not limited to materials involving a real child but encompasses materials such as cartoons and digitally created imagery.

The Convention prohibits various acts related to child pornography in the context of computers. This includes possession of child pornography in a computer system or on a computer data storage medium (article 9(1)(e)) and the procuring of child pornography through a computer system for oneself or for another person (article

²⁴ For all documents relating to the Council of Europe and its conventions, see <www.coe.int/>.

9(1)(d)). However, States parties may reserve their right not to criminalize these conducts (article 9(4)).

The 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (see below and chapter 3, page 39) includes a definition of child pornography and calls on States parties to criminalize the production, offering/making available, distribution/transmitting, procuring and possession of child pornography. The Convention requires States parties to criminalize the possession of child pornography, with reservations possible only for virtual materials that do not involve a real child or involving children who have reached the age of consent and the images are produced and possessed by them with their consent for their own private use (Article 20(3)), thus narrowing the exemptions from criminalization allowed in the Convention against Cybercrime.

The important procedural and international co-operation measures contained in this Convention also apply to other criminal offences committed by means of a computer system and to the collection of evidence in electronic form of criminal offences, including offences of sexual exploitation of children.

Convention on Action against Trafficking in Human Beings: This Convention was adopted in 2005 and entered into force on 1 February 2008; it has already been signed by 40 Member States, 18 of whom have ratified it. It is open for signature by those non-member states of the Council who participated in its elaboration and to other States, subject to approval by States parties to it.

The Convention uses as a starting point the Palermo Protocol and its definitions, including of child trafficking, and takes account of other international legal instruments. It seeks to strengthen the protection provided by those instruments and to raise the standards in them. In particular, the Convention recognizes trafficking in human beings as a violation of human rights and places a special focus on assistance to victims and protection of their rights. It applies to all victims of trafficking: girls, boys, women and men. A child-sensitive approach is reflected throughout the Convention, and special measures are required when children are victims of trafficking (for a detailed list, see chapter 3, page 37)

It establishes an independent monitoring mechanism, the Group of Experts against trafficking in human beings (GRETA). This is composed of independent experts whose task is adopting a report and conclusions on each State party's implementation of the Convention. Another more political body, the Committee of the Parties, is composed of representatives of States parties to the Convention (both Member States and non-members of the Council of Europe). It may adopt recommendations addressed to a party on the basis of GRETA's report and conclusions concerning the follow-up measures to be taken.

Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse: This very recent Council of Europe Convention is the most comprehensive instrument so far adopted to combat sexual abuse and exploitation. It builds on existing international instruments and takes account of new challenges. It is open for ratification not only by the 47 Member States of the Council but by other States that participated in its elaboration: Canada, the Holy See, Japan, Mexico and the United

States. Other states can accede to it with unanimous consent of the parties to it (articles 45 and 46). By September 2008, the Convention had been signed by 29 States; several States have indicated they will ratify it shortly. It will come into force following the fifth ratification (at least three of the five must be by Council of Europe Member States).

The Explanatory Memorandum to the Convention notes that available data suggest that the majority of sexual abuse against children is committed within the family, by persons close to the child or by those in the child's social environment. It is for this reason that the scope of the Convention covers all forms of sexual abuse and exploitation.

The purposes of the Convention, set out in Chapter I, are to:

- Prevent and combat sexual exploitation and sexual abuse of children;
- Protect the rights of child victims of sexual exploitation and sexual abuse;
- Promote national and international cooperation against sexual exploitation and sexual abuse of children.

Chapter II covers preventive measures, with the overall obligation on States to “take the necessary legislative or other measures to prevent all forms of sexual exploitation and sexual abuse of children and to protect children”. There are provisions on the recruitment, training and awareness-raising of people working in contact with children; education for children and for the general public; preventive intervention programmes or measures for both offenders and potential offenders; and requirements to encourage the participation of children in the development and implementation of policies, programmes and other initiatives and also to encourage participation of the private sector, the media and civil society.

Chapter III requires coordination on a national and local level between involved agencies. It requires States to set up or designate independent national or local institutions to promote children's rights, with specific resources and responsibilities and also mechanisms for relevant data collection.

Chapter IV covers protective measures and assistance to victims, with provisions on reporting, helplines and assistance to victims, and Chapter V requires that programmes or measures aimed at preventing or minimizing the risks of repeated offences of a sexual nature against children be made available to all those subject to criminal proceedings and/or convicted of any of the offences covered by the Convention as well as to those who fear they may commit such offences. Programmes must be developed or adapted to meet the developmental needs of children who sexually offend, including those below the age of criminal responsibility, to address their sexual behavioural problems.

Chapter VI defines in detail the conduct that must be criminalized, building on definitions in existing instruments and covering sexual abuse, child prostitution, child pornography (including the new offence of accessing child pornography online), corruption of children through intentionally causing them to witness sexual abuse or activities, solicitation including ‘grooming’ through the Internet (solicitation of children through the Internet for purposes of sexual abuse) and aiding or abetting the offences in the Convention or attempts to commit the offences. The Convention is

covered in more detail in chapter 2 as it provides an invaluable guide for framing of effective and appropriate national legislation worldwide.

In chapter X the Convention establishes a Committee of the Parties, consisting of representatives of various Council of Europe bodies as a monitoring mechanism. Its tasks include facilitating “the collection, analysis and exchange of information, experience and good practice between States to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children”.

European Convention and Court of Human Rights: The European Convention on Human Rights (1950) guarantees a number of rights to all individuals under the jurisdiction of States parties. It also sets up a European Court of Human Rights, which controls compliance with its provisions by States and receives applications from victims of a violation. Victims of violence or sexual abuse may invoke, among others, articles 3 and 8 of the Convention. Article 3, protecting all individuals from torture or inhuman or degrading treatment or punishment, is an unqualified right from which ratifying States are not permitted to derogate. Article 8, the right to respect for “private and family life”, covers less serious interferences in personal dignity and physical integrity. Such interferences can be justified by the ratifying State – for example, if deemed necessary in a democratic society for the protection of others’ rights or the prevention of crime.²⁵

In the case of *X and Y v. the Netherlands* (26 March 1985, Series A no. 91), the Court of Human Rights referred for the first time to a State’s positive obligations under article 8 of the Convention to protect minors against sexual abuse in an effective manner. The applicants were a 6-year-old girl with mental disabilities who had suffered sexual abuse and her father. Neither criminal law nor civil law in the Netherlands allowed the girl or her father to bring an action against the perpetrator. The Court found that it was the State’s obligation to provide for the possibility to bring the case before the criminal courts.

In the case of *M.C. v. Bulgaria* (no. 39272/98, ECHR 4 December 2003), concerning the rape of a girl aged 14 by two young men, the Court went a step further. Bulgarian criminal law only protected victims of rape who had offered strong resistance against the perpetrator. In the case of *M.C.*, the girl had opposed but not physically resisted. The Court found violations both of article 3 and article 8, stating “the member states’ positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim” (§166).

In *E. and others v United Kingdom* (N° 33218/96, judgement 26.11.2002), a case involving child sexual abuse within the family, the Court stated: “The test under Article 3 however does not require it to be shown that ‘but for’ the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State.” Thus all viable steps must be taken to prevent the abuse or exploitation of children.

²⁵ All judgements of the European Court are available at <http://hudoc.echr.coe.int/hudoc/>

Wherever possible the Court has given weight to the need to protect child victims of sexual exploitation or abuse, which it sees as a legitimate reason for the State to reduce the perpetrators' rights. For example, in two cases against Italy, the Court found no violation of defence rights in proceedings where sexual abusers were convicted on the basis of, in the first case, children interviewed by a judge and a child psychologist, and in the second case, video and audio recording of a child witness. This was despite the fact that, under article 6, defendants are entitled to examine or have examined witnesses against them (*Accardi and others v. Italy*, N° 30598/02; decision 20.1.2005 and *SN v. Italy*, N° 34209/86, Judgement 2.7.2002). Complaints against inclusion on a sex offender register have also been dismissed by the Court (*R v UK*, N° 22506/05, decision 4.1.2006 and *Adamson v. UK* N° 42293/98, decision 26.1.99).

European Social Charter and Revised Social Charter: The European Social Charter provides (article 7) that children have the right to special protection against physical and moral danger to which they are exposed. Article 17 includes children's right to social, legal and economic protection. Article 17(1)(b) states that governments shall take all appropriate and necessary measures designed to protect children and young persons against negligence, violence or exploitation.

The monitoring body for the Social Charter, the European Committee of Social Rights, has interpreted these provisions as including the right of children to protection against all forms of sexual exploitation, in particular from involvement in the "sex industry". The Committee has established definitions for child prostitution, child pornography and trafficking of children for sexual purposes. All these forms of exploitation should be criminalized according to the Committee. In this respect, it is not necessary for a party to adopt a specific mode of criminalization of the activities involved. Rather it must ensure that criminal proceedings can be instituted in respect of these acts. Furthermore, States must criminalize the defined exploitative activities with all children under 18 years of age irrespective of lower national ages of sexual consent. Child victims of sexual exploitation should not be prosecuted for any act connected with this exploitation. The Committee has also taken into account the evolution of technology; States parties must adopt measures in law and in practice to protect children from their misuse.²⁶

Europe: European Union

New Framework Decisions: The Council of the now 27 Member-State European Union has adopted a succession of binding 'Framework Decisions' on, or relevant to, combating sexual exploitation.²⁷ The 2001 Framework Decision on the standing of victims in criminal proceedings provides a variety of rights for victims, including victims of sexual exploitation.²⁸ The 2002 Framework Decision on combating trafficking in human beings notes that child victims of trafficking are entitled to special assistance. However its provisions are restricted to special protection measures in legal proceedings.²⁹

²⁶ For details of the work of the European Committee of Social Rights, see www.coe.int/T/E/Human_Rights/Esc/.

²⁷ For EU Framework Decisions, see <http://eur-lex.europa.eu/en/legis/index.htm>.

²⁸ 2001/220/JHA.

²⁹ 2002/629/JHA.

In 2004, the Framework Decision on combating the sexual exploitation of children and child pornography was adopted.³⁰ Its purpose is to harmonize the legislative and regulatory provisions of the EU Member States concerning police and judicial cooperation in criminal matters with a view to combating trafficking in human beings, the sexual exploitation of children and child pornography. It requires Member States to criminalize certain behaviours and provide for a commensurate level of maximum penalties, including imprisonment, for the more serious offences related to these offences. The offences linked to sexual exploitation relate to prostitution and use of force/threats or a position of trust/authority for sexual relations. Offences related to child pornography are criminalized whether or not they involve the use of a computer system. In addition, instigation, aiding, abetting and attempts related to these offences must be criminalized. The Framework Decision states that extraterritorial jurisdiction shall be put in place by virtue of the principle of “*aut dedere aut judicare*” (extradite or prosecute), and that the victims shall be considered particularly vulnerable in criminal proceedings. This refers to the 2001 Framework Decision on the standing of victims in criminal proceedings, noted above.

When there is a need to protect a victim from giving evidence in open court, the court may decide that the victim can testify in a manner providing protection. States must encourage personnel involved in proceedings or working with victims to receive special training, in particular regarding the most vulnerable groups. The European Commission issued a report on implementation of the Framework Decision on sexual exploitation in 2007 (see chapter 4, page 59).

In 2004, a Council Directive was issued encouraging the granting of residence permits to third-country nationals who are victims of trafficking or who have been the subject of an action to facilitate illegal immigration, and who cooperate with the competent authorities.³¹

In 2005, the European Commission issued its Communication on “Fighting trafficking in human beings – an integrated approach and proposals for an action plan”.³² This notes that further attention to and research on trafficking in children within Europe are needed. It states that EU institutions and Member States should ensure that the EU anti-trafficking policy reflects a child-rights approach based on globally recognized principles, in particular the Convention on the Rights of the Child. Such an approach must therefore apply to any person below the age of 18. Coordination with the Council of Europe Action Programme on Children and Violence (2006-2008) should also be ensured.

The Americas

Inter-American Human Rights System: The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was adopted by the OAS General Assembly in 1994 and has been ratified/acceded to by 32 States. Developed by the Inter-American Commission of Women, the Convention requires

³⁰ 2004/68/JHA.

³¹ 2004/81/EC of 29 April 2004

³² COM(2005) 514 final

States to give special attention to women “of minor age” and addresses violence in both public and private spheres.

The Inter-American Convention on International Traffic in Minors, adopted in 1994, entered into force in 1997. It is a comprehensive instrument aiming at protecting minors’ rights through appropriate mechanisms and awareness. The Convention requires that States parties designate one or more central authorities to oversee both criminal and civil matters related to the international traffic in minors. They must provide mutual assistance in judicial and administrative proceedings, the taking of evidence, any other procedural steps related to particular cases and establishing mechanisms for exchange of information among States parties.

South Asia: South Asian Association for Regional Cooperation

Convention on Preventing and Combating Trafficking in Women and Children for Prostitution: In 2002 members of the South Asian Association for Regional Cooperation (SAARC) signed this Convention – the first regional treaty dealing specifically with trafficking. The Convention came into force on 15 November 2005 and by September 2008 had been ratified by all eight SAARC Member States. It requires criminalization of trafficking. The Convention does not reflect the Palermo Protocol’s definitions of trafficking and child trafficking. It defines trafficking as “the moving, selling or buying of women and children for the purpose of prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking”. It also defines “persons subjected to trafficking” as “women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage or any other unlawful means.” Prostitution is defined in the Convention as the “sexual exploitation or abuse of persons for commercial purposes” (article 1(2)).

The trafficking focus of the Convention is thus limited to women and children who are trafficked for the purpose of sexual exploitation in prostitution. Notably, even though the Convention refers to children, the South Asia countries in practice tend to neglect trafficking of boys for sexual exploitation when implementing law and policy responses to trafficking at national level.³³

Article 2 stipulates that its purpose is to promote cooperation in order to prevent, prohibit and suppress the trafficking of women and children; to repatriate and rehabilitate victims of trafficking; and to prevent the use of women and children in international prostitution networks, particularly where SAARC countries are the countries of origin, transit or destination. The Convention lists State obligations for the prevention and prosecution of trafficking and protection of victims.

The Convention’s definition of trafficking encompasses trafficking both within and between countries. It covers both prevention and protection mechanisms that, although limited in their scope, have the capacity to safeguard and/or restore the rights of trafficked persons and those vulnerable to trafficking. Article 8 covers several preventive measures including sensitizing law enforcement agencies and the judiciary

³³ ECPAT, Global Monitoring Reports on the status of action against commercial sexual exploitation of children: Sri Lanka, 2006, p. 23, Pakistan, 2006 p. 20, Bangladesh 2006 p. 24, India 2006 p. 24

to trafficking issues; undertaking bilateral cooperation measures; exchanging information between State Parties; supervising employment agencies that recruit women and children; focusing prevention and development initiatives on known trafficking source areas; and promoting awareness in the media, including the harmfulness of projecting negative images of women.

Article 9 outlines the obligations of States in regard to care, treatment, rehabilitation and repatriation of trafficked persons. The Convention regrettably does not contain special measures for responding to child victims of trafficking. It does not elaborate on the provision of legal assistance (and most members of SAARC do not recognize trafficked persons' right to legal assistance), nor does it mention issues relating to the protection of witnesses in court. It also does not mention that repatriation should be voluntary and should be based on the safety of the trafficked person and their family.³⁴

Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia: This Convention was signed by the governments of Bangladesh, Bhutan, India, the Maldives, Pakistan and Sri Lanka in January 2002, by Nepal in 2005 and by Afghanistan in 2007. Article 4.3(a) affirms that States parties shall ensure that appropriate legal and administrative mechanisms, social safety nets and defences are always in place to protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking or violence.

Article 5(d) outlines State obligations to strengthen relevant SAARC bodies dealing with child welfare in order to formulate and implement regional strategies and measures for prevention of inter-country abuse and exploitation, including the trafficking of children for sexual, economic or other purposes. This Convention applies to trafficking for all purposes, including for sexual exploitation. It makes clear connections with the Convention on the Rights of the Child and addresses children's survival, protection, development and participation rights. It also underscores States' obligation to uphold the best interests of the child as a principle of paramount importance in all actions concerning children (in article 3.1, 3.3, and 3.4).

