



STRENGTHENING

Laws addressing child sexual exploitation

A Practical Guide



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GLOSSARY OF ACRONYMS & ABBREVIATIONS

ACC:	African Charter on the Rights and Welfare of the Child
ACHPR:	African Court on Human and Peoples' Rights
AFP:	Australian Federal Police
Agenda for Action:	Stockholm Declaration and Agenda for Action
ASEAN:	Association of Southeast Asian Nations
Banjul Charter:	African Charter on Human and Peoples' Rights
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR:	International Covenant on Civil and Political Rights
CDPC:	European Committee on Crime Problems
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CERD:	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR:	International Covenant on Economic, Social and Cultural Rights
CGI:	Computer generated images
Code of Conduct:	Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism
CoE:	Council of Europe
CRC:	Convention on the Rights of the Child
CRIN:	Child Rights Information Network
CSA:	Child Sexual Abuse
CSEC:	Commercial Sexual Exploitation of Children
ECHR:	European Court of Human Rights
ECPAT:	End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes
FDIC:	Federal Deposit Insurance Corporation
FWLD:	Forum for Women, Law and Development
GRETA:	Group of Experts against Trafficking in Human Beings
IACHR:	Inter-American Court of Human Rights
ICE:	US Department of Homeland Security's Office of Immigration and Customs Enforcement
ICH:	Internet content host
ICMEC:	International Centre for Missing and Exploited Children
ICT:	Information and communication technologies
ILO:	International Labour Organization
Internet providers:	ICH and ISP, collectively

ISP:	Internet service provider
IT:	Information technology
MW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NCMEC:	National Center for Missing and Exploited Children
NGO:	Non-governmental Organisation
OAS:	Organization of American States
OAU:	Organization of African Unity
OCC:	Office of the Comptroller of the Currency
OHCHR:	Office of the UN High Commissioner for Human Rights
OPSC:	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PICT:	Project on International Courts and Tribunals
PROTECT Act:	US’s Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003
SAARC:	South Asian Association for Regional Cooperation
SAARC Convention:	SAARC Regional Convention on Preventing and Combating Trafficking of Women and Children for Prostitution
SCIP:	UK’s Safeguarding Children Involved in Prostitution
SITA:	Bangladesh’s Suppression of Immoral Traffic Act
SRSO:	UN Special Representative on violence against children
Trafficking Protocol:	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UK:	United Kingdom
UN:	United Nations
UNHCHR:	UN High Commissioner for Human Rights
Unicef:	UN Children’s Fund
UNODC:	UN Office on Drugs and Crime
US:	United States of America

PREFACE

Strong laws, together with effective enforcement procedures which are child sensitive, are of crucial importance to protect children from all forms of sexual exploitation including child prostitution, child pornography, child trafficking for sexual purposes and child sex tourism. While progress has been made through international and regional standard-setting and national law, ECPAT International's work has demonstrated the inadequacy of their implementation. Around the world, basic legal provisions that clearly define and prohibit the different manifestations of child sexual exploitation are still lacking; and when they are in place, their enforcement remains a significant challenge.

This guide was developed to support a necessary transition from aspiration to action. It consolidates and builds upon the ECPAT network's experience monitoring and its systematic assessment of the implementation of international commitments such as the Stockholm Declaration and Agenda for Action and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Through this work, ECPAT has identified major gaps in protection and made concrete recommendations for change. The ECPAT network has also initiated and supported legal reform initiatives around the world which provide a solid foundation upon which it will continue building.

ECPAT is committed to supporting legal reform to ensure that national laws not only comply with international standards but that they are implemented to protect children. In fulfilling this mandate, ECPAT will continue to collaborate with government institutions, international and non-governmental organisations, professionals and all those involved in the protection and promotion of children's rights to live free from all forms of sexual abuse and exploitation. Against this background it is hoped that this guide will serve as a practical tool towards strengthening laws addressing child sexual exploitation so that we can put an end to these inhumane violations.

Purpose of the Guide

ECPAT International's work in combating commercial sexual exploitation of children has revealed the need for more guidance on the implementation of international legal standards, more specifically regarding the enactment of laws addressing the different manifestations of child sexual exploitation. While several international instruments exist, their provisions are far from being uniformly understood and applied and national laws vary substantially. This guide thus examines the international legal framework and provides examples of implementation at national level. It also suggests key elements of national legislation aimed at eliminating the sexual exploitation of children.

The guide was developed for international and non-governmental organisations, government institutions, professionals and all those working to end the sexual exploitation of children. Its purpose is three-fold: (1) to serve as a practical tool in the assessment of national child protection frameworks; (2) to inform the process of harmonising and strengthening legislation; and (3) to support advocacy for legal reform to better protect children. ECPAT International hopes that this guide will generate a dialogue among all concerned stakeholders that will further strengthen action against the sexual exploitation of children.

Some limitations

Comprehensive legal frameworks to better protect children from abuse and exploitation include several interlinked components such as laws regulating the provision of child welfare services and laws establishing juvenile justice systems. This guide focuses primarily on criminal laws to deter and punish child sexual exploitation as a key element of broader child protection frameworks. In this perspective it is meant to complement other existing tools and resources and to be read in conjunction therewith.

Use of definitions and terminology

There is currently some debate in the international community on the use of terms such as child pornography and child prostitution. Suggestions have been made to replace them with terms considered to better capture the abusive and exploitative nature of the crimes committed, such as child abuse images or children exploited in prostitution. While ECPAT welcomes the debate, for the sake of consistency throughout this guide reference will be made mostly to the terms that have been internationally agreed in the main existing conventions.

How to use the guide

The guide has been divided into six sections which can also be used on their own:

- Section 1 offers an overview of the main relevant international and regional legal instruments;
- Section 2 sheds some conceptual clarity on basic terms such as ‘child’, ‘child sexual abuse’ and ‘child sexual exploitation’ and emphasises the importance of consistent legal definitions;
- Sections 3 through 5 address respectively child prostitution, child pornography and child sex tourism as human rights violations;
- Section 6 briefly examines some key international cooperation measures such as extradition and mutual legal assistance.

Each section suggests a ‘legal reform checklist’ that States are encouraged to consider. A suggested ‘global checklist’ is offered at the end, which is not meant to be exhaustive or applicable to every legal system but rather to provide guidance.

For more information on the work of ECPAT please visit our website at www.ecpat.net or contact us at info@ecpat.net.

SECTION 1

THE INTERNATIONAL LEGAL FRAMEWORK

Objectives:

- To provide an overview of the main international and regional human rights legal instruments, in particular those relevant to the sexual exploitation of children
- To outline their main provisions as well as their monitoring and reporting mechanisms
- To provide a basic understanding of the functioning of human rights courts

HUMAN RIGHTS INSTRUMENTS

Universal human rights are those rights considered to be inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, age or any other status. Many of these rights are guaranteed by domestic and international law, through treaties and State law as well as through other sources of law.

Treaties are legally binding agreements concluded between States in written form.¹ Binding international legal instruments can also be referred to as **Conventions, Protocols, Agreements, and Covenants. Declarations and resolutions** are also legal instruments. They are not legally binding, but declare the aspirations of the States parties.

The United Nations (UN) human rights treaties lie at the very heart of the international system for promoting and protecting human rights. There are nine core international human rights treaties:

- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The International Covenant on Civil and Political Rights (CCPR) and its two optional protocols;
- The International Covenant on Economic, Social and Cultural Rights (CESCR);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocol;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The Convention on the Rights of the Child (CRC) and its two protocols;

¹ The Vienna Convention on the Law of Treaties provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, art. 26. Entered into force 27 January 1980. Accessed on 3 October 2008 from: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MW);
- The International Convention for the Protection of All Persons from Enforced Disappearance;² and
- The Convention on the Rights of Persons with Disabilities.