Global Commitments to Legislate against Sexual Exploitation

The Declaration of the first World Congress called for criminalizing commercial sexual exploitation and other forms of sexual exploitation of children, condemning and penalizing all those offenders involved, whether local or foreign, while ensuring that child victims are not penalized. States were urged to review, revise, implement and enforce laws. The Global Commitment following the Yokohama World Congress repeated this call in 2001.

Since then, States have made further strong commitments to action. In 2002, the outcome document of the **UN General Assembly Special Session on Children** called for a global movement to create 'A World Fit for Children'. One objective is to protect children "against any acts of violence, abuse, exploitation and discrimination". In the detailed Plan of Action, States resolved to protect children from all forms of

³⁴ Coomaraswamy and Satkunanathan (ILO): *Anti-child trafficking legislation in Asia: a six country review 2006*, p. 15

sexual exploitation, including paedophilia, trafficking and abduction, and to end impunity for all crimes against children.

States committed themselves to implement detailed strategies and actions to eliminate trafficking and sexual exploitation of children. This included pledges “to criminalize and penalize effectively, in conformity with all relevant and applicable international instruments, all forms of sexual exploitation and sexual abuse of children, including within the family or for commercial purposes, child prostitution, paedophilia, child pornography, child sex tourism, trafficking, the sale of children and their organs and engagement in forced child labour and any other form of exploitation, while ensuring that, in the treatment by the criminal justice system of children who are victims, the best interests of the child shall be a primary consideration”. (A/S-27/19/Rev.1, para. 44.40-47).

In 2005, in the **World Summit Outcome**, States expressed their “dismay at the increasing number of children involved in and affected by armed conflict, as well as all other forms of violence, including domestic violence, sexual abuse and exploitation and trafficking. We support cooperation policies aimed at strengthening national capacities to improve the situation of those children and to assist in their rehabilitation and reintegration into society”. States committed themselves to respect and ensure the rights of all children without discrimination (A/RES/60/1, paras. 141-142).

Successive resolutions on the rights of the child adopted by the **UN General Assembly** and by the **Commission on Human Rights** (and since 2006 by its successor body, the **Human Rights Council**) have added detail to these commitments to prohibit and eliminate all forms of sexual exploitation of children and to protect children from all forms of violence. (See text of sections on prevention and eradication of the sale of children, child prostitution and child pornography in the most recent resolutions: General Assembly, A/RES/62/141, 22 February 2008; Human Rights Council, A/HRC/RES/7/29, 28 March 2008.)

In 2007, during its 51st session, the **Commission on the Status of Women** considered the elimination of all forms of discrimination and violence against the girl child as its priority theme. The agreed conclusions urge governments to “take all appropriate measures to strengthen legal frameworks, including the review and amendment of existing legislation, the enactment of new laws where necessary, developing adequate programmes and formulating appropriate policies to prevent, prosecute and punish all cases of violence against girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life, and in particular physical, sexual, and psychological violence, wherever it occurs, within or outside the family...”. (E/2007/27)

The Commission also highlighted the importance of the role of men and boys, urging governments to encourage and support men and boys to take an active part in preventing and eliminating all forms of violence and encourage understanding among men and boys of how violence harms girls, boys, women and men and undermines gender equality.

UN Secretary-General's Study on Violence against Children

The report of this Study, submitted to the UN General Assembly in October 2006, provides a set of overarching recommendations (see box below) relevant to preventing and responding to all forms of violence against children, including sexual exploitation.³⁵ More detailed recommendations address violence against children in the various settings of their lives – home and family, schools, care and justice systems, the workplace and the community. This was the first comprehensive, global report on violence against children and the first UN exercise of this kind to aim at the systematic involvement of children. Children played an active role in the nine regional consultations held as part of the study, developing recommendations and declarations.

The Study's key message is that no violence against children is justifiable and all violence against children is preventable: "Every society, no matter its cultural, economic or social background, can and must stop violence against children. This does not mean sanctioning perpetrators only, but requires transformation of the 'mindset' of societies and the underlying economic and social conditions associated with violence." States are urged to prohibit all forms of violence against children, including sexual violence, with a deadline of 2009. The need for States to actively engage with children and respect their views in all aspects of prevention, response and monitoring of violence against them is highlighted, together with the creation of child-friendly reporting systems and services.

BOX

Summary of recommendations, Report of the Independent Expert for the United Nations Study on Violence against Children

1. Strengthen national and local commitment and action;
2. Prohibit all violence against children;
3. Prioritize prevention;
4. Promote non-violent values and awareness-raising;
5. Enhance the capacity of all who work with and for children;
6. Provide recovery and social reintegration services;
7. Ensure participation of children;
8. Create accessible and child-friendly reporting systems and services;
9. Ensure accountability and end impunity;
10. Address the gender dimension of violence against children;
11. Develop and implement systematic national data collection and research;
12. Strengthen international commitment.

Source: UN General Assembly 2006, A/61/299

END BOX

The Study recommends that States develop an "appropriate legal framework that is consistent with relevant international instruments and standards; strengthen efforts to protect all children from trafficking and sexual exploitation, including through

³⁵ For all documents relating to the UNSG's Study, see <http://www.violencestudy.org/IMG/pdf/English.pdf>

bilateral, sub-regional, regional and international cooperation and in this respect harmonize legal definitions, procedures and cooperation at all levels”. It argues for enhancement of prosecution of offenders relating to child prostitution and child pornography, including through the review of domestic laws to abolish the requirement of “double criminality”, and for preventing the criminalization of child victims. It urges States to strengthen efforts to combat the use of information technologies, including the Internet, mobile phones and electronic games, in the sexual exploitation of children. It encourages the information and communication industry to devise global standards for child protection, undertake research on protective hardware and software solutions, and fund worldwide education campaigns on the safe use of the new technologies. It also calls for support to measures to educate and advise children and their carers about the dangers and to criminalize and appropriately penalize those who make, distribute, possess or use child pornography.

The complementary *World Report on Violence against Children* states: “The exploitation of children under 18 in prostitution, in child and adolescent pornography or sex shows, constitutes prima facie violence against them”. On enforcement, the *World Report* emphasizes: “Criminal sanctions against the use of children for sex, prostitution or pornography, and against recruiters and traffickers of children need to be vigorously enforced.”³⁶

The Report submitted to the General Assembly recommends the appointment of a Special Representative to the Secretary-General on violence against children, “to act as a high-profile global advocate to promote prevention and elimination of all violence against children, encourage international and regional cooperation and ensure follow-up to the present recommendations” (para. 120 et seq). This was taken up in the 2007 General Assembly resolution on the rights of the child, which recommended that the Secretary-General appoint a Special Representative, “at the highest possible level, for a period of three years” (A/62/141, paras. 58 et seq). In October 2008 it appeared the appointment was imminent.

New Guidelines and Codes of Conduct

Since the Yokohama Congress, various guidelines and codes of practice have been adopted by UN or UN-related bodies promoting the development of effective legal frameworks and enforcement to combat sexual exploitation of children. These are summarized, and referred to elsewhere in this paper.

Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime:

The Guidelines³⁷ recognize in the preamble that justice for child victims and witnesses of crime must be assured while safeguarding the rights of accused persons. They also recognize that children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process. In

³⁶ *World Report on Violence against Children*, pp. 245 and 270; see

<http://www.violencestudy.org/IMG/pdf/English.pdf>

³⁷ Economic and Social Council resolution 2005/20, building on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, annex.

addition they note the serious physical, psychological and emotional consequences of crime and victimization for child victims and witnesses, in particular in cases involving sexual exploitation.

The Guidelines note that they cover a field in which knowledge and practice are evolving and improving; they are neither intended to be exhaustive nor to preclude further development, provided it is in harmony with their underlying objectives and principles. The Guidelines usefully define “child sensitive” as denoting “an approach that balances the child’s right to protection and that takes into account the child’s individual needs and views”. A child-friendly version of the Guidelines has been produced by UNICEF and the United Nations Office on Drugs and Crime with the support of UNICEF’s Innocenti Research Centre and the International Bureau of Children’s Rights (2007), as guidance for children and child professionals.³⁸

Paris Commitments and the Principles and Guidelines on Children Associated With Armed Forces or Armed Groups (2007): These cover the disarmament, demobilization and reintegration of all categories of children associated with armed groups, including those affected by sexual exploitation, through recruitment or otherwise.³⁹

UNICEF Guidelines on the Protection of Child Victims of Trafficking (2006): These guidelines are regularly updated, taking into consideration new international standards and good practices. The guidelines set out standards for good practice on protection of and assistance to trafficked children. They are based on international human rights instruments and look at the protection of trafficked children from identification through recovery and integration. These guidelines should be used together with other guidelines and tools focusing on prevention. At the national and regional levels, they provide a platform for developing policies and practices, taking into consideration local circumstances, constraints and resources.

Code of Conduct for the Protection of children from Sexual Exploitation in Travel and Tourism (2004):⁴⁰ This is an industry-driven responsible tourism initiative in collaboration with ECPAT International, funded by UNICEF and supported by the UN World Tourism Organization. The Code of Conduct is an instrument of self-regulation and corporate social responsibility. It has 600 signatories (tour operators or other tourist companies) in 26 countries. Companies that sign and adopt the Code commit themselves to:

- Establish an ethical policy regarding commercial sexual exploitation of children;
- Train the personnel in the country of origin and travel destinations;
- Introduce a clause in contracts with suppliers, stating a common repudiation of commercial sexual exploitation of children;
- Provide information to travellers by means of catalogues, brochures, in-flight films, ticket-slips, home pages, etc;
- Provide information to local “key persons” at the destinations;
- Report annually.

³⁸ See www.unicef.org/voy/media/Document.doc; this is not an official UN document.

³⁹ See www.un.org/children/conflict/english/parisprinciples.html

⁴⁰ Source: www.thecode.org

In 2001 the UN Economic and Social Council adopted a draft resolution on a **Global Code of Ethics for Tourism**. The Code was officially recognized by the UN General Assembly in December 2001 (A/RES/56/212), when it encouraged the World Tourism Organization to promote effective follow-up to the Code.

(For further information, see Theme Paper on sexual exploitation in travel and tourism)

Office of the High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking:

These guidelines (E/2002/68/Add.1 (2002)) assert that: “The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.” They include Guideline 8, on special measures for the protection and support of child victims of trafficking. This emphasizes that the particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children.

Child victims of trafficking should be provided with appropriate assistance and protection, and full account should be taken of their special rights and needs. Guideline 8 emphasizes that definitions of trafficking in children in both law and policy must reflect their need for special safeguards and care, including appropriate legal protection: “In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc., should not form part of the definition of trafficking where the person involved is a child.” Also, children who are victims of trafficking must not be subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

ILO-IPEC Guidelines on the Design of Direct Action Strategies to Combat

Commercial Sexual Exploitation of Children: These guidelines, published in 2007, offer a simple toolkit for project designers and managers to select the most appropriate strategies and actions to combat commercial sexual exploitation of children at the community level. They include examples, ‘do’s and don’ts’, and good practices from IPEC’s field experience and that of its partners worldwide.

UNHCR guidelines and handbooks: UNHCR has produced various guidelines and handbooks relevant to combating sexual exploitation of children who fall within its mandate. These include:

- Sexual and gender-based violence against refugees, returnees and internally displaced persons: Guidelines for prevention and response (2003)
- Handbook for the Protection of Women and Girls (2008)
- Guidelines on Determining the Best Interests of the Child (2008).

In relation to the link between trafficking and refugee status are the ‘Guidelines on International Protection No. 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked’ (2006).

CHAPTER 3. TRANSLATING HUMAN RIGHTS OBLIGATIONS INTO NATIONAL LEGISLATION

International human rights obligations require the protection of children from all forms of sexual exploitation, as set out in chapter 1. Chapter 3 addresses how these international obligations should be translated into effective and enforceable national legislation, while respecting all the rights of child victims.

During the period since the Yokohama Congress, progress has been made in consolidating the framework of international law. This includes further development of definitions and inclusion of new offences to combat the various forms of sexual exploitation. The task sometimes appears unending, given the horrific ingenuity of adults in devising new ways of exploiting children sexually. These now include the use of the Internet and other new communication and information technologies, including to ‘groom’ children and the increasing global mobility of the exploiters.

Preparatory meetings for World Congress III have emphasized the need to focus more effectively on reducing the demand for sexual exploitation by attention to those who are the exploiters of children in child prostitution and the consumers of child pornography. In his 2006 report, the Special Rapporteur on the sale of children, child prostitution and child pornography focused on the issue of demand for sexual services deriving from exploitation. The report pointed out that in any exploitive situation there are several kinds of demand generated by different actors at different times.⁴¹ It stressed that educational programmes and awareness-raising activities are essential to reduce demand for services deriving from sexual exploitation.

It also stressed that persons in prostitution should never be penalized, either directly for prostitution or indirectly for engaging in a commercial activity without a visa or permit. Non-criminalization ensures that women and children who are forced into prostitution have access to the authorities without fear of punishment. However, child sexual exploitation, including use of a child in prostitution, should always be criminalized, whether committed at home (internal trafficking) or abroad and whether involving an individual or an organized group. The Special Rapporteur provided detailed recommendations, including on legal measures and enforcement.

Addressing demand requires focusing on how to prevent the abuse. This includes raising awareness of these crimes, facilitating reporting and investigation, including cross-national, and ensuring that the sanctions match the seriousness of the crimes, relating to use as well as to profiting from child sexual exploitation. Prevention of offending requires the availability of counselling and voluntary treatment. Prevention of re-offending demands offender management systems, continuing treatment and preventing employment of offenders in situations providing access to children.

Where they have not done so already, States should urgently consider ratifying all the relevant international instruments (see chapter 2 and annex). They should review and consider withdrawing any declarations or reservations made on ratification that weaken the force of the instruments. On ratification, some States incorporate

⁴¹ Special Rapporteur on the sale of children, child prostitution and child pornography, E/CN.4/2006/67, paras. 126 - 131

international instruments into their law, where they take precedence in case of conflict with domestic law. In other States, domestic law has to be brought into compliance with the ratified instruments. Under articles 26 and 27 of the Vienna Convention on the Law of Treaties 1967, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Furthermore, “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

Identifying Legislation for Prohibition of Child Sexual Exploitation

The UN Secretary-General’s study on violence against children, with its clear recommendations (see chapter 2, page 23), has given a new impetus to the systematic protection of children from all forms of violence. But the need is urgent for further agreement on national legislation to satisfy the established international human rights standards, recognizing that new challenges may require new or revised legal provisions. It is hoped that World Congress III will take this process further and set time-bound goals for developing model laws and completing a global ‘map’ of States’ progress towards universal and effective protection.

States’ reports submitted under the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography generally provide detailed information with regards to legislation. But the Committee on the Rights of the Child frequently points out the need to harmonize national legislation with the Optional Protocol, especially with regard to criminalization of all offences listed in the Protocol. The Committee notes gaps in legislation and cites the need for existing legislation to be amended or new specific legislation to be adopted. Ratification of existing international instruments is often urged.

As noted in chapter 2, recently adopted international instruments have provided necessary definitions of the basic forms of sexual exploitation and child trafficking. The most advanced and detailed definitions relating to sexual exploitation are included in the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. It builds on the definitions in the Optional Protocol to the CRC, taking account of new knowledge about the threats to children. The Council of Europe Convention provides an extremely valuable and current set of principles and provisions for the design of national legislation, responding to emerging challenges, as does the Council of Europe Convention on Action against Trafficking in Human Beings, many of them identical or similar.