Many of these treaties have widespread acceptance by States. Since the adoption of the Universal Declaration of Human Rights in 1948, all UN member States have ratified at least one core international human rights treaty, and 80% have ratified four or more.³

THE LANGUAGE OF INTERNATIONAL LEGAL INSTRUMENTS

1. **Adoption** refers to the formal act of establishing the language of the treaty. This is usually done by consent of the States that negotiated the treaty.
2. By providing its **signature**, a State expresses its intention to ratify, accept or approve the treaty in the future but it does not establish its consent to be bound. Once a State has signed a treaty it becomes obligated to refrain from acting in a manner that would defeat the object and purpose of the treaty.
3. **Ratification** is the process by which a State agrees to be bound by the obligations set forth in a treaty. States ratify treaties in different ways depending on their own legal systems. Ratification may be effectuated through the issuance of a decree, by amending existing laws to conform with treaty obligations or by introducing new legislation making the treaty part of State law.
4. When a State agrees to be bound by the obligations of a treaty but did not participate in its negotiation, the State is said to have **acceded** to the treaty rather than to have ratified it. Accession can be effectuated in the same manner as ratification.
5. A treaty is said to have **entered into force** when a specified number of States have ratified or acceded to it. The exact requirements for entry into force are often detailed in the treaty itself.
6. Each treaty has a committee of experts or 'treaty body' that is responsible for **monitoring** implementation of the treaty's provisions by States parties. Treaty bodies are also responsible for receiving and considering complaints and other communications with regard to the treaty they monitor.
7. A **reservation** is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. For example, upon ratification of the OPSC, **Sweden** declared that it interpreted the term 'child pornography' to be restricted to visual representations.⁴

² This Convention has not yet entered into force.

³ Office of the High Commissioner for Human Rights (OHCHR). *United Nations Human Rights: Human Rights Bodies*. Accessed on 3 October 2008 from: <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.

⁴ UN Treaty Collection. *Multilateral Treaties Deposited with the Secretary-General*. Accessed on 7 October 2008 from <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=135&chapter=4&lang=en>.

The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was the first binding international instrument to set out the civil, political, economic, social and cultural rights of children. It was the result of a decade of negotiations between governments and NGOs. It came into force in September 1990 and currently counts 193 States Parties. Every UN member State has ratified or acceded to the CRC with the exception of **Somalia**⁵ and the **United States**⁶.

The CRC establishes four core principles that must be followed by States with regard to the human rights of children. These principles are:

- **Non-discrimination:** all children have the rights set forth in the CRC and States must actively identify individual children and groups of children for whom the recognition and realisation of those rights demands special measures⁷
- **The best interests of the child** as a primary consideration in all actions concerning children⁸
- **The child's inherent right to life and States parties' obligation, to ensure to the maximum extent possible, the survival and development of the child**⁹
- **Children's participation rights:** children have the right to voice their opinion and to participate in the promotion, protection and monitoring of their rights¹⁰

⁵ At present, Somalia is without a functioning central government. However, parties within the Government structure have committed to signing and ratifying the CRC once the situation is rectified.

⁶ In the case of the United States, procedural and political barriers play an important role in its lack of ratification of treaties in general. It is the policy of the US to thoroughly evaluate the constitutionality and potential impact of a treaty prior to giving its consent for ratification. Lengthy review processes can delay treaty ratification by many years, and if the treaty is controversial, it can become politicised, further lengthening the ratification process.

⁷ Article 2 of the CRC provides: 1. "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". 2. "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family member". Convention on the Rights of the Child, art. 2. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>; see also Committee on the Rights of the Child. *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, p. 4. UN Convention on the Rights of the Child. 27 November 2003. Accessed on 3 October 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En).

⁸ Article 3(1) of the CRC provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". (2) "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures". (3) "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision". Convention on the Rights of the Child, art. 3(1). Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

⁹ Article 6(1) of the CRC provides: "States Parties recognize that every child has the inherent right to life". (2) "States Parties shall ensure to the maximum extent possible the survival and development of the child". *Ibid.* art 6(1).

¹⁰ Article 12 of the CRC provides: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". (2) "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". *Ibid.* art. 12(1).

The CRC sets out child rights in its 54 articles and two optional protocols. It recognises that children have an inherent right to life and survival, to an identity, to a nationality, to be heard, to freedom of thought, conscience and religion, to health and to an education.

Articles 34 through 35 of the CRC directly obligate States to protect children from all forms of sexual exploitation, including child prostitution, child pornography and trafficking. These articles constitute the cornerstone of international legal protection of children against sexual abuse and exploitation.

Article 34 CRC

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

Article 35 CRC

“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

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

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC)¹¹ was the first of the CRC’s two optional protocols to enter into force. The OPSC was adopted in May 2000 and entered into force in January 2002. As of September 2008, it had been ratified by 129 UN member States.

¹¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The OPSC is a key instrument because it defines and prohibits the different forms of child sexual exploitation that are the sale of children, child prostitution and child pornography.¹² Accordingly, the OPSC requires that these offences to be treated as criminal acts by States Parties.¹³

The OPSC also requires the States parties to ensure that they have jurisdiction over the offences; to provide for the extradition of offenders; to encourage international cooperation between States in pursuing offenders; and to provide support to child survivors of commercial sexual exploitation including throughout the legal process.

Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography monitoring and reporting mechanism

The **Committee on the Rights of the Child** is the treaty body responsible for monitoring the implementation of the CRC and its two optional protocols. The Committee consists of 18 experts who periodically examine the progress made by States parties in meeting their obligations under the CRC.¹⁴

Within two years of the entry into force of the CRC and the OPSC, States parties are required to submit comprehensive initial reports to the Committee detailing their implementation of each of these instruments.¹⁵ Once they have submitted these initial reports, States must prepare reports on the implementation of the CRC and the OPSC every five years. After consideration of the State reports, the Committee publishes its recommendations in the form of concluding observations, which highlight positive aspects of implementation, as well as suggestions on how to improve the condition of children in their countries.

Periodic State reporting is important because it puts pressure on States to bring their legislation and policy into compliance with the CRC. NGOs can play an important role in this process by providing information and making recommendations in the monitoring process. **The CRC is the only international human rights treaty that expressly gives NGOs a role in monitoring its implementation.**

¹² *Ibid.* art. 2.

¹³ *Ibid.* art. 3.

¹⁴ Convention on the Rights of the Child, arts. 43(1) & 43(2). Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

¹⁵ *Ibid.* art. 44; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 12(1). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>. Unicef has published a handbook for the implementation of the CRC, providing a detailed reference for the implementation of law, policy and practice to promote and protect the rights of children. It examines each article in light of the Committee on the Rights of the Child's examination of State reports and Concluding Observations. Hodgkin, Rachel & Newell, Peter. *Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition*. Unicef. September 2007. Accessed on 3 October 2008 from: http://www.UNICEF.org/publications/index_43110.html.

Over the past years NGOs have played an important role in the CRC reporting mechanism.¹⁶ While the OPSC does not contain a similar provision, it has become practice for the Committee to receive NGO alternative reports addressing the OPSC.¹⁷ ECPAT groups are and have been very active in the development and submission of alternative reports.¹⁸

Gaps Highlighted by the Committee on the Rights of the Child

By September 2008, the Committee had examined initial reports on the implementation of the OPSC in 26 States. No States were found to have adequate legal frameworks for addressing the sexual exploitation of children. Two of the most commonly observed gaps are:

- The **absence of adequate legislation** that defines and prohibits all forms of sexual exploitation of children. In particular, legislation on child prostitution, child trafficking for sexual purposes and child pornography is insufficient; and
- The **treatment of child victims as criminals**, in contravention of their right to protection.

Other gaps include the lack of a specific governmental body to coordinate monitoring and implementation of the OPSC; the absence of data collection and analysis mechanisms; and the lack of dissemination and training about the OPSC.

Unfortunately there are no mechanisms to enforce the Committee's recommendations and conclusions with regard to a State's non-compliance with the CRC and the OPSC. The CRC will soon be the only international human rights treaty with mandatory reporting that lacks a mechanism to challenge violations of its provisions.¹⁹ A campaign is currently underway to draft and adopt a protocol to establish such a mechanism. It would allow individuals, groups or their representatives, claiming that their rights have been violated by a State party, to bring a communication before a committee, provided that the State has recognised the competence of the committee to receive such complaints.²⁰ **ECPAT encourages States to support the campaign for the development of a complaints procedure under the CRC.**

¹⁶ For more on the reporting process, see ECPAT International. *An ECPAT Guide on Alternative Reporting to the Optional Protocol on the sale of children, child prostitution and child pornography*. 2007.

¹⁷ Theytaz-Bergman, Laura. *A Guide for Non-Governmental Organizations Reporting to the Committee on the Rights of the Child*, p. 15. NGO Group for the Convention on the Rights of the Child. Geneva. 2006. Accessed on 3 October 2008 from: http://www.crin.org/docs/Reporting_Guide_2006_English.pdf.

¹⁸ ECPAT Guidelines on the Development of Alternative Reports are available from the ECPAT International Secretariat.

¹⁹ Such a mechanism is currently being developed for the *International Covenant on Economic, Social and Cultural Rights*; all of the other instruments have one.

²⁰ Child Rights Information Network (CRIN). *Campaign for a complaints procedure under the CRC: Sign the petition!* Accessed on 3 October 2008 from: <http://www.crin.org/petitions/petition.asp?petID=1007>.

The OPSC in short:

- First international instrument to define and prohibit the sale of children, child prostitution and child pornography
- One hundred twenty nine ratifications as of September 2008
- States parties required to take measures in the areas of prohibition, criminal/penal procedure, prevention, protection and international cooperation
- Implementation monitored by the Committee on the Rights of the Child
- NGOs can participate in the reporting process
- To find out whether a State has ratified the OPSC:
http://www2.ohchr.org/english/bodies/ratification/11_c.htm
- To consult State reports and the Committee's examination schedule:
<http://www2.ohchr.org/english/bodies/crc/sessions.htm>
- To consult the NGO alternative reports:
<http://www.crin.org/docs/resources/treaties/crc.25/annex-vi-crin.asp>

OTHER RELEVANT INTERNATIONAL TREATIES

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)²¹ is a supplement to the UN Convention against Transnational Organized Crime, which is the main international instrument in this area. The Trafficking Protocol was adopted in November 2000, and entered into force in December 2003. As of April 2008, it has been ratified by 116 UN member States.

The Trafficking Protocol provided the first international definition for 'trafficking in persons'²² and outlines a comprehensive law enforcement regime.²³ The Protocol defines 'trafficking in children' as the recruitment, transportation, transfer, harbouring or receipt of a person under 18 years of age for the purpose of exploitation, such as, but not limited to, prostitution, forced labour or slavery.²⁴ The Trafficking Protocol obliges States

²¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

²² Article 3 of the Trafficking Protocol reads as follows: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons by means of 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 purposes of exploitation [...]" *Ibid.* art. 3.

²³ *Ibid.* pt III.
²⁴ *Ibid.* art. 3.

parties to establish criminal responsibility under national law for these acts.²⁵ It is meant to serve as a model for national legislation, detailing which kinds of conduct should be sanctioned, the appropriate severity of punishment and effective measures to be taken to combat and prevent trafficking.

Trafficking Protocol monitoring and reporting

Though the Trafficking Protocol creates common ground for counter-trafficking activities, it lacks an enforcement or monitoring mechanism. Nevertheless, the Committee on the Rights of the Child has indicated that the reports that States must submit on the implementation of the OPSC should also include information on trafficking in children. Thus the Committee is monitoring the implementation of the Trafficking Protocol to some extent.

The Trafficking Protocol in short:

- One hundred twenty three ratifications as of September 2008
- Seeks an international consensus around the definition of ‘trafficking in human beings’, with specific provisions applying to child victims
- Contains no enforcement or monitoring mechanism. However, the Committee on the Rights of the Child receives and reviews information on trafficking through its monitoring of the OPSC
- To find out whether a State has ratified the *Trafficking Protocol*:
<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

International Labour Organization treaties: The Convention on the Worst Forms of Child Labour and the Minimum Age Convention

The International Labour Organization (ILO), which is the UN agency that brings together the governments, employers and workers of its member States to promote decent work conditions, has two ILO Conventions that are particularly relevant to child sexual exploitation.

ILO Convention No. 182 (Worst Forms of Child Labour) (ILO Convention 182)²⁶ was unanimously adopted by all 174 member States of the ILO in June 1999. It entered into force in November 2000. As of September 2008, it has been ratified by 169 of the signatory parties.²⁷

²⁵ *Ibid.* art. 5.

²⁶ ILO Convention 182 (Worst Forms of Child Labour). Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

²⁷ See ILO. *ILOLEX: Ratification by Convention*. Accessed on 3 October 2008 from: <http://www.ilo.org/ilolex/english/newratframeE.htm>.

The ILO Convention 182 defines those types of labour in which children below 18 years of age should not be involved. It defines the ‘worst forms of child labour’ to include all forms of slavery, trafficking, child prostitution, child pornography, the use of children for illicit activities (such as for the production and trafficking of drugs) and the use of children for any work that by its nature or the circumstances in which it is carried out is likely to harm the health, safety and morals of children.²⁸

The other relevant convention, **ILO Convention No. 138 (Minimum Age Convention)** (ILO Convention 138)²⁹ was adopted in June 1973 by the General Conference of the ILO and entered into force in June 1976. As of September 2008 it has been ratified by 150 of the ILO member States.³⁰ It expressly states that the minimum age for admission to any type of employment or work, which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young people, shall not be less than 18 years.³¹

International Labour Organization conventions monitoring and reporting

ILO Conventions 182 and 138 have two international supervisory processes: regular supervision and *ad hoc* procedures.

Regular supervision encompasses the State reports on measures they have taken to carry out the obligations of the Conventions. States Parties must submit those reports at regular intervals to the independent Committee of Experts on the Application of Conventions and Recommendations, which reviews the reports and other available information. If the Committee finds that the obligations under the Conventions are not fulfilled, the Committee may make a direct request for further information or publish an observation to that effect in its report.

In case of acute problems or persistent non-observance of a ratified Convention, the ILO Constitution sets forth **ad hoc procedures** to allow for the submission of allegations. Allegations are examined by designated bodies and result in recommendations. If these recommendations are persistently ignored, a country may be denied contact and assistance from the ILO, and possibly from the wider international community. This has occurred only once, in the case of Myanmar’s violations of its obligations under ILO Convention No. 29 (Forced Labour).

²⁸ ILO Convention 182 (Worst Forms of Child Labour), art. 3. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

²⁹ ILO Convention No. 138 (Minimum Age Convention). Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

³⁰ See ILO. *ILOLEX: Ratification by Convention*. Accessed on 3 October 2008 from: <http://www.ilo.org/ilolex/english/newraframeE.htm>.

³¹ ILO Convention No. 138 (Minimum Age Convention), art. 3. Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

ILO Conventions 138 and 182 in short:

- Define the ‘worst forms of child labour’ to include all forms of slavery, trafficking, child prostitution and child pornography
- Establishes 18 years as the minimum age for taking on employment likely to be harmful
- Some monitoring and reporting procedures in place
- To find out whether a State has ratified the conventions:
<http://www.ilo.org/ilolex/english/newratframeE.htm>

COMMITMENTS AND INITIATIVES AT THE INTERNATIONAL LEVEL

The Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment

In 1996, the ECPAT network, in collaboration with Unicef and the NGO Group for the Convention on the Rights of the Child, organised the First World Congress against the Commercial Sexual Exploitation of Children (CSEC) in Stockholm in Sweden. At the Congress, 122 countries adopted the Stockholm Declaration and Agenda for Action (Agenda for Action), which calls for States, all sectors of society and national, regional and international organisations to take action against CSEC. In particular, it calls on countries to develop National Plans of Action against CSEC and to implement the Agenda for Action in six areas: coordination, cooperation, prevention, protection, recovery and reintegration and child participation. The National Plans of Action provide governmental and child-care agencies with an opportunity to cooperate in devising national strategies to eliminate CSEC and promote child rights.³²

In December 2001, the Government of Japan hosted the Second World Congress against CSEC in Yokohama. At that Congress, 159 countries reaffirmed their commitment to the Agenda for Action by adopting the outcome document, the Yokohama Global Commitment. Participants recognised and welcomed the positive developments that had occurred since the First World Congress in 1996, including better implementation of the CRC and increased mobilisation of national governments and the international

³² Information on the Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment can be obtained from ECPAT International’s website. ECPAT International. *Global Action: Declarations*. Accessed on 6 October 2008 from: http://www.ecpat.net/EI/Global_declarations.asp.