Prohibiting All Forms of Violence

As highlighted in the report of the UN Secretary-General’s study on violence against children, prohibition in law of all forms of violence is a necessary foundation for its effective elimination. The report urges states “to prohibit all forms of violence against children, in all settings, including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation and so-called honour crimes, sexual violence and torture and other cruel, inhuman or degrading treatment or punishment, as required by international treaties...”⁴²

⁴² Report to the UN General Assembly, A/61/299

The persisting legality of violence, including violent discipline and punishment of children in a majority of States worldwide, continues to undermine the rights-based challenge to protect children from all forms of violence – including sexual abuse and exploitation. The widespread practice of physically hurting children in the name of punishment or ‘discipline’ violates their physical integrity and human dignity, and makes other invasions, including sexual exploitation, ‘easier’ and more likely. Laws in most States have until recently provided justifications for punitive violence against children – corporal or physical punishment. This reflects children’s traditional status as possessions rather than individual people and rights-holders, the very status that is demonstrated when adults treat them as commodities in trafficking and the sex trade.

All States have laws against assault, making any assault without consent a criminal offence. Children have a right to equal protection under the law. This requires States to ensure that these criminal laws apply to all assaults on children, whatever the context and whoever the perpetrator, by removing any existing defences or justifications for punitive violence. This is a necessary step towards ensuring the criminalization of all forms of sexual exploitation and ensuring a basis for accountability for any form of violence against children that constitutes an assault, in any setting and whoever the perpetrator.⁴³

Definition of Child and Age of Consent

In order to effectively prohibit all forms of sexual exploitation, national laws must reflect appropriate definitions. The relevant international instruments use the CRC’s definition of a child: everyone below the age of 18 (article 1). This emphasizes that the various forms of sexual exploitation must be criminalized in relation to all victims aged up to 18 – irrespective of the age of consent set in a particular State. In addition, a legal age is generally set for sexual activities. As yet, the international instruments leave it to individual States to define the age of consent. Without giving specific advice, the Committee on the Rights of the Child has expressed concern where the age is set too low and where there is discrimination in the form of different ages of consent for boys and girls or for consent to heterosexual versus homosexual activities.

In relation to Convention 182 on the worst forms of child labour, ILO’s Committee of Experts on the Application of Conventions and Recommendations has emphasized in its comments to States that they must take the necessary measures to prohibit and criminalize the use of a child up to the age of 18 for prostitution or pornography, irrespective of the age of consent in the State’s law.⁴⁴

The age of marriage is also relevant, because many States’ laws presume sexual consent in marriage; the Committee argues for a high and non-discriminatory age for legal marriage. States must ensure that procuring, offering, forcing or conducting an under-age marriage is prohibited. In 1994, the Committee on the Elimination of Discrimination against Women made a General Recommendation on equality in marriage and family relations recommending a minimum age for marriage of 18 for

⁴³ See also Committee on the Rights of the Child General Comment: The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (articles 19, 28.2 and 37, *inter alia*), 2006 No. 8, CRC/C/GC/8

⁴⁴ ILO CEACR, 2007, 78th session

both women and men.⁴⁵ The Committee on the Rights of the Child, in General Comment No. 4 on adolescent health, strongly recommends that States parties “review and where necessary reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years for both girls and boys”.⁴⁶

The Committee has also noted the need to protect children from early and forced marriages that “may also have the elements of some of the practices prohibited under the Protocol”. As noted in chapter 1, article 21(2) of the African Charter on the Rights and Welfare of the Child states: “Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory”. It calls for betrothal and marriage of children to have no legal effects and for legislation to prohibit forcing or facilitating children to live with someone as their spouse. Registration of marriages in an official registry should be made compulsory.

Under article 8(2) of the Optional Protocol, States must ensure that uncertainty over the age of the victim does not prevent criminal investigations into offences. The guidelines on reporting ask States to provide information on whether difficulties in determining the age of victims is a “substantial obstacle to law enforcement and effective protection of children” and, if so, what is being done in order to overcome such difficulties.

The Committee on the Rights of the Child has noted in Concluding Observations on States’ reports⁴⁷ that “a proper system of birth registration is among the most important preventative measures against the offences covered by the Optional Protocol”. In cases where there is doubt about a child’s age, the Committee has stated that States should “presume that young victims of sexual exploitation ... are children”. The Committee recommends that birth registration be free of charge and that mobile birth registration units be used to reach rural and remote areas. Birth registration makes it easier to verify the age of children and ensure that identity documents are not being falsified in countries where prostitution and pornography are legal activities for adults.

The Committee has also remarked that a low age of sexual consent may make children more vulnerable to sexual exploitation (with reference to a State where the age was set at 13) or may not provide adequate protection for children.

Criminalizing Sexual Activities with Children

Given the special status of children and adults’ authority over them, additional criminalization of sexual activities, beyond the age of consent defined by the State, is

⁴⁵ General Recommendation No. 21, 1994.

⁴⁶ Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the CRC (CRC/GC/2003/4), para. 20.

⁴⁷ Quotations from the Committee on the Rights of the Child are drawn from the Committee’s concluding observations on States’ reports under the CRC and the Optional Protocol on sale of children, child prostitution and child pornography.

needed in some circumstances up to age 18. Although the Optional Protocol applies to all children below 18, the Committee has identified countries in which children, particularly between the ages of 16 and 18, are not covered by legislation on sexual exploitation. It has requested that legislation be amended to ensure that all children are protected. It has also found that legislation in a number of States does not always adequately cover sexual exploitation of boys and therefore recommends amending such legislation to ensure that boys and girls receive equal protection under the law.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse requires criminalization of the following intentional conduct: engaging in sexual activities with a child who, according to the relevant provisions of national law, has not reached the legal age for sexual activities; or engaging in sexual activities with a child “where use is made of coercion, force or threats, or abuse is made of a recognized position of trust, authority or influence over the child, including within the family, or abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence” (article 18).

Some States, by criminalizing sexual activities below the defined age of consent, have effectively criminalized consensual sexual activities between children below the age of consent but above the age of criminal responsibility. The Council of Europe Convention notes that these provisions “are not intended to govern consensual sexual activities between minors” (article 18(3)); some countries have defined explicit exceptions to achieve this.

Sexual Exploitation in Child Prostitution

Article 2 of the Optional Protocol defines child prostitution as “the use of a child in sexual activities for remuneration or any other form of consideration...” Article 3 requires criminalization of “offering, obtaining, procuring or providing” a child for prostitution and also of attempts to commit any of these acts and of complicity or participation in any of them.

The annex to the Committee on the Rights of the Child’s guidelines on reporting requests that States report on “heterosexual and homosexual prostitution, and commercial or other forms of prostitution, such as the delivery of children to temples or religious leaders for the purpose of providing sexual services, sexual slavery, the solicitation by teachers of sexual favours from students and sexual exploitation of child domestic workers”.⁴⁸ The Committee has recommended that all forms of child prostitution be criminalized even when the sexual acts do not involve penetration or when the child him/herself receives payment for the sexual act.

The guidelines ask States to provide data on the number of children engaged in prostitution, the increase or decrease of child prostitution and the extent to which child prostitution is linked to sex tourism. They also call for information on any attempts to promote sex tourism involving children in other countries. Specifically, the Committee has recommended that measures be taken to combat the use of boys in

⁴⁸ Committee on the Rights of the Child, Revised Guidelines regarding initial reports to be submitted by States Parties under article 12, paragraph 1 of the OPCS, para. 11(b)

prostitution and has noted that temporary marriages may be considered to be a form of sale.

The Council of Europe Convention builds on the definition in the Optional Protocol, aiming to encompass the various forms of involvement in child prostitution: "...using a child for sexual activities where money or any other form of remuneration or consideration is given or promised as payment, regardless if this payment, promise or consideration is made to the child or to a third person". The Convention requires that the following intentional conduct is criminalized: recruiting a child into prostitution or causing a child to participate; and coercing a child into prostitution or profiting from or otherwise exploiting a child for such purposes. It should be highlighted that the Convention requires the criminalization of having recourse to – using – children exploited in prostitution (article 19). This is an element often missing from national legislation. Including it, and ensuring wide awareness-raising of the crime, is an essential strategy to reduce the demand for sexual exploitation that fuels the commercial sex industry.

The Committee on the Rights of the Child has emphasized that the definition of a child for the purposes of defining offences of child prostitution must extend to 18. If set below that age, it may mean that children – aged 16 and 17, for example – may not be regarded as victims of the criminal offences outlined above, but instead may be criminalized if prostitution is itself criminalized.

Sexual Exploitation in Child Pornography

Article 2 of the Optional Protocol to the CRC defines child pornography as "any representation, by whatever 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..." Some countries, perceiving a possible conflict with the right to freedom of expression, lodged declarations when ratifying the Optional Protocol stating that the words "any representation" should be taken only to mean "visual representation". Thus written descriptions of sex with children would not be included.

Article 3 requires criminalization of producing, distributing, disseminating, importing, exporting, offering or selling child pornography. It should be noted that article 3(1c) of the Optional Protocol only requires the criminalization of the possession of pornography when it is produced, distributed, disseminated, imported, exported, offered or sold; there is no requirement to criminalize possession of pornography. However, the Committee on the Rights of the Child has recommended that States adopt legislation that criminalizes the possession of child pornography "without requiring the intent of dissemination", thus addressing demand. This includes accessing "virtual pornography". The Protocol requires the criminalization of attempting, complicity or participation in any of the offences.

The reporting guidelines of the Committee on the Rights of the Child request States to provide information on the extent to which "pornography featuring persons actually or apparently under the age of 18, is produced, imported, distributed or consumed within the territory of the State party and any increases or decreases in the production, importation, distribution or consumption of child pornography that have been measured or detected". These include photographs and other printed materials;

videos, motion pictures and electronically recorded materials; Internet sites containing photographs, videos, motion pictures or animated productions (e.g. cartoons) depicting, offering or advertising child pornography; and live performances. The Committee has specifically requested that legislation be amended to prohibit “cartoon representation” of children.

The Committee has recommended that States adopt specific legislation on the obligations of Internet service providers, including the obligation to prevent the dissemination of and access to child pornography and to report child abuse images. The Concluding Observations have also highlighted the need for raising awareness among children and their parents on the dangers on the Internet. The Committee has noted an absence of services available for victims of child pornography and has recommended that efforts be made to strengthen measures to identify and assist child victims.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse reflects the Optional Protocol’s definition, referring to any “material that visually depicts a child engaged in real or simulated sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual purposes”. But the Convention goes significantly beyond the Optional Protocol in requiring the criminalization of simple possession and accessing of child pornography. It requires the following intentional conduct related to child pornography to be criminalized: production; offering or making available; distributing or transmitting; procuring for oneself or another person; possessing; and “knowingly obtaining access, through information and communication technologies, to child pornography”. States are allowed narrow discretion in applying some of these provisions (see article 20(3)).

The Convention builds on the Convention on Cybercrime (article 9; see chapter 2, page 16); both aim to modernize criminal law provisions to prevent computer systems from being used to further the sexual abuse and exploitation of children. In explanatory notes to the Convention on protection against sexual exploitation and abuse, the Council states: “In the present Convention, the offence is not restricted to child pornography committed by the use of a computer system. Nevertheless, with the ever-increasing use of the Internet this is the primary instrument for trading such material. It is widely believed that such material and on-line practices play a role in supporting, encouraging or facilitating sexual offences against children”.

In addition, the Convention requires States to criminalize intentional recruiting, causing or coercing a child to participate in pornographic performances; profiting from or otherwise exploiting a child for this purpose; and knowingly attending pornographic performances involving the participation of children (articles 20-21).

Additional Related Offences Including ‘Grooming’ for Abuse

The Council of Europe Convention also requires criminalization of the intentional causing, for sexual purposes, of a child below the age of consent to witness sexual abuse or activities, even without having to participate (article 22). ECPAT notes that cases are reported in which children are exposed to pornography or sexual acts

between individuals with a view to breaking down their inhibitions and thus preparing them for exploitation.

Article 23 concerns solicitation of children below the age of consent for sexual purposes, more commonly known as ‘grooming’. Those drafting the Convention felt it was essential to combat the recent phenomenon of children being sexually harmed in meetings with adults whom they had initially encountered in cyberspace, Internet chat rooms or game sites. The Convention requires criminalization of an intentional proposal, through information and communication technologies, of an adult to meet a child under the age of consent for sexual purposes, where the proposal has been followed by “material acts leading to such a meeting” (a number of States, including South Africa and the United Kingdom, have developed legislation along these lines). The Convention also requires criminalization of these offences to be widened to include aiding or abetting the commission of them, as well as attempts to commit them (article 24).

Trafficking for Purposes of Sexual Exploitation

World Congress III is concerned with trafficking of children for purposes of sexual exploitation. The Palermo Protocol (article 3) provides the accepted international definition of trafficking in persons and of child trafficking (see chapter 2, page 10). Article 2 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography defines sale of children as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration...”

The Committee on the Rights of the Child has focused a considerable amount of attention on the situation of foreign-born children who may have been victims of trafficking, prostitution or child pornography. The Committee’s guidelines on reporting request that States provide information on the number of foreign-born child victims and on the policy of the State party “regarding the repatriation of child victims and reintegration with their families and community, including the way such policies address issues such as the best interests of the child, the right of the child to have his or her views taken into account, the child’s participation in criminal proceedings against those responsible for his or her exploitation and the right of the child to protection against the risk of reprisals and to assistance in physical and psychological rehabilitation”. The guidelines also ask for information on legal agreements with other countries on reestablishing the identity of child victims, locating their families and evaluating the appropriateness of returning a child to his or her family or community (para. 36).

The Committee has recommended that foreign-born child victims not be deported unless it is in their best interests and has suggested that trafficked children may be eligible for refugee status under the 1951 Refugee Convention if they have a well-founded fear of persecution in their country of origin. The Committee recommended that foreign-born child victims have access to refugee status determination and not be returned to a country where there is a risk of being re-trafficked. The absence of adequate legislation in accordance with international obligations for refugee protection may “jeopardize the possibility for these children to be adequately protected”. Deportation should be suspended pending investigations, and children

should be granted access to shelter or temporary residence while they await a decision. Foreign-born child victims should not be discriminated against in judicial or administrative proceedings. The Committee urges States to take into account its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (see chapter 2, page 6).

In determining what legislation is needed nationally to effectively combat and eradicate trafficking, the Council of Europe Convention on Action against Trafficking in Human Beings provides a detailed list of criminal law provisions. These reflect some of the challenges encountered over the years since the Yokohama Congress and can be useful as a guide.

The section on substantive criminal law in the Council of Europe Convention requires first the criminalization of trafficking in human beings, incorporating in national legislation the definition, including the definition of child trafficking, from the Palermo Protocol. There must also be criminalization of the knowing use of services of a victim of trafficking. Making fraudulent travel or identity documents, procuring or providing such documents, and “retaining, removing, concealing, damaging or destroying a travel or identity document of another person” must all be criminalized when committed intentionally and for the purpose of enabling trafficking. This is in recognition of the frequent removal of travel and identity documents by traffickers as a way of exerting pressure on victims.

Attempts to commit offences and aiding or abetting these offences must also be criminalized. Corporate liability needs to be recognized, and criminal penalties must be “effective, proportionate and dissuasive”. In relation to the offence of trafficking, penalties must provide for prison sentences that can give rise to extradition. Aggravating circumstances should be defined, including where trafficking endangered the victim’s life deliberately, or by gross negligence, or when the offence is committed against a child.

In line with the aim of avoiding further victimization of victims, national laws need to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that their involvement was forced. This should apply in every case for trafficked children.

The Council of Europe Convention includes provisions to prevent trafficking, including an obligation to discourage the demand for sexual exploitation, which promotes trafficking. Further detailed measures are defined to protect and promote the rights of child victims:

- Special measures to reduce children’s vulnerability to trafficking, notably by creating a protective environment for them (article 5).
- Identification and representation of child victims (article 10).
- Protection of the private life and identity of child victims (article 11).
- Issuance of residence permits for child victims in accordance with the best interests of the child (article 14).
- Child victims not to be returned to a State if there is indication that such return would not be in the best interests of the child (article 16).
- Repatriation programmes for child victims to include enjoyment of the right to

education and measures to secure adequate care or receipt by the family or appropriate care structures (article 16).

- Among the “aggravating circumstances” to be considered when determining the penalty for the offence of trafficking is that the victim is a child (article 24).
- Special protection measures to be afforded to child victims during and after investigation and prosecution (article 28).
- During Court proceedings, special care to be taken of children’s needs and their right to special protection measures ensured (article 30).