³³ *Ibid.*

community to adopt laws, regulations and programs to protect children from CSEC.³³ Although the Agenda for Action and the Yokohama Global Commitment represent strong governmental commitments that should be honoured, they are not legally binding. Part of ECPAT's mandate is precisely to monitor the implementation of the Agenda for Action, to identify areas of gaps and compliance, to make recommendations to governments and to develop appropriate strategies to implement the commitments. In 2006, ECPAT produced a compendium of reports entitled *Global Monitoring Report on the Status of Action against the Commercial Sexual Exploitation of Children*, consisting of more than 60 country reports analysing the measures that have been taken to counteract CSEC.³⁴

The Agenda for Action and the Yokohama Global Commitment in short:

- The first international instruments aimed at eradicating CSEC
- One hundred twenty two States committed in Stockholm; 159 committed in Yokohama
- Soft law instruments, which are not legally binding on participating States
- To consult ECPAT's global monitoring reports:
http://www.ecpat.net/A4A_2005/index.html

Special Rapporteur on the sale of children, child prostitution and child pornography

By 1990, international awareness of the problem had grown to such a level that the UN Commission on Human Rights created the position of Special Rapporteur on the sale of children, child prostitution and child pornography.

Since then, the appointment of the Special Rapporteur has been regularly renewed, most recently, in March 2008, for a three year period, by the UN Human Rights Council. The Human Rights Council is the body which replaced the Commission on Human Rights in 2005. It is a subsidiary organ of the UN General Assembly and is responsible for promoting human rights, addressing human rights violations and making recommendations to the General Assembly. It is also tasked with conducting a universal periodic review of the fulfilment by each State of its human rights obligations and commitments.

³⁴ These reports can be obtained from ECPAT International's website. ECPAT International. *ECPAT Global Monitoring Report on the Status of Action against the Commercial Sexual Exploitation of Children*. Accessed on 6 October 2008 from: http://www.ecpat.net/A4A_2005/index.html.

In its 2008 resolution, the Human Rights Council mandated that the Special Rapporteur, *inter alia*, analyse the root causes of the sale of children, child prostitution and child pornography; identify new patterns emerging from these issues; identify, exchange and promote best practices on measures to combat each problem; and make recommendations on the promotion and protection of the human rights of child victims of sale, prostitution and pornography and their rehabilitation. The Special Rapporteur is also competent to receive information on alleged violations of the OPSC from governments, NGO's and individuals.³⁵

Ms. Najat M'jid Maalla was appointed Special Rapporteur in May 2008. Previous mandate-holders are Mr. Vitit Muntarbhorn (1991-1994), Ms. Ofelia Calcetas-Santos (1994-2001) and Mr. Juan Miguel Petit (2001-2008).

Special Rapporteur on trafficking in persons, especially in women and children

In 2004, the UN Commission on Human Rights appointed, for a three year period, a Special Rapporteur on trafficking in persons, especially women and children. The Commission invited the Special Rapporteur to submit annual reports to the Commission, together with recommendations on measures required to uphold and protect the human rights of trafficking victims, to address violence against women and to take full account of the Commission's contributions to the issue. Ms. Joy Ngozi Ezeilo was appointed as Special Rapporteur in July 2008.

The Special Rapporteur is competent to receive complaints regarding violations against trafficked persons and situations in which there has been a failure to protect their human rights. Complaints can be transmitted to the Special Rapporteur electronically via the website of the UN High Commissioner for Human Rights.³⁶

A World Fit for Children: the declaration and action plan

In May 2002, a Special Session of the UN General Assembly addressing children took place in New York. This unprecedented meeting was dedicated to the children and adolescents of the world. It brought together government leaders and other heads of State, NGOs, children's advocates and young people and sought to realise the goals set at the World Summit for Children³⁷ in 1990, and to move children's rights up on the

³⁵ More information on this topic can be obtained from the website of the UN High Commissioner for Human Rights (UNHCHR). OHCHR. *Individual complaints and model questionnaire*. Accessed on 6 October 2008 from: <http://www2.ohchr.org/English/issues/children/rapporteur/model.htm>.

³⁶ OHCHR. *Special Rapporteur on trafficking in persons, especially in women and children: Individual complaints*. Accessed on 6 October 2008 from: <http://www2.ohchr.org/english/issues/trafficking/complaints.htm>.

³⁷ On 29 and 30 September 1990 the largest gathering of world leaders in history assembled at the UN to attend the World Summit for Children. Led by 71 heads of State and 88 other senior officials, mostly at the ministerial level, the World Summit adopted a *Declaration on the Survival, Protection and Development of Children* and a *Plan of Action* for implementing the Declaration in the 1990s.

world agenda. The session reviewed the progress that had been made since the World Summit and created a renewed commitment and pledge to take specific actions for children in the coming decade. The Special Session produced a global plan of action for children and young people called A World Fit for Children.³⁸ It set forth goals and an action plan to ensure the best possible start in life for children; a good-quality basic education for children; and the opportunity for all children, especially young people, to meaningfully participate in shaping their countries' policies.

With regards to sexual exploitation, the declaration commits leaders to protecting children from all forms of sexual exploitation and to taking "necessary action, at all levels, as appropriate, 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, 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 the primary consideration."³⁹

In December 2007, a commemorative high level plenary meeting of the General Assembly and roundtable discussions took place in New York, devoted to following-up on the outcome of the 2002 Special Session on Children. At this meeting, the UN Secretary General launched his report on progress towards the goals of A World Fit for Children. On the same occasion, more than 140 countries adopted a new declaration on children, in which they reaffirmed their "commitment to the full implementation of the Declaration and Plan of Action contained in the outcome document of the twenty-seventh special session of the General Assembly on children, entitled 'A world fit for children', recognising that their implementation and the fulfilment of obligations under the CRC, the Optional Protocols thereto and other relevant international instruments are mutually reinforcing in protecting the rights and promoting the well-being of all children. In all our actions, the best interests of the child shall be a primary consideration."⁴⁰

³⁸ UN General Assembly Resolution S-27/2 (A world fit for children). 10 May 2002. Accessed on 6 October 2008 from: <http://www.unicef.org/worldfitforchildren/files/A-RES-S27-2E.pdf>.

³⁹ *Ibid.* para.45.

⁴⁰ UN General Assembly Resolution 62/88 (Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children). 13 December 2007. Accessed on 6 October 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/62/88&Lang=E>.

Special Representative on Violence against Children

The UN Secretary-General's Study on Violence against Children⁴¹ was developed under the leadership of Professor Paulo Sérgio Pinheiro. The Study analyses the nature, extent and causes of violence against children, including sexual exploitation, and proposes recommendations on how to prevent and respond to it. The Study recommends "that the General Assembly request the Secretary-General to appoint a Special Representative on violence against children (SRSG) 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 [Study's] recommendations."⁴² In November 2007, the UN General Assembly requested the Secretary-General to appoint a SRSG for a period of three years, but as of September 2008, this appointment has not yet been made.

COMMITMENTS AND INITIATIVES AT THE REGIONAL LEVEL

In addition to the above described treaties and mechanisms, there are also mechanisms promoting and protecting human rights at the regional level. In the second half of the twentieth century, three regional human rights treaties were developed: the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms,⁴³ the American Convention on Human Rights⁴⁴ and the African Charter on Human and Peoples' Rights⁴⁵. These treaties set out basic human rights and establish monitoring bodies to which victims of alleged violations may seek recourse under special circumstances. The establishment of these three human rights bodies represents significant developments because they provide avenues for recourse against States that fail to meet their obligations under human rights treaties.⁴⁶

Within the broad framework of regional human rights instruments, regional conventions addressing child sexual abuse and exploitation have also been developed; mainly in Europe. In fact, the Council of Europe (CoE) has played a crucial role in negotiating and developing three key treaties: the Convention on the Protection of children against sexual exploitation and sexual abuse, the Convention on Action against Trafficking in Human Beings and the Convention on Cybercrime.

⁴¹ UN Secretary-General. *Violence Against Children: United Nations Secretary-General's Study*. Accessed on 7 October 2008 from: <http://www.unviolencestudy.org/>.

⁴² Pinheiro, Paulo S. *World Report on Violence against Children*. UN Secretary-General's Study on Violence against Children. Accessed on 6 October 2008 from: <http://www.violencestudy.org>.

⁴³ Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13. Accessed on 6 October 2008 from: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁴⁴ American Convention on Human Rights (Pact of San Jose, Costa Rica). Accessed on 6 October 2008 from: <http://www.oas.org/juridico/English/treaties/b-32.html>.

⁴⁵ African Charter on Human and Peoples' Rights. Accessed on 6 October 2008 from: http://www.achpr.org/english/info/charter_en.html.

⁴⁶ The International Criminal Court deals with crimes against humanity, war crimes and genocide. While there has been some discussion around the possibility of categorizing CSEC crimes as crimes against humanity, there is no such formal recognition to date.

Other regional forums have tackled the issue, albeit in an incomplete fashion, with some conventions addressing trafficking. For instance, the South Asia region has adopted the South Asian Association for Regional Cooperation (SAARC) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*;⁴⁷ the Organization of American States (OAS) has adopted the *Inter-American Convention on International Traffic in Minors*;⁴⁸ and the Organization of African Unity (OAU) has enacted the *African Charter on the Rights and Welfare of the Child*.⁴⁹

EUROPE

The main human rights instrument in Europe is the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*, which was concluded in 1950 under the aegis of the CoE to protect human rights and freedoms.⁵⁰ The Convention established the **European Court of Human Rights (ECHR)** to monitor compliance of member States. All of the member States of the CoE are also signatories to the Convention.

The ECHR may receive applications from any person, NGO or group of individuals claiming to be the victim of a violation by a state party of the rights set forth in the Convention.⁵¹ It may also hear cases between States.⁵² In accordance with international law, the ECHR may only deal with a matter once all domestic remedies have been exhausted.⁵³

When the ECHR was first established, individuals did not have a direct access to the Court, but had to apply to the European Commission of Human Rights for redress. CoE Protocol 11, which entered into force in 1998, abolished the Commission and established individual access to the Court.

The ECHR is the largest international bench and has developed the most extensive jurisprudence on the protection of human rights.⁵⁴

⁴⁷ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Accessed on 6 October 2008 from: http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

⁴⁸ Inter-American Convention on International Traffic in Minors. Accessed on 6 October 2008 from: <http://www.oas.org/juridico/English/Treaties/b-57.html>.

⁴⁹ African Charter on the Rights and Welfare of the Child. Accessed on 6 October 2008 from: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

⁵⁰ Project on International Courts and Tribunals (PICT). ECHR: European Court of Human Rights. Accessed on 6 October 2008 from: <http://www.pict-cti.org/courts/ECHR.html>.

⁵¹ Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13, art. 34. Accessed on 6 October 2008 from: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁵² *Ibid.* art. 33.

⁵³ *Ibid.* art. 35(1).

⁵⁴ PICT. *ECHR: European Court of Human Rights*. Accessed on 6 October 2008 from: <http://www.pict-cti.org/courts/ECHR.html>.

Basic rights and freedoms established under the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 – Obligation to respect human rights set out in the Convention

Article 2 – Right to life

Article 3 – Prohibition of torture

Article 4 – Prohibition of slavery and forced labour

Article 5 – Right to liberty and security

Article 6 – Right to a fair trial

Article 7 – No punishment without law

Article 8 – Right to respect for private and family life

Article 9 – Freedom of thought, conscience and religion

Article 10 – Freedom of expression

Article 11 – Freedom of assembly and association

Article 12 – Right to marry

Article 13 – Right to an effective remedy before a national authority

Article 14 – Prohibition of discrimination

The Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse

In July 2007, the Committee of Ministers of the CoE adopted the *Convention on the Protection of children against sexual exploitation and sexual abuse*.⁵⁵ In October 2008, it had been signed by 30 member States. The Convention will enter into force upon its ratification by five States, including at least three member States of the CoE.⁵⁶ The purposes of this Convention are to prevent and combat the sexual exploitation and abuse of children; to protect the rights of victims of sexual exploitation and sexual abuse; and to promote national and international cooperation against sexual exploitation and sexual abuse of children.⁵⁷ The Convention offers clear definitions of the terms ‘sexual abuse of children’ and ‘sexual exploitation of children’ and requires that their different manifestations be treated as criminal offences. The Convention also recognises the linkages between various forms of sexual crimes against children and groups them under a single umbrella.

⁵⁵ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

⁵⁶ State ratifications can be viewed at the CoE website. CoE. *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No.: 201*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=&CL=ENG>.

⁵⁷ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 1. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse represents significant progress in strengthening child protection standards for sexual abuse and exploitation. Many of its features will be explored throughout this publication and presented as examples that other countries may chose to follow. **This Convention is also open to ratification by countries outside of Europe and provided a good basis for harmonisation at international level.**

Monitoring and reporting mechanism

The Convention on the Protection of children against sexual exploitation and sexual abuse is to be monitored by the Committee of the Parties, which is composed of representatives of the parties to the Convention. The Committee is to be convened the first time by the Secretary General of the CoE, within a year of the entry into force of the Convention. The Committee will subsequently meet at the request of a third of the parties, or of the Secretary General of the CoE. The functions of the Committee will include making proposals to facilitate or improve the effective use and implementation of the Convention and playing a general advisory role by expressing an opinion on any question concerning its application.⁵⁸

The Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe Convention on Action against Trafficking in Human Beings⁵⁹ opened for signature in May 2005 and entered into force on 1 February 2008. As of October 2008, it had been ratified by 18 member States.⁶⁰ This comprehensive treaty focuses on the protection of victims of trafficking and the safeguard of their rights. It also aims to prevent trafficking and prosecute traffickers. It applies to all forms of trafficking; whether national or transnational, whether or not it is related to organised crime, whether the victim is a woman, man or child and whether the exploitation takes the form of sexual exploitation, forced labour or services or other practices.⁶¹

Monitoring and reporting mechanism

The Convention is to be monitored by the Group of Experts against Trafficking in Human Beings (GRETA) and the Committee of the Parties. GRETA will be a technical body of independent and highly qualified experts. The Committee of the Parties will be a political

⁵⁸ *Ibid.* art. 41.

⁵⁹ Council of Europe Convention on Action against Trafficking in Human Beings. Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

⁶⁰ State ratifications can be viewed at the CoE website. CoE. *Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=&CL=ENG>.

⁶¹ Council of Europe Convention on Action against Trafficking in Human Beings, art. 2, 4(a). Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

body, composed of the Committee of Ministers' representatives of the parties to the Convention. GRETA will have the task of adopting a report and conclusions on each party's implementation of the Convention. The Committee of the Parties will be able to adopt recommendations, on the basis of GRETA's report and conclusions, addressed to a party concerning the measures to be taken to follow-up on GRETA's conclusions.