The difficulties of ‘freeing’ victims of trafficking and enabling them to escape the influence of the traffickers and consider cooperating with national authorities has led to proposals for particular provisions in the Convention. States are required to provide a “recovery and reflection period” of at least 30 days for a person believed to be a victim, without enforcing any expulsion order against him or her. States are required to issue a renewable residence permit to victims when the competent authority believes their stay is necessary owing to their personal situation, and/or the competent authority believes their stay is necessary in order to cooperate with investigation or criminal proceedings. For child victims, the residence permit, when legally necessary, shall be issued and where appropriate renewed in accordance with the best interests of the child (articles 13 and 14).

After extensive consultation, UNICEF issued ‘Guidelines on the Protection of Child Victims of Trafficking’ in 2006. The guidelines as technical notes to be regularly updated in the light of developing international standards and good practices (see chapter 2, page 27).

Jurisdiction

Fighting impunity of perpetrators of sexual exploitation and related trafficking, and in particular of those involved in sex tourism, requires attention to the definition of jurisdiction and to extradition treaties. Adopting ‘extraterritorial’ criminal laws is essential. Extraterritorial jurisdiction has existed under international law for a very long time; in recent years it has been exercised by some countries in an effort to curb sexual exploitation in travel and tourism. It has been used in this way particularly where children are abused or exploited in States that do not have the will or resources to successfully pursue and prosecute perpetrators.

The Optional Protocol on the sale of children, child prostitution and child pornography requires that States establish jurisdiction over offences that are “committed in its territory or on board a ship or aircraft registered in that State” (article 4(1)). Under the Optional Protocol, States may, but are not required, to establish jurisdiction over offences committed outside the State, when the alleged offender is a national of that State or has their habitual residence in the State’s territory or when the victim is a national of that State (article 4(2)). The Optional Protocol requires that the offences defined in it should be deemed extraditable offences in any extradition treaty existing between states and shall be included in every extradition treaty subsequently concluded (article 5).

To prevent sexual exploitation of children in travel and tourism, the Committee on the Rights of the Child suggests that States should promote responsible tourism through

awareness-raising campaigns directed at tourists as well as cooperating with travel operators, NGOs and civil society organizations to protect children. The Committee has also noted the need to “tackle attitudes, such as the idea that it is acceptable to abuse and exploit children living in poverty in foreign countries”.

The Committee has recommended that States follow the code of conduct developed by the World Tourist Organization, earmark funds for the national tourism authority to promote responsible tourism and consistently prosecute offenders for crimes committed abroad upon their return. The Committee has also suggested that the State could provide funding for public campaigns on sexual exploitation in travel and tourism.

Although the Optional Protocol does not require States to prosecute their nationals for crimes committed abroad, the Committee requests that States provide information on offences committed abroad, particularly with regards to sex tourism.

Most countries that have come before the Committee require ‘double criminality’ in order to extradite and prosecute crimes committed outside their territory. The Committee systematically recommends that legislation be amended in order to abolish this requirement as it limits the possibility of prosecution of offences committed abroad. The Committee has suggested that States “prosecute an alleged offender present in its territory who has committed one of the offences covered by the Optional Protocol...even if the country where the offence was committed is not a Party to the Optional Protocol or does not criminalize these acts in its legislation”. Where the principle of dual criminality is not a requirement, the Committee has pointed to the need for adequate resources for international cooperation to investigate cases of sexual exploitation of children.

The Committee has also recommended that the Optional Protocol be used as a “legal basis for extradition” for offences committed under it (article 5(2)), when no extradition treaty exists between the States involved. In line with the Optional Protocol, the Committee strongly recommends that States include the offences under the Protocol as extraditable offences in any existing as well as future extradition treaties.

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse attempts to deal comprehensively with issues of jurisdiction, to ensure that all forms of sexual exploitation are effectively criminalized, wherever they occur (and similarly the Council of Europe Convention on Action against Trafficking in Human Beings). Each State must ensure that offences are criminalized when committed on its territory or on ships flying its flag or aircraft registered under its laws. The defined offences, when committed by one of its nationals in other territories, must also be criminalized – the ‘extraterritoriality’ principle.

In addition, the Convention requires legislation to enable a person who has his or her habitual residence in the State’s territory (but is not a national) to be prosecuted for offences committed abroad – again aiming to combat sex tourism. However, States can by declaration opt out or limit the effect of this provision. States are required to

“endeavour” to establish jurisdiction also over offences committed abroad against children who are nationals or persons who have habitual residence in their territory.

A further important provision requires States to ensure that the ‘double criminality’ principle does not inhibit prosecution. This has become a particular concern in attempts to combat sex tourism through extraterritorial prosecution. In relation to the more serious of the defined offences of sexual abuse and exploitation, each State must take the necessary legislative or other measures to ensure that its jurisdiction is not limited by a condition that the acts are also criminalized in the state where they happened (article 25).

Other provisions are designed to ensure that a prosecution can go ahead in the state of nationality or habitual residence of the perpetrator, whether or not there is a report from the victim or a denunciation from authorities in the state where the offence was committed. And following the principle ‘extradite or prosecute’ (*aut dedere aut judicare*), a State is required to establish jurisdiction over the offences in cases where an alleged offender is on its territory and it does not extradite him or her, solely on the basis of nationality. Where more than one Party claims jurisdiction over an offence, the parties involved must consult, “with a view to determining the most appropriate jurisdiction for prosecution” (article 25 (8)).

Another implication of extraterritorial offences is that States must allow for previous convictions in another State to be taken into account in determining sanctions.

Corporate Liability

Article 3(4) of the Optional Protocol establishes the liability of “legal persons” for offences committed under the Optional Protocol. This liability may be criminal, civil or administrative depending on the legal principles of the State party and subject to the provisions of national law. The guidelines on reporting of the Committee on the Rights of the Child request States to provide information on legislation relating to the criminal liability of legal persons and to comment on the effectiveness of such laws as a deterrent. Legal persons are defined by the guidelines as “physical persons that have legal personality, such as corporations and other businesses, local or regional governments and legally recognized foundations, organizations and associations” (para. 18). If criminal liability is not extended to legal persons, the Committee requests States to do so.

Article 7 of the Optional Protocol requires that goods and proceeds be seized or confiscated and that any premises relating to the commission of offences be closed. This provision is once again subject to national law.

The Council of Europe Conventions also require states to ensure corporate liability, where appropriate, for the defined offences of sexual abuse and exploitation of children in prostitution, pornography and trafficking. The intention is to make commercial companies, associations and other entities liable for criminal actions performed on their behalf by anyone in a senior position within them or when such a person fails to supervise or check on an employee or agent, thus enabling them to commit one of the offences. There are complex conditions; liability may be civil, criminal or administrative, as long as the measures are “effective, proportionate and

dissuasive” and include monetary sanctions. Also, corporate liability does not exclude individual liability.

Sanctions and Measures

There is a need to ensure not only criminal law provisions to prevent impunity and prosecute perpetrators but also adequate civil law provisions to ensure effective child protection. This includes, for example, rights to intervene and remove children to a place of safety in an emergency, allow for the removal of the perpetrator or the child, and for other measures including withdrawal of parental rights or monitoring or supervision.

The Committee on the Rights of the Child has highlighted the need for States to criminalize all of the offences covered by the Optional Protocol in national legislation. It has also highlighted the need to investigate and when appropriate try to “adequately” punish offences, including “complicity or participation” that are covered by the Optional Protocol. These crimes should be “punishable by appropriate penalties taking into account their grave nature”. The Committee has also specifically recommended that brothel owners be prosecuted in cases of child prostitution.

The Committee has been concerned by the lack of enforcement by the police and the justice system and problems with complicity and corruption, which may impede the effectiveness of legislative measures. In these cases, the Committee has urged the State party to investigate and punish those concerned. The lack of social condemnation or a climate of impunity have also been found to reinforce cultural acceptance of these behaviours. The Committee has remarked on light sentences for offenders that “may weaken the deterrent effects of the existing law” and encouraged the “strict application and enforcement of existing legislation” and an increase in maximum penalties. The Committee has noted in the case of one State that insufficient resources dedicated to the investigation of crimes of sexual exploitation may also weaken enforcement of legislation. In another case it noted that lack of clear definitions may prevent the prosecution of perpetrators of these offences.

Article 10(1) of the Optional Protocol encourages international cooperation for the prevention, detection, investigation, prosecution and punishment of those responsible for acts of sale of children, child prostitution and child pornography. The Committee systematically recommends that States strengthen multilateral, regional and bilateral agreements in these areas and has noted that these agreements should always be in the best interests of the child and should respect international human rights standards.

Here too, the new Council of Europe Conventions reflect the obvious requirement that sanctions for those found guilty of offences of sexual exploitation or trafficking must be “effective, proportionate and dissuasive”, taking into account their seriousness. In order to ensure that extradition is possible, available sentences must include deprivation of liberty, as this may be a condition for extradition. Other measures must be available, including for example to allow seizure and confiscation of goods used to commit offences and of the proceeds derived from offences; temporary or permanent closure of establishments used; and denying perpetrators the exercise of professional or voluntary activity involving contact with children, in the course of which offences

were committed. Legislation should enable aggravating circumstances to be taken into account in determining the response to offences.

The Convention also requires States to take the necessary legislative or other measures to ensure effective investigation and prosecution of offences, including allowing for covert operations. They must also enable investigatory services to identify child victims, including by analysing child pornography material (article 30).

Concerns were expressed during preparatory meetings for World Congress III that sanctions for the crimes of abusing children in child prostitution and trafficking for remuneration and accessing/consuming child pornography often do not reflect the seriousness of these crimes of exploitation and abuse. Thus they do not adequately challenge the demand that fuels commercial exploitation.

Statute of Limitation

Another concern in pursuing prosecution of perpetrators of sexual exploitation has been to ensure that statutes of limitation do not unreasonably prevent initiation of proceedings, at least for serious offences, after a child victim has reached age 18. This is to acknowledge the fact that many child victims of sexual abuse or exploitation are unable, for various reasons, to report the offences perpetrated against them before reaching the age of majority. The Committee on the Rights of the Child has suggested that the statute of limitation for offences under the Optional Protocol begin only after the child victim has reached the age of majority. The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse requires States to ensure that the limitation for initiating proceedings continues “for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question” (article 33).

Safeguarding Children’s Rights

The importance of respecting all children’s rights in all elements of the response to sexual exploitation and to related trafficking, to avoid double victimization of children, has been increasingly emphasized by the Committee on the Rights of the Child and other Treaty Bodies, by the Special Rapporteur on the sale of children, child prostitution and child pornography, in resolutions of the General Assembly and the Human Rights Council and by the successive World Congresses.

There has also been an ever-growing reaffirmation of the obligation to regard children who become involved in prostitution or pornography, including those who are trafficked for the purpose of sexual exploitation, as victims of abuse and exploitation, not offenders, and to ensure that they are not criminalized.

To guide implementation of the CRC, the Committee has identified four articles as providing core general principles of particular relevance to the implementation of all others: all rights to be ensured without discrimination; the best interests of the child to be the primary consideration in all actions; recognition of the child’s right to life and maximum development; and the child’s right to be heard and have his/her views given due weight “in all matters affecting the child” (articles 2, 3, 6 and 12).

Article 12 of the CRC requires that the legal framework for all elements of child protection includes a requirement on all those involved in investigation and decision-making to ensure the child has an opportunity to express his or her views freely at all stages. It also requires that those views are given due weight, in accordance with the age and maturity of the child. The Committee on the Rights of the Child has emphasized that there is no lower age-limit on the right to express views in the light of article 12, which refers to a child “capable of forming his or her own views”.

Guided by this principle, the Council of Europe Convention on sexual exploitation and sexual abuse requires States to encourage the participation of children, according to their evolving capacity, in developing and implementing state policies, programmes or other initiatives concerning the fight against sexual exploitation and sexual abuse of children (article 9).

The Committee on the Rights of the Child regularly highlights the non-criminalization of children in order to “ensure that child victims of exploitation and abuse are neither criminalized nor penalized and that all possible measures be taken to avoid the stigmatization and social marginalization of these children”. The Committee has maintained that child victims must not be treated as offenders or delinquents and must always be exempt from arrest and prosecution.

Article 8 of the Optional Protocol requires that child victims and witnesses be protected at all stages of the criminal justice process. The Committee also recommends that the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (see chapter 2, page 26) be used to provide more detailed guidance on protecting children’s rights under the criminal justice system. The best interests of the child are to be the primary consideration, and rights to privacy, identity and safety are to be safeguarded. The Committee systematically recommends that States use child-sensitive procedures, provide free legal aid or funding for legal representation, establish a separate and specialized juvenile justice system or specialized judges for children, and allow the views of child victims and witnesses to be presented and considered in the proceedings. Article 8 also requires that professionals working with child victims be trained, and the Committee frequently reminds States of this obligation.

Article 10(2) of the Protocol requires States to promote international cooperation in assisting child victims in their recovery, reintegration and repatriation.

The Council of Europe Convention reflects the principles identified in the CRC and expands on their implications in the context of challenging sexual abuse and exploitation. The Convention notes that it does not affect the rights and obligations arising from the CRC and the Optional Protocol, and “is intended to enhance the protection afforded by them and develop and complement the standards contained therein” (article 42). The Convention requires measures to ensure that investigations and criminal proceedings are carried out “in the best interests and respecting the rights of the child”. States must “adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where

appropriate”. Investigations and proceedings must be treated as a priority, with no unjustified delay.

The Council of Europe Convention requires general measures of protection of the rights and interests of victim children at all stages of investigations and criminal proceedings, including as witnesses (article 31). There are also detailed requirements concerning interviews with the child, including arrangements for videotaping of interviews and the acceptance of taped evidence in court. All those involved in criminal court proceedings must be offered training on children’s rights and sexual abuse and exploitation. Judges must be able to order that hearings take place without the presence of the public, and the victim may be heard without being present, through the use of appropriate communication technologies (articles 35 and 36).

Providing a Legislative Basis for Prevention

The overall and primary purpose of all legislation to combat sexual exploitation must be to prevent it from occurring. The need for prosecution is an indication that insufficient and ineffective measures have been taken to prevent the exploitation.

Article 9 of the Optional Protocol obliges States to develop prevention and rehabilitation mechanisms. These include awareness raising, education and training for the general public, including children, about the harmful effects of the sale of children, child prostitution and child pornography and to combat and prevent discrimination against victims. This is of particular importance in States where these issues are generally not discussed in public. States are also required to provide physical and psychological assistance to victims. The Committee has recommended that this assistance include both medical and psychosocial attention in accessible crisis centres. Recovery and rehabilitation services must be provided “to boys as well as girls, in a multi-lingual format, in particular, taking into account the most common countries of origin of child victims of trafficking and sexual exploitation”. The Committee has highlighted the need for specialized services provided by competent staff, taking the best interests of the child as the primary consideration.

As noted briefly in chapter 1, some of the legislative and other measures required of States in the new Council of Europe Convention are specifically aimed at prevention and build on those in the Optional Protocol. These include requirements for training of those in contact with children on children’s rights and on sexual exploitation and abuse, including its identification; awareness raising for the general public; and education for children on the risks of sexual exploitation and abuse and on the means to protect themselves, adapted to their evolving capacity.

Another aspect of prevention is seeking to prevent those who pose a threat to children from having easy access to them. Thus the Council of Europe Convention requires that States should ensure that those who have been convicted of acts of sexual exploitation or abuse are not employed in positions that give them regular contact with children (article 5). The Convention also requires States to take necessary legislative or other measures to collect and store data (with appropriate safeguards) relating to the identity and to the genetic profile (DNA) of persons convicted of offences of sexual exploitation and abuse. They should identify a single national authority responsible for this and ensure that the information can be transmitted to

similar authorities in other States, again with appropriate safeguards (article 37). The sharing of information and evidence between States, including of convicted and travelling sex offenders and child abuse images, is vital to identifying victims and ending impunity of perpetrators (see details of INTERPOL's work, including operation of its Child Abuse Image Database in chapter 3, page 50). States need to remove any legal obstacles to the sharing of information (see article 37(3) of the Council of Europe Convention).