This monitoring scheme is to be set up within one year of the Convention entering into force, which took place 1 February 2008. The CoE seems to be moving forward in establishing GRETA. On 11 June 2008, it adopted rules of procedure for the election of the members of GRETA.⁶²

The Council of Europe Convention on Cybercrime

The Council of Europe Convention on Cybercrime⁶³ (Convention on Cybercrime) is the only binding international instrument attempting to tackle the issue of cybercrime. It was adopted in Budapest in 2001 and entered into force in July 2004. As of October 2008 it had been ratified by 23 countries.⁶⁴ Developed by a group of CoE experts working together with the **United States, Canada, Japan** and other non-member countries, the Convention on Cybercrime represents a significant achievement in child protection from pornography, as it acknowledges a new form of sexual exploitation triggered by the ever-increasing use of the Internet as the primary instrument for trading child pornography-related material. The Convention on Cybercrime offers a comprehensive definition of child pornography, i.e. pornographic materials that visually depict, not only minors engaged in sexually explicit conduct, but also persons appearing to be minors, as well as realistic images representing minors.⁶⁵ It also modernises criminal provisions to more effectively circumscribe the use of computer systems in the commission of sexual offences against children.⁶⁶

Monitoring and reporting mechanism

Article 46 of the Convention on Cybercrime creates a framework for the parties to consult periodically to facilitate its use and implementation, and to exchange information on significant legal, policy or technological developments pertaining to the subject of

⁶² CoE. *Nomination of candidates for GRETA by the governments of states party*. Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Monitoring/Nomination_en.asp.

⁶³ Council of Europe Convention on Cybercrime. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>. This Convention has been supplemented by an additional protocol making any publication of racist and xenophobic propaganda via computer networks a criminal offence.

⁶⁴ As with other CoE instruments, the Convention is not only open for ratification by members States of the CoE but also for those which participated in its elaboration. Among this last group of countries, only the US has ratified it. State ratifications can be viewed at the CoE website. CoE. *Convention on Cybercrime CETNS No.: 185*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>.

⁶⁵ Council of Europe Convention on Cybercrime, art. 9(2). Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

⁶⁶ *Ibid.* art. 9.

computer or computer-related crime, the collection of evidence in electronic form and the possibility of supplementing or amending the instrument.⁶⁷ The European Committee on Crime Problems (CDPC) is to be kept periodically informed regarding the result of these consultations.⁶⁸ The procedure is flexible and it is left to the parties to decide how, when and whether to convene.

AFRICA

The main human rights instrument in Africa is the 1981 **African Charter on Human and Peoples' Rights** (Banjul Charter), concluded under the auspices of the Organization of African Unity (OAU), which has since been replaced by the African Union. The Charter establishes the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia.

In 1998, a protocol to the Banjul Charter was adopted to establish the **African Court on Human and Peoples' Rights (ACHPR)**. The ACHPR rules on African Union States' compliance with the Banjul Charter. The protocol establishing the ACHPR came into force in 2004. Prior to that, monitoring of the Banjul Charter rested with the African Commission on Human and Peoples' Rights; a quasi-judicial body with no binding powers. The ACHPR is in the process of being merged with the African Court of Justice following a decision by member States at the June 2004 African Union Summit and is located in Arusha, Tanzania. In January 2006, the Eighth Ordinary Session of the Executive Council of the African Union elected the first eleven judges of the ACHPR.

A promising aspect of the ACHPR is that actions may be brought before the Court on the basis of any instrument, including international human rights treaties which the State in question has ratified. In other words, the ACHPR could become the judicial arm of a panoply of human rights agreements.⁶⁹

The African Charter on the Rights and Welfare of the Child⁷⁰

The **African Charter on the Rights and Welfare of the Child (ACC)** was adopted by the OAU in 1990. The ACC is the first African regional treaty on children's rights. In many respects, the provisions of the ACC are modelled on the provisions of the CRC.

⁶⁷ Article 46 of the Convention on Cybercrime provides: "The Parties shall, as appropriate, consult periodically with a view to facilitating: (a) the effective use and implementation of this Convention, including the identification of any problems thereof, as well as the effects of any declaration or reservation made under this Convention; (b) the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form; (c) consideration of possible supplementation or amendment of the Convention." *Ibid.* art. 46.

⁶⁸ *Ibid.* art. 46(2).

⁶⁹ PICT. *ACHPR: African Court of Human And Peoples' Rights*. Accessed on 6 October 2008 from: <http://www.pict-pecti.org/courts/ACHPR.html>.

⁷⁰ African Charter on the Rights and Welfare of the Child. Accessed on 6 October 2008 from: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

The ACC calls for protection against abuse and maltreatment, negative social and cultural practices and all forms of exploitation or sexual abuse, including involvement of children in prostitution and pornography. It also aims to prevent the sale and trafficking of children, kidnapping of children and begging by children.

Monitoring and reporting mechanism

The ACC provides for the establishment of an African Committee of Experts on the Rights and Welfare of the Child (ACERWC) within the OAU to promote and protect the rights and welfare of the child. The Committee has the mandate to collect and document information; to give its views and make recommendations to governments; to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa; and to monitor the implementation of the ACC and ensure protection of the rights enshrined in it.⁷¹ Within two years of entry into force of the ACC, States parties must submit reports to the Committee on the measures they have adopted to give effect to the provisions of the ACC and on the progress they have made in the enjoyment of these rights.⁷² Thereafter, reports must be made every three years.⁷³ At the pre-session of its 11th meeting held in May 2008 in Addis Ababa, Ethiopia, the ACERWC reviewed the reports submitted by **Egypt, Nigeria, Mauritania** and **Rwanda**.

AMERICAS

The main human rights instrument for the Americas is the 1969 **American Convention on Human Rights**, concluded under the auspices of the Organization of American States (OAS). The **Inter-American Court of Human Rights (IACHR)** was established to oversee compliance with the Convention, along with the **Inter-American Commission of Human Rights (Inter-American Commission)**.

Unlike the ECHR, individuals cannot directly access the IACHR to seek redress for the violation of their rights. They must first file a complaint with the Inter-American Commission, which in turn seeks redress from the IACHR. This narrower and conditional access explains why the IACHR has only been able to render one-tenth the number of the judgments as its European analogue per year.⁷⁴

⁷¹ *Ibid.* art. 42.

⁷² *Ibid.* art. 43.

⁷³ *Ibid.* art. 43.

⁷⁴ PICT. IACHR: *Inter-American Court of Human Rights*. Accessed on 6 October 2008 from: <http://www.pict-pecti.org/courts/IACHR.html>.

The American Convention on Human Rights is the only of the three core regional human rights conventions that specifically recognises the right of protection for children.

Article 19 of the Convention states that “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

The Organization of American States Inter-American Convention on International Traffic in Minors

Adopted during the Fifth Inter-American Specialized Conference on Private International Law held on 18 March 1994, the *Inter-American Convention on International Traffic of Minors* entered into force in August 1997 and at the time of writing this manual has 11 States Parties and nine signatories.⁷⁵ The Convention defines international traffic in minors as the abduction, removal or retention, or attempted abduction, removal or retention, of a minor under the age of 18 years for unlawful purposes including prostitution and sexual exploitation. It stipulates the obligation of States parties to institute a system of mutual legal assistance dedicated to the prevention of international trafficking in minors, the punishment of its perpetrators and to ensuring the prompt return of child victims to the State of their habitual residence; all while bearing in mind the best interests of the minors.⁷⁶

Monitoring and reporting mechanism

The Convention does not provide for the establishment of a monitoring body, leaving the task of adjudicating instances of international trafficking to the member States’ national courts.⁷⁷ As such, it is not linked to any regional enforcement mechanism. This is problematic as impunity is common in many countries of the OAS. However, certain decisions of the IACHR do afford a basis for recourse to the Inter-American Commission and the IACHR in the case of a member State failing to afford the needed protection to its children.⁷⁸ Hence, victims of trafficking could petition the Commission and the Court to obtain reparation in a case where the government failed to take appropriate measures to ensure children are not being trafficked outside of or within its borders.⁷⁹

⁷⁵ Inter-American Convention on International Traffic in Minors. Accessed on 6 October 2008 from: <http://www.oas.org/juridico/english/signs/b-57.html>.

⁷⁶ *Ibid.*, art. 2.

⁷⁷ *Ibid.*, art. 9.

⁷⁸ *Villagran-Morales et al. v. Guatemala*. IACHR. 19 November 1999. Accessed on 6 October 2008 from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.doc; see also *Judicial condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)*. University of Minnesota Human Rights Library. Accessed on 6 October 2008 from: http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html.

⁷⁹ This would be done most likely under Articles 4 (right to life), 5 (right to physical integrity), 7 (right to liberty) and 19 (rights of the child). See *Villagran-Morales et al. v. Guatemala*, paras. 178-191. IACHR. 19 November 1999. Accessed on 6 October 2008 from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.doc. In essence, the Court rules that a child deprived of the protection usually afforded by his/her family is entitled to protection from the State.

SOUTH ASIA

There is no human rights mechanism in the South Asia region. However, the South Asian Association for Regional Cooperation (SAARC) has adopted a [Convention on regional arrangements for the promotion of child welfare in South Asia](#). In 2002, it also adopted the [SAARC Regional Convention on Preventing and Combating Trafficking of Women and Children for Prostitution \(SAARC Convention\)](#),⁸⁰ which entered into force in November 2005.

The SAARC Convention was created as a response to the increasing incidence of human trafficking throughout the South Asia region. It recognises the transnational nature of trafficking and the necessity of cooperation in the prevention, protection and punishment of trafficking offences. Despite some positive features, such as the simplification of repatriation procedures for trafficking victims, this convention has been harshly criticised for a number of reasons, including a narrow definition of trafficking, which limits it to trafficking for the purpose of prostitution; the lack of provisions for victim compensation; and for its criminalisation of prostitution.⁸¹

Monitoring and reporting mechanism

The SAARC Convention has been criticised for its inadequate monitoring mechanism.⁸² In the absence of an established body with the power to monitor and report on implementation by the individual States, regional coordination is threatened. Thus it is important that an independent treaty body be created to ensure consistent and effective implementation.⁸³

SOUTHEAST ASIA

While there are four national human rights institutions in Southeast Asia (the **Philippines, Indonesia, Malaysia** and **Thailand**), the region is one of the last without an intergovernmental human rights mechanism. Although ASEAN – the Association of Southeast Asian Nations – has long been perceived as a promising avenue for regional monitoring and promotion of children’s rights, it appears as though human rights are not yet a priority on ASEAN’s agenda.

⁸⁰ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Accessed on 6 October 2008 from: http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

⁸¹ Forum for Women, Law and Development (FWLD). Prevalence of the Problem. Kathmandu. Information retrieved on 20 March 2007 from: <http://www.fwld.org.np/advsaarc.pdf>.

⁸² *Ibid.*

⁸³ *Ibid.*

At the 13th ASEAN summit in November 2007, in Singapore, ASEAN's officials signed the regional body's charter but failed to agree on the establishment of a human rights body,⁸⁴ leaving this issue to be discussed at a future Foreign Ministers gathering.⁸⁵ Unfortunately, the protection of children and the enforcement of their rights under the auspices of ASEAN are achievements which remain quite remote, although some progress has been made since the idea of a human rights mechanism was first introduced in 1993.

CONCLUSION

The protection and promotion of the human rights of children, as set out in the numerous treaties and other existing instruments, lies primarily with the State. By signing and ratifying international and regional treaties, States commit themselves to making children's rights to protection from all forms of sexual abuse and exploitation a reality. This commitment includes the development of strong legal frameworks that define and prohibit these violations – an element that, unfortunately, is still missing 18 years after the entry into force of the CRC. With this in mind, the remainder of this publication will examine the development of protective frameworks.

⁸⁴ ASEAN signs landmark charter. *Associated Press*, 21 November 2007. Accessed on 6 October 2008 from: <http://edition.cnn.com/2007/WORLD/asiapcf/11/21/asean.myanmar.ap/>.

⁸⁵ Charter of the Association of Southeast Asian Nations, art. 14. Accessed on 6 October 2008 from: <http://www.aseansec.org/ASEAN-Charter.pdf>.

LEGAL REFORM CHECKLIST

International Level

- ✓ Government has signed and ratified:
 - ✓ The CRC
 - ✓ The OPSC
 - ✓ The Trafficking Protocol
 - ✓ ILO Conventions 182 and 138

- ✓ Government has submitted its CRC, OPSC and ILO reports

Regional Level

- ✓ Government has signed and ratified the relevant regional instruments (see p. 36 for a more complete list), in particular:

Europe

- ✓ The Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse
- ✓ The Council of Europe Convention on Action against Trafficking in Human Beings
- ✓ The Convention on Cybercrime

Africa

- ✓ The ACC

Americas

- ✓ The Inter-American Convention on International Traffic in Minors

South Asia

- ✓ The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

- ✓ Government has complied with its reporting obligations under the relevant regional instruments

- ✓ Reservations that restrict the scope of child rights treaties are removed

LIST OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS RELEVANT TO THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN

International Instruments

International Convention for the Protection of All Persons from Enforced Disappearance. Not yet entered into force. http://untreaty.un.org/English/notpubl/IV_16_english.pdf.

Convention on the Rights of Persons with Disabilities. Entered into force 12 May 2008. <http://www.un.org/disabilities/convention/conventionfull.shtml>.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Entered into force 1 July 2003. http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm.

Rome Statute of the International Criminal Court. Entered into force 1 July 2002. <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Entered into force 18 January 2002. <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>.

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Entered into force 1 January 2002. http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70.

ILO Convention No. 182 (Worst Forms of Child Labour Convention). Entered into force 19 November 2000. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Entered into force 1 May 1995. http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

Convention on the Rights of the Child. Entered into force 2 September 1990. <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Entered into force 26 June 1987. http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

Convention on the Elimination of All Forms of Discrimination against Women. Entered into force 3 September 1981. <http://www.un.org/womenwatch/daw/cedaw/>.

Convention on the Civil Aspects of International Child Abduction. Entered into force 1 December 1983. http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

ILO Convention No. 138 (Minimum Age Convention). Entered into force 19 June 1976. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

International Covenant on Civil and Political Rights. Entered into force 23 March 1976. <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

International Covenant on Economic, Social and Cultural Rights. Entered into force 3 January 1976. http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

International Convention on the Elimination of All Forms of Racial Discrimination. Entered into force 4 January 1969. http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Entered into force 25 July 1951. <http://www.unhchr.ch/html/menu3/b/33.htm>.

Geneva Convention relative to the Protection of Civilian Persons in Time of War. Entered into force 21 October 1950. <http://www.unhchr.ch/html/menu3/b/92.htm>.

Regional Instruments

Africa

African Charter on the Rights and Welfare of the Child. Entered into force 29 November 1999. http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

African Charter on Human and Peoples' Rights. Entered into force 21 October 1986. http://www.achpr.org/english/info/charter_en.html.

Americas

Inter-American Convention on International Traffic in Minors. Entered into force 15 August 1997. <http://www.oas.org/juridico/english/sigs/b-57.html>.

American Convention on Human Rights. Entered into force 18 July 1978.
<http://www.oas.org/juridico/English/treaties/b-32.html>.

Asia

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Entered into force November 2005. http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. Signed 5 January 2002. http://www.slmfa.gov.lk/saarc/images/agreements/saarc_child_welfare_2002.pdf.