Another requirement is prevention of re-offending. Again, the new Council of Europe Convention requires States to take logical steps, including ensuring the availability of intervention programmes or measures designed to prevent and minimize the risks of repeated offences of a sexual nature against children. These should be available at any time as appropriate to those subject to criminal proceedings for offences of sexual abuse/exploitation, in and outside prison, as well as to those convicted. The Convention proposes, in addition, that intervention programmes or measures are developed or adapted to meet the developmental needs of children who sexually offend, including those below the age of criminal responsibility, with the aim of addressing their sexual behavioural problems (article 16). A further preventive proposal is that States should make available intervention programmes or measures for those who come forward because they fear they might commit sexual offences against children (article 7). This demands the availability of counselling and voluntary treatment that allows individuals to be anonymous.

All these and other measures can help to reduce the demand for sexual exploitation of children that feeds the industry and those who facilitate and profit from it, including organized crime. Also needed is widespread awareness raising on the nature of the crimes of exploitation and abuse and on children's right to protection from them.

Reporting of Sexual Exploitation

Article 19 of the CRC requires States to take protective measures, which should include effective procedures for identification, reporting, referral, investigations, treatment and follow-up of child maltreatment. No international instrument requires a mandatory reporting system. Where States have an obligation on certain professional groups, or on everyone, to report signs or suspicions of sexual exploitation (mandatory reporting), the Committee on the Rights of the Child has emphasized the need to ensure that public employees and civil society are aware of the obligation through public media campaigns. Mandatory reporting should also be accompanied by training of professionals working with children. The Committee has highlighted the need for accessible, child-friendly, independent complaints mechanisms, for example provided by an ombudsperson for children. It has also recommended that confidential telephone helplines be established or strengthened.

The UN Secretary-General's study on Violence against Children heard varying views on mandatory reporting. The report suggests it is essential for every government to review existing reporting systems – and involve children or young adults with recent experience of child protection services in the review.

The report includes as a key recommendation: "States should establish safe, well-publicized, confidential and accessible mechanisms for children, their representatives

and others to report violence against children. All children, including those in care and justice institutions, should be aware of the existence of mechanisms of complaint. Mechanisms such as telephone helplines, through which children can report abuse, speak to a trained counsellor in confidence and ask for support and advice, should be established and the creation of other ways of reporting violence through new technologies should be considered.” Ensuring that all those working with children are able to identify potential signs of sexual abuse or exploitation is vital to early and effective responses.

The *World Report on Violence against Children*, which complements the Secretary-General’s study, suggests: “In every locality and every setting which includes children, there should be well-publicised and easily accessible services required to investigate reports or indications of violence against children. There should also be access to services where children can go to talk in confidence about anything that is worrying or hurting them. Providing confidential services for children – services which guarantee that they will not report to others or take action without the child’s consent, unless the child is at immediate risk of death or serious harm – remains controversial in many countries. Making confidential services available to children challenges outdated concepts of parental ‘ownership’ of their children. Yet what we now know about intra-familial violence demands that children should have the same rights as adults to seek confidential advice and help.”⁴⁹

The Council of Europe Convention does not require reporting to be made mandatory. But it does propose that States take legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals working with children do not prevent them from reporting to child protection services when they have reasonable grounds for believing that a child is the victim of abuse or exploitation. States are also required to take legislative or other measures to “encourage” any person who knows about or suspects sexual exploitation or abuse of children to report to the competent services (article 12). In addition the Convention requires States to take the necessary legislative or other measures to “encourage and support” the setting up of information services, such as telephone or Internet helplines, “to provide advice to callers, even confidentially or with due regard for their anonymity” (article 13).

Remedies for Child Victims of Sexual Exploitation

As the Committee on the Rights of the Child asserts in its General Comment No. 5 (on the general measures of implementation for the CRC): “For rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties. Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with

⁴⁹ *World Report on Violence against Children*, page 21: For all documents relating to the UNSG’s Study, see <http://www.violencestudy.org/IMG/pdf/English.pdf>

necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.”⁵⁰

Thus legal frameworks must ensure that children and their representatives have clear, well-publicized and accessible means of challenging the various forms of sexual exploitation and related trafficking, including direct access to the courts when necessary. Given the involvement of parents in exploitation and abuse, it is essential that children have legal standing independent of their parents and that parents’ permission is not required for filing of a complaint of violence or for prosecution.

There must be rights to adequate compensation for children who have been victims of any forms of violence, without delay. The Optional Protocol on the sale of children, child prostitution and child pornography requires States to ensure there is no unnecessary delay, including in the execution of orders or decrees granting compensation to child victims (article 8(1)(g)). The Committee on the Rights of the Child’s revised guidelines for reporting under the Optional Protocol notes that States’ reports “should contain information on existing remedies and procedures that may be used by child victims of sale, prostitution or pornography to seek compensation for damages from those legally responsible” (para. 37).

Article 9(4) of the Optional Protocol requires that child victims have access to adequate procedures to seek compensation for damages from those legally responsible. The guidelines on reporting define damages as “physical or mental injury, emotional suffering, prejudice to moral interests (e.g. honour, reputation, family ties, moral integrity), denial of one’s rights, loss of property, income or other economic loss and expenses incurred in treating any injury and making whole any damage to the victim’s rights” (guideline 37). This recommendation is regularly repeated by the Committee in its Concluding Observations.

The Council of Europe Trafficking Convention requires that victims should have information on relevant judicial and administrative proceedings, legal assistance and free legal aid as well as a right to compensation from the perpetrators. It also proposes the adoption of necessary legislative or other measures to guarantee compensation for victims, for example through the establishment of special funds (article 15).

⁵⁰ Committee on the Rights of the Child General Comment No. 5: General measures of implementation for the Convention on the Rights of the Child 2003 No. 5, CRC/GC/2003/5, para. 24

CHAPTER 4. PROGRESS TOWARDS ADOPTING AND ENFORCING EFFECTIVE NATIONAL LAWS⁵¹

Despite the heightened focus on sexual exploitation of children following the first two World Congresses and the development and application of new international human rights instruments, there is a general lack of systematic recording and reporting of developments in national legislation and its enforcement.

Global and Cross-regional Reviews

UNICEF's Innocenti Research Centre reviewed law reform relating to sexual exploitation of children in 52 States as part of a recent study on the General Measures of Implementation of the CRC.⁵² Overall, the report notes: "The evidence of the impact of child rights legislation in the lives of children is, to be sure, fragmentary. Serious efforts to monitor the impact of new legislation more systematically and in a wider variety of areas is urgently needed." It also states: "Older legislation concerning sexual offences in various parts of the world often contains significant gaps in the way offences concerning children are defined, as well as provisions that discriminate on the basis of sex." Almost all the legislation described in the study was adopted in the 1990s, well before the Yokohama Congress.

ECPAT, working collaboratively with other partners, has developed 68 state reports, aiming to provide a baseline of information on actions taken and remaining gaps for addressing sexual exploitation of children in each country. These are based on the framework of the Agenda for Action against Commercial Sexual Exploitation of Children developed at the first World Congress (more than 160 states have adopted the Agenda).⁵³

The reports cover an overview of the main child commercial sexual exploitation manifestations affecting the country; analysis of the country's National Plan of Action (NPA) for addressing the problem and its implementation, or the absence of an NPA; overview and analysis of coordination and cooperation efforts during the period under review; overview and analysis of prevention efforts; overview and analysis of protection efforts (which includes detailed information on relevant national legislation); and priority actions required.

⁵¹ Shortage of time and resources prevented thorough analysis of regional and national developments. The positive examples of laws included here are a sample of those in effect in all regions. Governments have submitted more than 85 individual reports, including on legislative developments, during the preparations for World Congress III. These are currently being analysed according to the themes of the World Congress by UNICEF's Innocenti Research Centre and reports will be available at www.unicef-irc.org.

⁵² *Law Reform and implementation of the Convention on the Rights of the Child*, UNICEF Innocenti Research Centre, December 2007

⁵³ See http://www.ecpat.net/A4A_2005/index.html

A common foreword to the reports notes: “Experience demonstrates that the level of responsibility and role that a government takes to set and uphold standards of protection, like the lead taken for protecting children’s rights, determines the nature, quantity and quality of what the country achieves for its children. Governments can and have accelerated progress for implementation of the Agenda for Action [of the Stockholm Congress], often opening new and important channels for such work. Nevertheless, their actions have not been uniform and, as these country profiles attest, far more urgent work must be done to protect children from such heinous violations, as these are still perpetrated with impunity in many countries.”

A forthcoming commentary on sexual exploitation of children as a worst form of child labour suggests: “In contrast to information on legislative action – which in the case of sexual exploitation of children appears to indicate that many countries are making efforts to shore up legislation – there is precious little information available on what policy measures have been implemented by countries.” One reliable way of measuring the impact of ILO conventions, including Convention 182, can be found in the supervisory work of ILO’s Committee of Experts on the Application of Conventions and Recommendations. Taking 1999 as a starting point, significant levels of legislative activity can be identified, including adoption of legislation against the trafficking of human beings, particularly children, and against the involvement of children in prostitution and the production of pornography. But on the other hand, analytical work by ILO/IPEC suggests that specific action by countries against the sexual exploitation of children is for the moment quite modest.⁵⁴

Global survey by the International Centre for Missing and Exploited Children: A survey of child pornography legislation currently in place in the 184 INTERPOL Member Countries in 2006 reviewed in particular whether national legislation:

- Specifically addresses child pornography;
- Provides a definition of child pornography;
- Criminalizes computer-facilitated offences;
- Criminalizes possession of child pornography, regardless of the intent to distribute;
- Requires Internet service providers to report suspected child pornography to law enforcement or some other mandated agency.

The summarized results were as follows:

- Only five States fulfilled all five of these criteria – Australia, Belgium, France, South Africa and the United States;
- Only 22 States met all but the last criteria, on service provider reporting;
- Ninety five States had no legislation at all specifically addressing sexual exploitation in child pornography.

Of the remaining States that have legislation specifically addressing sexual exploitation in child pornography:

- 54 do not define child pornography in their legislation;
- 27 do not provide for computer-facilitated offences; and

⁵⁴ Kooijmans J., *Prostitution, Pornography, and Pornographic performances as Worst Forms of Child Labour: A Comment to art. 3b of Convention No. 182*, in: *Eliminating Child Labour: The Plight of the ILO in a Globalized World - A Legal Analysis* (Trento University, 2008) (forthcoming)

- 41 do not criminalize possession of child pornography, regardless of the intent to distribute.⁵⁵

Council of Europe Project on Cybercrime: This three-year project comes to an end in 2008. It promotes ratification of the Council of Europe's 2001 Convention (see chapter 1, page 16), global application of the Convention's standards and development of effective national legislation. A follow-up project is planned, and one of its proposed outputs will be enhanced knowledge of standards against the sexual abuse and exploitation of children and trafficking on the Internet.⁵⁶

INTERPOL's coordination of international investigations: General Secretariat is continuously working to draw law enforcement agencies together and ensure countries work jointly and in coordination to identify victims of child sexual exploitation worldwide. INTERPOL's work involves coordinating international investigations, analysing information and intelligence recovered from police operations worldwide, and – most importantly – operating the INTERPOL Child Abuse Image Database, which has the capability to match images from a specific case or location. The database allows investigators to determine whether images are known, victims have been identified and the images have been distributed. It also answers further crucial questions.

The International Child Sexual Exploitation (ICSE) database builds upon images of child sexual exploitation seized by law enforcement agencies worldwide. The database, financially sponsored by the G8 countries, included over half a million images of child sexual exploitation and the intelligence related to them by 2008, and it is constantly growing. Early on the database included around 30 identified victims, but increased efforts and cooperation have now brought the number of identified and rescued child victims to nearly 800 children⁵⁷. In addition to supplying investigators with additional and more complete information on child sexual exploitation material, the database helps reduce duplication of work and focus law enforcement efforts on unidentified victims suffering ongoing exploitation.

The ICSE database supplies both a powerful technical tool and valuable access to a worldwide online network of specialized investigators who share their expertise with each other. The ability to identify and rescue victims and prosecute their abusers depends on States' contribution to the database and on their cooperation with other States through the INTERPOL child sexual exploitation investigators' network.

Child sexual exploitation images are seized during police work in almost every country today, but this evidence material is not always acted upon or shared. The material often includes evidence relating to crimes committed both inside and outside the country of seizure. In order to safely store such material and aid the identification and rescue of child victims nationally and globally, it is crucial that countries connect to the ICSE database through the INTERPOL network.

⁵⁵ National Center for Missing and Exploited Children, *Child Pornography: Model legislation and Global Review*, 2006; see http://www.icmec.org/en_X1/pdf/ModelLegislationFINAL.pdf

⁵⁶ see

http://www.coe.int/t/DG1/LEGALCOOPERATION/ECONOMICCRIME/cybercrime/default_en.asp: *The Project on Cybercrime: activities and results to date; priorities and funding needs in 2008*

⁵⁷ According to verbal information from INTERPOL

Daily INTERPOL analysis of images of child sexual exploitation seized from computers of abusers and consumers worldwide has highlighted that further thought should be given to the definition of what is illegal material in this crime area. Analysis of seized material reveals that consumers often collect large numbers of ‘child nude posing’ images, downloaded from commercial websites dedicated to such images. These images, while clearly produced, distributed and consumed as images for sexual stimulation, are still considered in some countries a legitimate form of expression. Analysis shows such series usually consist of a naked child photographed in a studio setting, in different positions, almost always with the child’s genitals explicitly portrayed. It is hard to claim the images are produced for any purpose other than distribution as objects for sexual stimulation, given the great number of images (from a few dozen to a few hundred per child), the similar style and setting of portrayal and the fact that websites offering these images are usually dedicated solely to this type of image. States may need to reconsider the legality of the production, distribution and consumption of such images and treat websites offering them accordingly.⁵⁸

G8 countries’ legislation on sexual exploitation in travel and tourism: All G8 countries have laws that can be used to prosecute those who travel to sexually exploit children. All have legislation permitting them to prosecute their own nationals for the sexual exploitation of children committed outside their borders. Some legislation applies not only to nationals but also to permanent residents living within the borders of the home country.

Most G8 countries do not require dual criminality in order to prosecute sex tourists. This means that prosecutions in most G8 countries can proceed if the underlying sexual activity involving children would have been a crime had it taken place domestically, regardless of whether the activity was illegal in the destination country. This removes a key obstacle to prosecution. For example, if a destination country does not criminalize the sexual exploitation of children in prostitution or sets the age of sexual consent particularly low, the home country can still prosecute its nationals and permanent residents who sexually abuse children abroad.

None of the G8 countries requires proof that the defendant travelled for the purpose of engaging in illegal sexual activity with a minor. Experience has taught that proving the defendant’s intent prior to starting a trip presents a significant challenge to prosecutors.

Almost all of the G8 countries’ extraterritorial laws cover all three of the major categories of sexual crimes against children: all forms of sexual abuse, prostitution and pornography. Criminalizing both the extraterritorial production of sexually explicit images of children and sexual exploitation of children in tourism is particularly important, as recent experience suggests that those two crimes are often related.

Some G8 States use their conspiracy or incitement laws to criminalize the planning of sexual exploitation of children through tourism even before travel takes place. Some States can issue court orders preventing travel of convicted sex offenders; some

⁵⁸ for more details, see <http://www.interpol.int/Public/Children/Default.asp>

take other non-legislative steps, or notify destination countries of such travel, which can lead to the offender being refused admission to the destination country.⁵⁹

(For further analysis of legal and other developments to combat sexual exploitation of children in travel and tourism, see Theme Paper on sexual exploitation in travel and tourism)

Protection of Children from Sexual Exploitation in the Context of Armed Conflict

The 2007 Secretary-General's report 'The elimination of all forms of discrimination and violence against the girl child', prepared for the 51st session of the Commission on the Status of Women, reported: "Girls are subjected to discrimination and violence during conflict and post conflict situations. An estimated 40 per cent of child soldiers are girls who were forcibly or coercively recruited. Girls may be lured by offers of protection and access to safety zones. Many are abducted to take up arms as combatants or to cook, clean, maintain the camps and provide sexual services for the fighting forces. Others are forced to participate in economic activities related to the conflict, such as diamond and gem mining. They are exposed to abuse, exploitation and sexual violence, including through torture, rape, forced pregnancy, sexual slavery, forced prostitution and trafficking. Rape, including of very young girls, has been used widely as a weapon of war in recent conflicts."⁶⁰

In its examination of States' reports under the Optional Protocol on the sale of children, child prostitution and child pornography, the Committee on the Rights of the Child notes the particular vulnerability of children in situations of armed conflict. For example, following its examination of one State's initial report under the Protocol in 2007, it concluded: "The Committee notes that the conflict situation combined with extreme poverty, drought and famine has contributed to the significant number of street children and internally displaced children who are vulnerable to all forms of exploitation...In this regard, the Committee is concerned at the information that children may resort to prostitution and/or are forced into early marriages as a means for survival in exchange for food, money or basic goods." The Committee recommended the adoption or strengthening, implementation and dissemination of laws, administrative measures, social policies and programmes to prevent offences.

Abduction of children linked to sexual exploitation has taken place during periods of armed conflict. The Committee has requested that efforts to prevent it be intensified, adequate resources be provided for family reunification when in the child's best interests and international agreements be concluded to prevent, reunify and rehabilitate abducted children.

⁵⁹ *G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes Against Children*, unpublished paper prepared for UNICEF's Innocenti Research Centre by Maggie Brennan at the Child Exploitation and Online Protection Centre (CEOP) in the UK, 2007

⁶⁰ Economic and Social Council, Commission on the Status of Women 51st session, Report of the Secretary-General on "Progress in mainstreaming a gender perspective in the development, implementation and evaluations of national policies and programmes, with a particular focus on the elimination of all forms of discrimination and violence against the girl child, E/CN.6/2007/2, para. 30

A 2007 report from the Special Representative to the Secretary-General on children and armed conflict reports on the findings of the Machel Study 10-year Strategic Review of Children Affected by Armed Conflict.⁶¹ The report notes that the Office of the Special Representative has advocated consistently for ending impunity, in particular for certain categories of crimes against children in situations of armed conflict, including rape and other sexual violence. The report also notes that lack of security in and around refugee camps has led to increased vulnerability of children to grave violations of their rights, including sexual violence and abduction.

Widespread rape or other grave sexual violence continues to be committed in virtually every conflict situation and can take the form of sexual slavery, forced prostitution, sexual mutilation or other forms of brutality. Gender-based violence often leads to severe and long-lasting health problems, including early pregnancies, fistula, infections, HIV/AIDS and psychological trauma. Rape victims and children born as a result of rape are often marginalized. In certain African States, for example, children born of rape are at times referred to as ‘children of hate’ and at times even as ‘the enemy’s children’.

Nineteen country reports have been prepared for the Security Council and its Working Group on Children and Armed Conflict as of August 2008, in accordance with Security Council resolution 1612.⁶² Most refer to instances of rape or other serious sexual violence among the grave violations of children’s rights. The resolution is resulting in progressive action by some countries, but the Special Representative has noted that while the Council expressed its intention to take targeted measures against perpetrator countries recruiting and using children, “action in this regard remains a pressing challenge”⁶³.

Sexual Exploitation of Refugee Children

UNHCR highlights discrimination in access to rights that may reduce the protection of children who are trafficked and/or subjected to sexual exploitation. Such children come within its mandate as asylum seekers, refugees, internally displaced children or returnees, or stateless children.

The UNHCR Executive Committee’s Conclusion on Children at Risk (2007) provides operational guidance for States, UNHCR and other relevant agencies and partners, including by identifying components that may form part of a comprehensive child protection system to strengthen protection of children at risk. The conclusion emphasizes the need for a “rights-based approach, which recognizes children as active subjects of rights, and according to which all interventions are consistent with States’ obligations under relevant international law, including, as applicable, international refugee law, international human rights law and international humanitarian law, and acknowledgement that the CRC provides an important legal and normative framework for the protection of children...”.

⁶¹ UN General Assembly, A/62/228, 2007

⁶² see <http://www.un.org/children/conflict/english/securitycouncilwgroupdoc.html>

⁶³ Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/62/228, para. 34

The Conclusion also calls for the establishment and/or implementation of codes of conduct, “including stipulating zero tolerance for child exploitation and abuse for all humanitarian staff, including those working in the delivery of services, and for other staff in authority such as border guards, and ensuring that confidential and accessible complaints systems are in place which include child and gender-sensitive investigation and follow-up, so as to encourage the reporting of abuse and exploitation where codes of conduct are breached...”⁶⁴

Another UNHCR Executive Committee Conclusion, on Women and Girls at Risk, addresses their heightened risk of sexual and gender-based violence and proposes preventive strategies and appropriate responses.⁶⁵ And in 2003, the Executive Committee issued a Conclusion on Protection from Sexual Abuse and Exploitation that provides further detailed guidance, recognizing the increased vulnerability of the children it is concerned with and the need for effective mechanisms to prevent sexual abuse and exploitation in all phases of the refugee experience. It also emphasizes the need for easily accessible complaint and redress mechanisms for those who suffer sexual abuse or exploitation. These apply sanctions to perpetrators (with due respect for their rights to due process) and safeguard the security and rights of victims and witnesses.⁶⁶

Child Participation in Legal and Administrative Proceedings

UNICEF’s Innocenti Research Centre has recently conducted research on the right of children to participation in legal and administrative procedures, under the framework of the Implementation of International Standards.⁶⁷ Article 12(2) of the CRC requires providing the child with the opportunity to be heard “in any judicial or administrative proceedings affecting the child...” In general, this right has been overshadowed by the attention given to the child’s right to participate in the family, community and society at large. Children who are witnesses as victims of sexual exploitation are clearly “affected” and so have a right to be heard in related judicial and administrative proceedings.

A preliminary research paper by the Innocenti Research Centre suggests that most of the countries covered by the study have taken some steps to expand the right of children to be heard in legal and/or administrative proceedings, but in most cases the steps are limited in scope. Only a few States have elevated the child’s right to be heard to constitutional rank. None of the constitutional provisions identified in this study refers specifically to the right to be heard in legal proceedings.

Much of the law reform undertaken has been narrowly targeted and concerns family law, child protection and children who are victims of crimes, including crimes of sexual exploitation. As a rule, the only legislation that recognizes this right in broad,

⁶⁴ UNHCR Executive Committee Conclusion No. 107 (LVIII), 2007.

⁶⁵ UNHCR Executive Committee Conclusion No. 105 (LVI), 2006.

⁶⁶ UNHCR Executive Committee Conclusion No. 98 (LIV), 2003. For details of UNHCR guidelines and handbooks, see chapter 2, page 28.

⁶⁷ UNICEF’s Innocenti Research Centre is conducting research on how States parties are implementing the General Measures of Implementation of the CRC; this Study into the implementation of article 12(2) forms part of that research; full report forthcoming, 2008

general terms applicable to all legal and administrative proceedings is to be found in children's codes and comprehensive child rights laws.

In many countries, age limits play a role in regulating children's right to be heard in legal and administrative proceedings. In relation to the age at which children are allowed to be heard in legal proceedings, the countries in the study can be divided into three groups: The first group, representing a few countries, recognizes a broad, general rule that children below a certain age may not be heard in legal proceedings (the age is usually seven); in the second group, the legislation contains no age-based threshold (although lower age limits based on jurisprudence or regulations usually exist); in a third group of countries, children above a certain age must be heard, and courts and administrative bodies have discretion to hear younger children if they are considered mature enough. In child protection proceedings, six is the youngest age identified in this study at which children must be heard; the oldest is fifteen.

Only a small number of States have undertaken studies that quantify the extent to which children are actually heard and have their views taken into account. Only in a few countries have the views of children on this issue been collected and analysed.

When courts or administrative bodies have discretion to determine whether or not to hear a child, the criterion most often applied is whether the child is capable of forming his or her own views on the matter before the court. In some countries, the criterion of ability to express one's views such that they can be understood also applies.

Regional Reviews

Africa

For the African Technical Preparation Conference for World Congress III, the African Child Policy Forum carried out an Africa-wide study. It examined the legislative frameworks relating to sexual exploitation of children through a desk-based review that analysed primary sources, including treaties, conventions, charters and national laws on children. Where primary data were unavailable, a review was conducted of secondary data from government websites and organizations working in the area of sexual exploitation.⁶⁸

The review found that many African countries have laws to protect children from forms of violence, including sexual abuse, exploitation and trafficking. Some protective measures were found in constitutions, others within child-specific legislation and others within the criminal law. Nonetheless, these legal instruments were insufficient to protect children for a variety of reasons: a complex patchwork of laws; lack of an overarching definition of the child; poor implementation, including lack of treatment and rehabilitation for survivors; inadequate access to child-friendly procedures at police stations and courts; and ineffective sanctions for perpetrators. Moreover, most countries have no specific laws that prohibit the exploitation of children through trafficking, pornography and prostitution.

⁶⁸ The African Child Policy Forum: *Sexual Exploitation of Children in Africa: Background Paper Prepared on Legal Frameworks and Law Enforcement for the African Technical Preparation Meeting for the World Congress III against Sexual Exploitation of Children*, Dakar, Senegal, September 2008

Various national legislative reform efforts have attempted to address protection of children from sexual exploitation. The countries studied have used various approaches, such as enacting consolidated children's acts, amending the criminal law and revising the penal code, and enacting legislation prohibiting specific offences – or a combination of these approaches. Overall, the patchwork of legislation relating to children's rights poses a significant barrier to effectively harmonizing national laws with international norms and standards.

African governments have made a number of commitments to protect the rights of children from sexual exploitation, and ratification of the key international and regional instruments has increased. At the international level, there has been growing recognition and emphasis among governments of the importance of children's rights and a call for more effective implementation of international legal instruments on children. But such instruments on children must be translated into national legislation, policies and programmes in order to work. The review identified several problems:

- The lack of an overarching definition of the child;
- Ambiguities and inconsistencies in the minimum ages of marriage and sexual consent;
- Allowance of the defence of 'reasonable belief' that the child victim was old enough to consent to sexual relations;
- Legislation affording less protection to boys than girls despite the growing visibility of sexual exploitation of boys on the continent;
- Ambiguous definitions of prostitution, trafficking and pornography;
- In many countries, a lack of legislative provisions protecting children from exploitation in pornography.

In addition, in cases of abduction, if the victim agrees to marry her abductor, the perpetrator can only be prosecuted upon complaint by other people who can ask for the annulment of the marriage.

Among identified challenges to the implementation of laws were inappropriately lenient sentences and impunity for perpetrators. Many of the countries under review have ineffective sanctions and penalties. Sex offenders are often allowed bail and are given suspended, non-custodial or short sentences. Implementation of legislation by duty-bearers was poor throughout the criminal justice system, including lack of child-friendly procedures. Medical and other services for child victims were lacking, and many laws do not adequately address the care and rehabilitation of child victims and their need for medical, legal, and psychological support. Moreover, many African countries have insufficient birth registration systems, which may preclude children from protection against sexual exploitation. This is because children without formal proof of age may not benefit from protective minimum ages and from the protection from exploitation to which all persons below 18 are entitled.

Costing South Africa's child-related law reform: South Africa is in the process of comprehensive reform of child-related law. Major pieces of legislation containing provisions challenging sexual exploitation of children have either passed or are at an advanced stage. An innovative element has been preparation of cost-effectiveness analyses, budgets and implementation plans before passage of legislation.

First attempts were made during the development of the Child Justice Bill. A South African Law Reform Commission project committee commissioned a cost-effectiveness investigation of the proposed juvenile justice system and developed a strategy for implementation, involving collaboration between lawyers and economists. This involved preparing a flow chart showing the current cost – across five departments and at both national and provincial level – of taking a child through the criminal justice system. Then the cost of the current system was compared with that proposed in the bill. Three scenarios were developed: baseline, ideal and a ‘roll-out’ scenario seeking to replicate how the new system was likely to operate at about the halfway point of its implementation. The analysis was found to be valuable during the bill’s drafting.

As the bill approached Parliament for the first time, officials recognized that it was important to achieve ‘buy-in’ by high level government officials, including chief financial officers of the relevant departments and representatives of the Treasury. They also realized the importance of developing budgets and implementation planning compatible with the government’s three-year rolling budget system. An economist, provided through a UN technical assistance project, supported departmental staff with these tasks.

South Africa’s Children’s Act, passed in 2006, had been under development since the late 1990s. What eventually emerged is the most comprehensive legislation pertaining to children ever developed in South Africa. It deals primarily with care and protection, including prevention. Aware of the experimental process that had led to a budget and implementation plan for the Child Justice Bill, the lead department (Social Development) hired a team to assist in costing the Children’s Bill. From the outset the consulting team provided detailed support and developed models, but the departments that would be responsible for implementing the bill ran their own costing, budgeting and implementation planning process, monitored by the consultants. A 122-page report, ‘The Cost of the Children’s Bill’, was completed in July 2006. It included a set of full-cost scenarios and implementation-plan scenarios (allowing for a phased implementation); these were signed off by the heads of the departments that would have substantial responsibilities for implementation. The costing project did not attempt to evaluate or cost the expected benefits of the systems proposed in the bill to children or to society. But it did establish the cost of implementation and provided the basis for a detailed implementation plan.⁶⁹

Amendment of Ethiopia’s law on sexual exploitation: Ethiopian criminal law relating to sexual exploitation of children was reviewed and amended in 2004 to enhance its ability to protect. Also notable is that the Constitution (1994) prohibits human trafficking for any purpose (article 18(2)). In Ethiopia, the revised penal code provides that:

- It is an offence to procure a minor for prostitution, even if he/she consents, or to keep a minor in a brothel for the sake of prostitution. If convicted, this crime

⁶⁹ For a more detailed account of these developments, see ;Reforming child law in South Africa: budgeting and implementation planning;; UNICEF Innocenti Research Centre, 2007.

carries a prison term of five years' rigorous imprisonment and a fine of up to 10,000 Birr (approximately USD 1,125);

- Abducting a minor with the intent to use him/her for prostitution is an aggravated crime punishable by 10 to 25 years imprisonment;
- It is illegal to have sexual relations with children, with enhanced punishment where the child is under 13;
- It is unlawful to traffick children or women for gain or to "gratify the passions of another" by enticing, inducing or procuring a child or a woman for prostitution, or arranging or providing for the procurement of trafficked children;
- It is illegal to make, import, export, transport, receive, possess, publicly display, sell, distribute, traffick or trade writings, images, posters, films or other objects that display simulated sexual intercourse by a child or that exhibit the genitals;
- It is an offence to recruit, hide, transport, export or import a child for forced labour.

New Legislation on Trafficking in Nigeria: In 2003, Nigeria enacted new legislation on trafficking that includes provisions to combat the exploitation of children through prostitution, sex tourism and pornography. The Trafficking in Persons (Prohibition) Law Enforcement and Administration Act includes the following provisions:

- It is illegal to use threats, intimidation or false pretences to procure a person under 18 years of age to engage in sexual activity in or outside of Nigeria, or to use any drug to overpower a person under 18 years of age in order for a man to have sex with the drugged person. Offenders of these two provisions may be punished with a fine or 14 years' imprisonment.
- The law prohibits any Nigerian resident from encouraging the prostitution of a person under 18 years of age, permitting such a person's defilement on one's premises or allowing such a person to be in a brothel. The law also makes it illegal to keep a brothel or to trade in prostitution.
- In relation to the exploitation of children through tourism, the law prohibits organizing or promoting foreign travel that promotes or encourages prostitution. Violators may be punished with 10 years' imprisonment. Tour operators and travel agents must notify their clients of their obligation under this law and may not aid, abet, facilitate or promote a person's exploitation in tourism. Contravening these provisions may be punished with up to 12 months' imprisonment.

Europe

A report from the European Commission on implementation of the Council Framework Decision to combat the sexual exploitation of children and child pornography (2007; see chapter 2, page 20) suggests that legislation of most **EU Member States** ensures a high level of protection of children from sexual exploitation and abuse and provides for an appropriate level of penalties.⁷⁰ The report shows that the provisions applicable in Member States mostly comply with the

⁷⁰ European Commission: Report from the Commission on the implementation of the Council Framework Decision on combating the sexual exploitation of children and child pornography, MEMO/07/477, Brussels, 20 November 2007

requirements of the Framework Decision with respect to criminalizing sexual exploitation of children.

Exploitation of children through pornography is an increasing criminal phenomenon in Europe, the European Commission report found. According to figures published by Microsoft, 500,000 original images of children are offered on the Internet involving 50,000 different child victims. Currently at least 200,000 sites offer images of abuse of children.⁷¹ The Framework Decision requires States to criminalize child pornography. It is defined as the production, distribution, dissemination or transmission, the supplying or making available, and the acquisition or possession of pornographic materials that depict or represent children.

The depiction of children engaged in sexually explicit conduct is normally not allowed when the child is under 18. However, the Framework Decision allows – only in certain specific cases – exclusion from criminal liability for child pornography involving children who have reached the age of sexual consent. Therefore the real level of protection in every Member State is linked with the age of sexual consent, which varies from 13 to 17 years.

The European Commission report notes a lack of adequate information concerning the provisions in the Framework Decision relating to the treatment of children as particularly vulnerable victims during criminal proceedings. Taking into account recent developments, the Framework Decision may need updating and strengthening. This is particularly the case with respect to offences committed through the Internet or other communication networks, such as ‘grooming’. The report notes that 55 per cent of children appear to use the Internet every day, and out of these 11 per cent use social networking sites such as chat rooms, the risk for many children worldwide of being involved in sexually abusive relationships is very high.

According to the Commission report, the exploitation of children through travel and tourism mostly escapes investigation and prosecution. Nationals of many countries, including EU countries, travel to other areas of the world and buy sexual services provided by children in regions including Southeast Asia and Latin America.

The report highlights that legislation of EU countries complies with the minimum requirement of criminalization specified in the Framework Decision on combating the sexual exploitation of children and child pornography. However, information transmitted by Member States is often insufficient to enable the Commission to assess the real level of protection of children. This is especially the case concerning the extent of the exception allowed by the Framework Decision on extraterritorial jurisdiction.

A 2006 European Commission report on EU Member States’ response to the binding Framework Decision on combating trafficking in human beings (see chapter 2, page

⁷¹ Report from the Commission on the implementation of the Council Framework Decision on combating the sexual exploitation of children and child pornography, MEMO/07/477, Brussels, 20 November 2007 (no para. Numbers)

20) found varying levels of implementation; the Decision requires States to submit the relevant text of new or revised national laws to the European Commission.⁷²

A study by UNICEF's Innocenti Research Centre on child trafficking in Europe was published in 2008, covering 51 States including EU and other Western European countries, 10 States in South East Europe and 11 in the Commonwealth of Independent States. The report suggests that all but two of these countries have adopted laws to criminalize trafficking in human beings. But national legislation varies widely, with relevant provisions found in constitutions, criminal codes and criminal procedure codes.⁷³

In some cases, comprehensive anti-trafficking acts have been adopted and include detailed provisions on victim assistance, witness protection and special procedures for affected children: "National laws specifically addressing child trafficking are as diverse as those pertaining to trafficking in adults. Most European countries have defined aggravating circumstances if the crime is committed against a child – special circumstances that increase the severity of the crime and the respective punishment. Some countries address child trafficking through specific articles on trafficking introduced into the general child protection act. Further research is needed to assess how effectively these different approaches embrace the complexity of child trafficking and the special vulnerability of children, and protect the human rights of child victims".

The report indicates that while most countries have adopted the Palermo Protocol definition of trafficking in human beings, less than half of the countries reviewed (23 out of 51) have adopted a distinct legal definition of child trafficking in national law. Nevertheless, the legislation in 41 States reflects the Palermo Protocol's approach: that child trafficking is a crime even if no illicit means are used to recruit, transport, transfer, harbour or receive a child for the purpose of exploitation.

The report suggests that the lack of a consistent legal definition of child trafficking shared by all European countries "is a considerable obstacle to effectively addressing child trafficking. This not only poses challenges for international cooperation between countries, but also has major implications for the identification of trafficked children and their effective protection".

Far too often, the report suggests, victims of trafficking are treated as illegal migrants or as individuals who are criminally complicit in their own exploitation. The study reveals that in more than half of the European countries, trafficked children are not yet sufficiently protected by law from criminal prosecution for offences committed while still in exploitive situations. The study found 14 countries where provisions were in place to protect children from criminal prosecution for offences related to their situation as victims of trafficking and 29 where no such provisions were in place. (Information was not available for a further eight countries.)

The study found that of the (then) 25 EU Member States, 11 confirmed that their national legislation ensures that child victims of trafficking "should be considered as

⁷² European Commission, COM(2006) 187, 2 May 2006, page 22

⁷³ *Child Trafficking in Europe: a broad vision to put children first*, UNICEF Innocenti Research Centre, Florence, 2008

particularly vulnerable victims”, while 11 stated that their legislation did not (no information was available from six countries).

At their Third Summit (Warsaw, May 2005), the Heads of State and Government of the **Council of Europe** renewed their commitment to implementation of the CRC. They asked the Council of Europe to launch a plan of action on violence against children, with a particular focus on sexual violence. As a result, in 2006 the Council of Europe launched its transversal programme, ‘Building a Europe for and with children’. It aims to promote children’s rights and the elimination of all forms of violence against children. As a complement to the new conventions on trafficking and sexual exploitation and abuse, the programme has developed other standards and instruments to protect and empower children in the new information and communications environment. This includes an online game on Internet safety available in 20 languages, ‘Through the Wild Web Woods’.⁷⁴

The programme strategy for the years 2009-2011 was discussed at a high level conference in Stockholm (8-10 September 2008). This strategy includes inter alia drafting of European guidelines on child-friendly justice, adoption of policy guidelines for integrated national strategies on violence against children, promotion of child participation and launching (in 2010) of a campaign against sexual violence. This will be similar to the ongoing campaign against corporal punishment of children launched in 2008.

The **Parliamentary Assembly of the Council of Europe** has also continued to give attention to sexual exploitation of children. In September 2002, the Assembly adopted Resolution 1307 on the sexual exploitation of children: zero tolerance. The Assembly called for Council of Europe Member States to adopt a dynamic policy on impunity, together with procedures giving priority to the rights of child victims and their views and aiming at ensuring that perpetrators have no opportunity to evade justice.

South Asia

All countries in the South Asia region have ratified the Convention on the Rights of the Child. Afghanistan, Bangladesh, India, Nepal, Sri Lanka and the Maldives have ratified the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (and the Optional Protocol on the Involvement of Children in Armed Conflict). Bhutan and Pakistan are signatories to these protocols.

None of the countries has ratified the Palermo Protocol, though India and Sri Lanka are signatories to it. National legal definitions of human trafficking vary widely from State to State, and few comply with the international definition set out in the Palermo Protocol. As a result, trafficking in human beings has different meanings in different States. This limits the possibility of developing an effective approach based on regional and international cooperation.

Bhutan, India, Nepal, Pakistan and Sri Lanka have adopted laws that criminalize trafficking in human beings, and Bangladesh’s Women and Children’s Repression Act 2000 criminalizes trafficking in women and children. But of these countries, only

⁷⁴ See Council of Europe, “Building a Europe with and for Children”, <http://www.coe.int/>

Nepal, Pakistan and Sri Lanka have a legal definition of human trafficking. Bangladesh, Bhutan, India, Pakistan and Sri Lanka have adopted laws that criminalize trafficking in children specifically. However, only Bangladesh and Sri Lanka have a legal definition of child trafficking. In India it exists only in the state of Goa (the Goa Children's Act). None of these definitions corresponds exactly to the definition in the Palermo Protocol; rather they address specific aspects of child trafficking.

All the States have laws addressing different aspects of child trafficking. Particularly relevant is legislation regarding forced or bonded labour, child labour, sexual exploitation, adoption, marriage and kidnapping. Some laws refer directly to trafficking, while others can be used to address situations of exploitation, including in the context of trafficking. The relevant legal provisions can be found in constitutional laws, criminal codes, criminal procedure codes and labour codes.

Birth registration laws and policies have been adopted in some countries and are vital to anti-trafficking efforts. This is because prostitution is legal in parts of South Asia, so determining whether a 'sex worker' is in fact a child is often the beginning of anti-trafficking efforts. For example, in Bangladesh the Birth Registration Project, launched in 2001, is supported by recent legislation making birth registration compulsory. This standardized information will help prevent child labour, trafficking and child marriage.

The prevailing approach in the region is to address child trafficking as a law enforcement and criminal justice issue. Laws contain few requirements for legal, social, psychological or other kinds of assistance to victims or measures to ensure the empowerment and protection of the child. Throughout the region, there is an absence of comprehensive national child protection laws operational at the national and community levels to prevent trafficking, prosecute perpetrators or assist trafficked children.

The legal age of majority for children and other age limits defining the child in different contexts vary significantly in national legislation. This directly affects how stakeholders, particularly police and courts, address children's needs, respect their ability to make decisions and approach their innocence and accountability.

Also, some national frameworks grant different standards of services and protection for girls and boys. For example, boys may receive less legal protection from sexual exploitation than girls, or the minimum age of marriage may be lower for girls than for boys.

Penalties for child trafficking and other forms of child exploitation vary widely across the region as well as within some countries. For example, Bangladesh has enacted the death penalty for child trafficking, while other countries give lenient sentences for sexual exploitation of children. On the one hand, harsh penalties signal that trafficking, exploitation and abuse are considered serious crimes. On the other hand, such penalties could encourage people not to report these crimes out of fear that the perpetrator, whom they might know, will be sentenced to death or life imprisonment. Judges may also be reluctant to inflict such strong penalties and may find the perpetrator not guilty in order to avoid doing so.

Legal protection for children who have been trafficked remains insufficient across the region. None of the countries has a clear provision to protect child victims of trafficking from criminal prosecution or sanctions for offences related to their situation as trafficked persons. In India, the Goa Act, enacted by the state government of Goa and applicable only there, requires the government to establish centres to assist children who have been victims of trafficking and support them in criminal proceedings. It proposes establishment of a children's court to try all offences against children and establishes detailed safeguards for child victims and witnesses (see box).⁷⁵

BOX

Protection of child victims/witnesses in the Goa Children's Act

Extract from procedures of the Children's Court:

In all dealings with children, the Children's Court shall follow the following guidelines:

- (a) Child victims/witnesses are informed of their role in regard to court proceedings;
- (b) Their views are allowed to be heard and respected;
- (c) Inconvenience to them is minimized and their privacy is respected;
- (d) Delays in the proceedings are reduced;
- (e) Aggressive questioning or cross examination of child victims is avoided and the same, if necessary, is done through the judge;
- (f) Provisions are made for trials in camera⁷⁶;
- (g) The identity of the child is protected;
- (h) Child victims are prepared for the judicial process and prosecution of alleged abusers is not rushed if a child is not ready to go to court;
- (i) The investigator ascertains the need for medical examination of the child victim and when examination is undertaken, ensures that multiple re-examination is avoided;
- (j) The medical examination should be conducted in the presence of the parent/guardian and social worker/counselor as far as possible;
- (k) The child's testimony should be recorded in the presence of a social worker/counselor as early as possible after the abusive incident with other witnesses at hand;
- (l) Adequate translations/interpretations and translators/interpreters who are sensitive to children's needs should be provided wherever needed;
- (m) In case of a mentally challenged child, the competent service provider should depose on behalf of the child;
- (n) The special needs of the child victims/witnesses should be catered for. These should include the following:-

Enable children to familiarize themselves with the court surroundings;

Inform children of the different roles of the key persons at court, such as the judge, the defence lawyer and the prosecutor;

Inform the court of the special needs of children in general and of the individual children in specific cases;

⁷⁵ Two recent reports from UNICEF's Innocenti Research Centre provide a detailed regional analysis of anti-trafficking initiatives in South Asia, from which this summary has been extracted: 'South Asia in Action: Preventing and responding to child trafficking' and 'South Asia in Action: Preventing and responding to child trafficking: Child-rights-based programme practices'.

⁷⁶ 'In camera' means in private, without spectators.

Help children be comfortable in the proceedings;
Encourage questionings to be short and clear so as not confuse child witnesses;
Permit children below eight years of age to respond to leading questions facilitated by a social worker.

Goa Children's Act 2003 (Goa Act 18 of 2003), section 32

END BOX

The Americas

Results from surveys by the Inter-American Children's Institute in 2003, 2004 and 2005 show increasing ratification of relevant international human rights instruments in the region. By 2005, there were 30 ratifications of ILO Convention 182 within the OAS framework (88 per cent of Member States). There was one additional signatory to the OPSC in 2005 (Haiti), thus increasing the number to 24, with 20 ratifications, five more than in 2004 (58.8 per cent).

By 2005, 23 OAS Member states (68 per cent) had developed action plans against the sexual exploitation of children; the 11 who have not are mostly in the Caribbean sub-region. In terms of implementation, 17 of the 23 states with a plan had developed the relevant programmes and services; five were in the process of doing so and one had not started. In relation to the actions developed under plans, more States had developed preventive and protective measures, both legal and judicial; the least developed measure was child participation.

CHAPTER 5. RECOMMENDATIONS

Sexual exploitation of children is a gross violation of their human rights, including their right to respect for their human dignity and physical and mental integrity. The effective protection of children from all forms of sexual exploitation must be seen as the fulfilment of States' clear and immediate human rights obligations under international law.

States must translate these obligations, set out in chapter 1, into an effective framework of national law to prevent all forms of sexual exploitation and to respond urgently to it when it occurs, achieving prohibition while respecting throughout the rights of child victims. Chapter 2 provides guidance on this process and chapter 3 presents some illustrative indications of progress globally. Stemming the demand for sexual exploitation of children and addressing the persons profiting from commercial sexual exploitation are equally urgent measures to eliminate a global industry in which children's bodies are treated as commercial commodities.

Safeguarding children's rights requires laws, policies and programmes specifically designed with and for children. Children's right to have their views heard and given due weight must be reflected in legislation and applied throughout the development, implementation and evaluation of child protection from sexual exploitation. Rights must apply to all children, without discrimination. This does not, of course, bar the need for affirmative action in the form of legitimate differentiation in treatment of individual children because of their particular risks or needs.

The preparatory meetings for World Congress III emphasized the need to focus on implementation of human rights standards at national level. Also emphasized was the importance of legal frameworks combating more systematically the 'demand' for sexual exploitation of children, which is also addressed in recommendations. Equally, international instruments must be ratified and urgent action taken to stop organized crime and smaller networks profiting from commercial sexual exploitation of children. It is a global industry, considered by the United Nations to be the third most "profitable" illegal business after weapons and drugs.⁷⁷

International Bodies

These recommendations should be pursued as soon as possible, with a review by the end of 2009:

Special Representatives and Special Rapporteurs

- Encourage close cooperation between the new Special Representative to the Secretary-General on violence against children, the Special Representative on children and armed conflict and the Special Rapporteur on the sale of children, child prostitution and child pornography, together with other special representatives/rapporteurs with relevant mandates, and in collaboration with the Committee on the Rights of the Child. This should aim at avoiding duplication,

⁷⁷ UNICEF, see <http://www.unicef.ca/portal/GetPage.aspx?at=1429>

developing memoranda of understanding to maximize their impact on the challenge to sexual exploitation of children, and in particular to:

- Consider how best to develop model laws and guidance for national adaptation. These should reflect States' human rights obligations to prevent sexual exploitation of children without discrimination, respond to it effectively when it occurs, including through international cooperation, and uphold the rights of all child victims.
- Encourage consistent reporting by all States by the end of 2009 (to coincide with the 20th anniversary of the adoption of the CRC), coordinated by the Special Representative on children and violence, on their laws relevant to the prohibition of all forms of violence against children, in particular all sexual exploitation. The goal of this effort is to develop global 'map' of progress towards universal protection of children and to ease international cooperation.

Committee on the Rights of the Child

- Develop General Comments on combating all forms of sexual exploitation of children and related child trafficking, including detailed guidance to States parties on the development, implementation and enforcement of national legislation.
- Review guidelines for periodic reports under the CRC to ensure that they underline the importance of States reporting fully on the extent of sexual exploitation of children (with statistics) and on legislative and other measures combating sexual exploitation of children and their impact. States should also report fully on the follow-up to the Committee's Concluding Observations on previous reports. The Committee should consider providing a checklist of necessary legal provisions.
- Continue to pay special attention to States' progress towards the prevention, prohibition and elimination of all forms of sexual exploitation of children, including to States' follow-up to the recommendations arising from the three World Congresses.

UN agencies, NGOs and human rights institutions are encouraged to report fully to the Committee's pre-sessional working groups, preparing for examination of States' reports, on the extent of and response to sexual exploitation.

Other Human Rights Monitoring Bodies and Mechanisms

Other United Nations and regional human rights treaty bodies and special procedures of the Human Rights Council are encouraged to continue to pay particular attention to combating all forms of violence against children, in particular sexual exploitation, within their respective mandates and during their examination of States' reports or country visits. UN agencies, NGOs and human rights institutions are encouraged to provide reports on the extent of and response to sexual exploitation to these bodies.

Office of the High Commissioner for Human Rights

The OHCHR and other relevant agencies are encouraged to ensure that children and their representatives in all States are aware of the various international and regional human rights mechanisms available to hold States and individuals to account for crimes against children, including the International Criminal Court and

communications procedures established under the various instruments. All such mechanisms and special procedures should be encouraged to review their operations to ensure they are sensitive to the needs of child applicants and deal with cases involving children, including cases of sexual exploitation, as a priority, without delay and with full regard to the rights of child victims and witnesses.

Members of the Human Rights Council

Universal Periodic Review process: is a new process in the Human Rights Council, in which States' overall human rights record is examined, to ensure that it includes rigorous examination of States' fulfilment of their obligations to prevent and prohibit all forms of sexual exploitation of children and to respect fully the rights of child victims.

Communications procedure for CRC: The Convention on the Rights of the Child is the only core international instrument lacking a final or draft communications procedure, and this is an unwarranted discrimination against children seeking remedies for breaches of their rights, including their right to protection from all forms of sexual exploitation. States are therefore urged without delay to support the drafting and adoption of an Optional Protocol to the CRC to provide an appropriate communications procedure for children, for the Convention as well as the two Optional Protocols.

National Governments

Ratify international instruments and withdraw reservations by November 2009 (20th anniversary of the adoption of the CRC): States that have not done so should ratify the core international human rights instruments identified in chapter 1, including the CRC, its two Optional Protocols and the Palermo Protocol as well as the relevant regional instruments. States should also review and withdraw any reservations and declarations they may have made on ratification. These undermine the aims and purpose of the instruments, including by restricting the rights of children to protection from all forms of sexual exploitation.

Ensure that national law fully complies with relevant international human rights instruments and pursue full implementation: States should ensure urgently that they fulfil the obligations inherent in ratification of international human rights instruments, reporting (as proposed above) to the Special Representative on violence against children by November 2009 on the state of their relevant legislation. In particular, they should ensure that:

- International human rights standards are fully and appropriately incorporated in national law and/or that all national law – civil, criminal, customary and other relevant law – fully complies with them. Ensure that they can be invoked directly and enforced through the courts, including by children and/or their representatives.
- Children – particularly children with relevant experiences – are involved in this process of law review and development of legal frameworks to combat sexual exploitation.
- Capacity building to improve implementation and enforcement of legislation is provided for all those who are or should be engaged in the process, including in

the education, health, welfare, social and criminal justice sectors. This recognizes that preventing and responding to sexual exploitation of children requires a multi-sectoral approach.

- Sufficient resources are provided to implement the legislative framework. This requires detailed budget analysis and agreed implementation strategies across sectors, specifically for the prevention of and effective response to sexual exploitation of children.

Development and involvement of national children's rights institutions: States that have not done so are urged to establish (through legislation) independent children's rights institutions – children's ombudspersons or commissioners for children's rights, or focal points on children's rights within national human rights institutions or general ombudspersons offices. These should comply with the Paris Principles and take account of the Committee on the Rights of the Child's General Comment No. 2.⁷⁸ These institutions, together with all other national human rights institutions and ombudsperson institutions, should play a key role in the independent monitoring of government responses to sexual exploitation. They should advocate for effective legal frameworks and enforcement and where necessary ensure that child victims have effective remedies and redress, supporting them in pursuing these.

In reviewing and reforming national legal frameworks, States should give special attention to the following:

Birth, death and marriage registration: States should intensify efforts to ensure the right to birth registration, without discrimination, as one necessary safeguard against sexual exploitation. States should create and maintain birth, death and marriage data registries with full national coverage.

Definition of the child: States should ensure that, for the purpose of laws protecting children from sexual exploitation, the child is consistently defined as everyone below the age of 18 years, whatever the age of consent and age of marriage or onset of puberty. States should thus ensure that the age of consent does not in any way affect the criminalization of all forms of sexual exploitation of those under 18, with no exceptions whatsoever.

In line with international standards and the recommendations of the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, States should ensure that the age of marriage for both boys and girls is 18 without discrimination, so that consent to under-age marriage cannot be valid.

Definitions of forms of sexual exploitation and actions to be prohibited: States should ensure that national legislation incorporates the most comprehensive definitions of all forms of sexual exploitation and abuse of children.

Prohibition: States should ensure the prohibition of all forms of violence against children, in particular all sexual exploitation and other sexual violence, all corporal punishment and harmful traditional practices. In States that recognize an age of

⁷⁸ Paris Principles (Principles relating to the Status of National Institutions), GA resolution 48/134, 1993; Committee on the Rights of the Child General Comment No. 2 The role of independent national human rights institutions in the protection and promotion of the rights of the child, CRC/GC/2002/2

consent below the age of 18, consent shall not be taken into consideration, nor ever bar criminal responsibility for sexual abuse of children up to 18, when based on coercion, a relationship of authority or significant difference in age or mental or emotional maturity. Such measures should not govern consensual sexual activities between children.

Child victims: States should review their legislation to ensure that child victims (defined as everyone up to 18) of all forms of sexual exploitation are not criminalized for their involvement or stigmatized in any way, but consistently recognized as victims.

Jurisdiction: Each State is urged to establish jurisdiction over all offences of sexual exploitation when committed:

- On its territory or on ships flying its flag or aircraft registered under its laws;
- By one of its nationals, or by persons having habitual residence in its territory, in other territories;
- In other territories against a child who is a national or has his/her habitual residence in the State's territory.

Each State should also ensure that its extraterritorial jurisdiction is not limited by requiring that the acts are also criminalized in the State where they happened (the double criminality condition). Such conditions should be removed urgently to tackle impunity of perpetrators.

Statutes of limitation: States should ensure that in all cases of sexual crimes against children, statutes of limitation or prescription periods continue to run for a sufficient time to allow the initiation of proceedings after a child victim has reached 18.

Remedies: States should ensure real and realistic remedies for children for breaches of their right to protection from all forms of sexual exploitation. These should include provision of child-friendly information, advice and advocacy, including support for self-advocacy by children, access to independent complaints procedures and where necessary to the courts with legal and other assistance. Where rights are found to have been breached there should be appropriate reparation, including compensation, and where needed measures to promote physical and psychological recovery, rehabilitation and reintegration (as required by the Optional Protocol and by article 39 of the CRC).

Sanctions and treatment: Ensure that sanctions defined in legislation for crimes of sexual exploitation are effective, proportionate and dissuasive. In particular, States should ensure that the sanctions set for crimes of use of child prostitution and consumption of or access to child pornography reflect fully the seriousness of these crimes. The primary aims of the criminal justice system in responding to sexual exploitation should be achieving the safety of children and the public, including through effective deterrence and prevention of re-offending.

Intervention programmes or measures, including offender management systems and treatment, designed to minimize the risk of repeat offences should be made available to alleged and sentenced offenders. Measures should also allow for the seizure and

confiscation of goods, funds, etc., used to commit offences and temporary or permanent closure of establishments used.

Views of the child: States should ensure that the legal framework fully complies with article 12 of the CRC, requiring all those involved in responding to sexual exploitation to ensure that children are aware of their right to, and are given the opportunity to, express their views and have those views given due weight at all stages and in all decision-making and in all administrative and judicial proceedings.

Child-sensitive justice: States should ensure that all involvement of children with the criminal justice system complies with international human rights standards and with the child's best interests and respects their right to express views and have them given due weight. States are encouraged to widely disseminate to all those concerned the 'Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime'. All involved in law enforcement, including in particular judges in criminal and civil proceedings, must receive ongoing and comprehensive training on child sexual exploitation and child victims' responses to it.

Privacy: There should be clear obligations in national law to respect the privacy of children and to avoid identifying victims in investigatory or court proceedings or in the media. There should be no public identification of child perpetrators of sexual exploitation and abuse.

Legislative basis for reporting mechanisms: All States should review by 2012 their procedures for identification, reporting, referral and investigation of all forms of sexual exploitation and sexual abuse. This is to ensure that they provide an effective and accessible service in the best interests of children. Where mandatory obligations to report signs or suspicions of sexual exploitation of children to competent authorities are placed on certain professions (and in some cases on the public), these should be widely known and disseminated to children. There should be no legal reporting obstacles for professionals in contact with children. In addition children should have the right of access to advice and advocacy services and helplines that operate on a confidential basis, only reporting without the child's agreement when the child or other person is believed to be at immediate risk of death or serious injury, or where the child clearly lacks sufficient understanding and it is believed that breach of confidentiality is necessary to prevent them being harmed.

Legislative basis for prevention: The legislative framework should include measures to prevent sexual exploitation (see Optional Protocol article 19). These should require:

- Training and awareness-raising on children's rights, the law and the various forms of sexual exploitation of children for all those working with children;
- Public awareness-raising of the forms and risks of sexual exploitation, their impact on children and how to identify and report;
- Prevention of offending, through measures to ensure that those who come forward because they fear they may commit sexual crimes against children are offered counselling and treatment programmes. The availability of such programmes should be widely disseminated;
- Prevention of re-offending, through offender management systems and treatment, should be made available to those subject to criminal proceedings,

before and after conviction, in and out of prison. Best practices in offender management and treatment should be reviewed and disseminated globally;

- Therapy and rehabilitation for children and adolescents with sexually problematic/harmful behaviour who may pose a risk to other children, through appropriate child-focused measures and programmes that will not criminalize them but will balance their best interest with due regard for public safety;
- Systems to enable relevant criminal records to be stored and checks to be made on all those employed or seeking employment in positions giving them regular contact with children, with appropriate safeguards;
- Systems to collect and store (with appropriate safeguards) data relating to the identity and genetic profile (DNA) of those convicted of sexual exploitation offences. Such systems should ensure the immediate availability of this information to other States.

Recommendations Specific to Particular Forms of Sexual Exploitation

Sexual exploitation in prostitution: States should ensure criminalization of recruiting a child into prostitution or causing a child to participate; coercing a child into prostitution or profiting from or otherwise exploiting a child for that purpose; and using a child in prostitution. Attempting and aiding or abetting or any other act of complicity with these offences should also be criminalized.

Sexual exploitation in pornography: Regarding sexual abuse representations, States should ensure the criminalization of production; offering or making available; distributing or transmitting; procuring for oneself or another person; possessing; knowingly obtaining access and viewing through information and communication technologies; intentional recruiting or causing or coercing a child to take part in pornographic performances; profiting from or otherwise exploiting a child for this purpose; knowingly attending pornographic performances involving the participation of children (and in addition, attempting, aiding or abetting these offences); and advertising in any way child exploitation in pornography and child abuse images.

States should ensure the existence of a national specialized law enforcement unit dedicated to investigating Internet-facilitated crimes against children and to identifying victims of child sexual exploitation. States should ensure their national specialized units work in cooperation with other national units on this crime area, through the international network of INTERPOL. States should also share seized images of child sexual exploitation through the International Child Sexual Exploitation database (ICSE), as evidence material of a committed crime.

States should implement the now readily available Child Sexual Abuse Anti-distribution Filter to block access to websites containing child sexual abuse images. Internet service providers should be under appropriate duties to report child abuse images and block access to sites including them.

Corruption of children and grooming: States should ensure the prohibition of intentionally causing a child below the age of consent to witness sexual abuse or activities. States should also prohibit grooming –making intentional proposals by an adult, including through the Internet, to meet a child under the age of consent for

sexual purposes. There should also be administrative regulation of cybercafés and other places where computers are made available to the general public, including the establishment of specific measures to ensure adequate protection for children and adolescents, which may take the form of a standard or a code of conduct.

Corporate liability: States should ensure that legal entities can be liable for any involvement in sexual exploitation of children, as well as aiding and abetting or other complicity in offences. *(See also Theme Paper on Corporate Social Responsibility)*

Organized crime: International and national agencies involved in combating organized criminal groups should be made aware of the substantial involvement of such groups in the sexual exploitation of children. They should research this involvement and identify best practice in stopping these activities, through measures including, for example, prevention of money laundering, seizure and confiscation of criminal assets and special investigation techniques. International forums such as the United Nations Office of Drugs and Crime and Financial Action Task Force, which deal with international crime and organized criminal groups, should urgently address sexual exploitation of children, nationally, regionally and internationally.

Child trafficking related to sexual exploitation: States should review laws and ensure that they conform fully to international standards – in particular to incorporate the definition of trafficking and child trafficking from the Palermo Protocol, addressing trafficking for all forms of sexual exploitation within a human rights framework and respecting the rights of child victims. Trafficked boys and girls up to age 18 must not be criminalized, including for any offences they commit in relation to their situation as victims of trafficking for sexual exploitation. People's migration must not be jeopardized.

National laws should be harmonized to ensure protection for child victims of cross-border trafficking, who may fall under the legal purview of two or more nations. In particular, harmonization of legislation should be achieved in relation to the definitions of trafficking, legal definition of the child, possibility of obtaining compensation for harm suffered by trafficking victims and repatriation measures. Foreign-born child victims must have access to refugee determination procedures under the Refugee Conventions and must not be deported unless in their best interests. *(See also Theme Paper on child sexual exploitation in trafficking)*

ANNEX

International human rights instruments relevant to challenging and ending sexual exploitation of children

All binding International Instruments relevant to sexual exploitation of children

Convention concerning Forced or Compulsory Labour ('Forced Labour Convention' No. 29; 1930).

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, (1949)

Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

Convention concerning Minimum Age for Admission to Employment (Minimum Age Convention No. 138; 1973).

Convention on the Elimination of all Forms of Discrimination against Women (1979)

Hague Convention on the Civil Aspects of International Child Abduction (1980)

Convention on the Rights of the Child (1989)

International Convention on the Protection and Rights of All Migrant Workers and Members of their Families (1990)

Rome Statute of the International Criminal Court (1998)

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Worst Forms of Child Labour Convention, 1999)

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)

Convention against Transnational Organized Crime (2000)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000) ('Palermo Protocol')

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime (2001).

Convention on the Rights of Persons with Disabilities (2006)

International Convention for the Protection of All Persons from Enforced Disappearance (2006)

Binding Regional Instruments

Africa

African Charter on Human and Peoples' Rights (1981)

African Charter on the Rights and Welfare of the Child (1990)

African Youth Charter (2006, not yet in force)

Asia

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (2002)

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia (2002)

Europe

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)

European Social Charter (1961) and Revised Social Charter (1996)

Convention on Cybercrime (2001)

Council of Europe Convention on Action against Trafficking in Human Beings (2005)

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007; not yet in force October 2008)

European Council Framework Decisions (2001/220/JHA, 2002/629/JHA 2004/68/JHA)

The Americas

American Convention on Human Rights (1969)

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)

Inter-American Convention on International Traffic in Minors (1994)

Inter-American Convention on the International Return of Children (1989)