Europe

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Not yet entered into force.
<http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

Council of Europe Convention on Action against Trafficking in Human Beings. Entered into force 1 February 2008. http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

Council of Europe Convention on Cybercrime. Entered into force 1 July 2004.
<http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

Convention for the Protection of Human Rights and Fundamental Freedoms. Entered into force as amended 1 November 1998. <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

SECTION 2

DEFINITIONS THAT REFLECT A COMMON UNDERSTANDING

Objectives:

- To identify the differences and linkages between child sexual abuse and child sexual exploitation
- To underscore the importance of national legal provisions that clearly define and prohibit the different forms of child sexual abuse, child sexual exploitation and child trafficking for sexual purposes
- To better understand the CRC definition of a child and its implications for child protection from sexual abuse and exploitation

Key Provisions:

- Articles 1, 34 and 35 of the CRC
- Article 3(d) of the Trafficking Protocol
- Article 2 of the ILO Convention 182
- Paragraph 5 of the Stockholm Agenda for Action
- Preamble and Articles 3(b), 18 and 22 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

Over the years, States have sought to address the emergence and identification of new sexual crimes against children through their national laws as well as through ratifying and implementing internationally agreed conventions. Child trafficking issues, for instance, have been addressed within the context of a convention on transnational organised crime (see Section 1 above). The first international instrument addressing child pornography was a European convention targeting cybercrime. As a result, States' obligations to protect children from different forms of sexual abuse and exploitation can be found in several legal instruments, some of which are redundant or have insufficient application to cover the full array of sexual crimes against children.

While this publication focuses on criminal legislation as an essential element of broader child protection frameworks, States are encouraged to review all relevant laws affecting children to ensure that provisions defining and prohibiting child sexual abuse and exploitation are consistent with international standards and that they reflect a common understanding among different countries.

WHAT IS COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN? DISTINGUISHING ABUSE FROM EXPLOITATION

The commercial sexual exploitation of children (CSEC) is a violation of children’s rights and consists of criminal practices that demean and threaten the physical and psychosocial integrity of children. The Stockholm Agenda for Action defines it as:

“A fundamental violation of children’s rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.”

The primary, interrelated, forms of CSEC constituting the focus of this guide are the prostitution of children, child pornography, trafficking of children for sexual purposes and child sex tourism.

It is important to include in-kind transactions in the definition of CSEC, as there is a tendency to view such transactions as demonstrating consent on the child’s part. Where sexual exploitation occurs in exchange for protection, a place to sleep, access to higher school grades or promotion, the child does not ‘consent’ to the transaction, but is the victim of manipulation and abuse of a position of power and responsibility by another person.

CSEC exists because there is a demand for it. However, there is a complex matrix of factors which make children vulnerable and shape the forces and circumstances that allow for commercial sexual exploitation. These factors include, but are not limited to, societal tolerance, poverty, domestic abuse and neglect, and children living and working on the streets.⁸⁶

Child sexual abuse (CSA) can be defined as contacts or interactions between a child and an older or more knowledgeable child or adult, such as a stranger, a neighbour or a relative, where the child is being used as an object of gratification for the abuser’s sexual needs. The abuser may use force, threats, bribes, trickery or pressure. Abusers also use a process called ‘grooming’, whereby they will befriend a child in order to lower the child’s inhibitions and prepare him/her for abuse. In recent years increased attention has been devoted to Internet ‘grooming’, whereby an adult deliberately sets out, using Internet chat rooms or ‘Social Networking’ websites to prepare or ‘groom’ a child

⁸⁶ For more information on the factors that make children vulnerable, consult *Questions & Answers about Commercial Sexual Exploitation of Children*. ECPAT International. 2001. Accessed from: <http://www.ecpat.net>.

for a subsequent physical or virtual meeting with the intent or result of sexually abusing the child. The Internet has also made organised CSA more widespread, providing opportunities for individuals to form networks for the purpose of exchanging child abuse images and gaining access to victims.⁸⁷ Wherever trading of images or information occurs, the abuse can be categorised as sexual exploitation of children.

Sexually abusive activities do not necessarily involve bodily contact between abuser and child. Abusive activities could include exhibitionism or voyeurism, such as an adult watching a child undress, or encouraging or forcing children to engage in sexual activities with one another while the abuser observes or films such activities. It could also include making sexual comments to a child, exposing intimate body parts, having a sexual fixation on a child's or youth's clothing or body parts, luring, making sex-related phone calls, etc. **It is therefore important that the criminal law addresses all such conduct.**

Abusers are often people who know their victim and have a responsibility, in some capacity, for the child's safety and well-being. Thus any abuse of the child is both a breach of trust and a misuse of a position of power.

ADDRESSING CHILD SEX ABUSE AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN UNDER NATIONAL LAW: INTERNATIONAL STANDARD-SETTING

CSEC and CSA are distinct forms of sexual violence against children, requiring different interventions for their elimination. However they also overlap.

The remuneration factor distinguishes CSEC from CSA, as commercial or in-kind gain is absent from the latter, although sexual exploitation is also abusive. Through CSEC a child becomes not only a sexual object but also a commodity. CSEC is the use of a child for sexual purposes in exchange for cash, goods or in-kind favours between the exploiter, intermediary or agent, and others who profit from the sexual exploitation of the child.

There are situations which are difficult to categorise strictly as either CSA or CSEC. For example, child domestic labourers, among whom girl children are disproportionately represented, are particularly vulnerable to sexual abuse and are often victims of such abuse. It is difficult to categorise such situations as either CSA or CSEC, as there can be an implicit expectation by the employer that the child's duties include providing 'sexual services' as part of the employment. Another example of the difficulties in categorisation relates to child pornography. For example, child abuse images can be created for non-commercial use or exchange. Nevertheless, child pornography initially made for non-commercial purposes may subsequently be commercially traded or exchanged.⁸⁸

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse acknowledges the linkages between child sexual abuse and exploitation and includes a broad range of offences such as engaging in sexual activities with a child who has not reached the age of consent, child prostitution, child pornography and causing children to witness sexual abuse or sexual activities. The Convention also addresses the issue of child abuse and exploitation in a fairly holistic way, requiring prevention activities, assistance and protective measure to be undertaken as well as treatment for victims. There is an accompanying Explanatory Report to the CoE Convention which is useful for interpreting its objectives and helping States to implement them at the national level.⁸⁹ Under the Convention States are explicitly allowed to reserve their right to criminalise certain conduct, which limits the uniformity of its application across the States that ratify it.⁹⁰

The table below lists examples of offences that States should consider including in criminal legislation.

Child Sexual Abuse Offences ⁹¹	Child Sexual Exploitation Offences
<ul style="list-style-type: none"> • Engaging in sexual activities with a child under the age of sexual consent • Engaging in sexual activities with a child using force, coercion or threats • Engaging in sexual activities with a child by abusing a position of trust, authority or influence over the child, including within the family • Engaging in sexual activities with a child by abusing the vulnerable situation of the child, such as a mental or physical disability or a situation of dependence • Making a child watch sexual acts • Soliciting a child for sexual purposes 	<ul style="list-style-type: none"> • Child prostitution: recruiting or coercing a child to participate in prostitution or having recourse to a prostituted child • Child pornography: producing, offering, distributing, possessing, procuring or accessing child pornography • Pornographic performances/sexual posing: promoting, recruiting or exploiting the participation of a child in pornographic performances/sexual posing⁹²
<p>Aiding, or abetting the commission of such offences should also attract criminal liability in any legal system.</p>	

⁸⁹ CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 143. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

⁹⁰ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, arts. 20(3) & (4), 21(2), 24(3), 25(3). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

⁹¹ *Ibid.* arts. 18 & 22.

⁹² In April 2005 the Swedish *Penal Code* was amended to include a new offence termed 'exploitation of a child for sexual posing'. The Code makes it an offence for anyone to promote or exploit the performance or participation in sexual posing by a child under fifteen years of age in return for compensation. This provision also applies to such an act against a child who has attained 15 years of age, but not 18, if the posing is, by its nature, likely to damage the child's health or development. This crime refers to sexual posing that occurs in sex clubs, private circles or for the production of pornographic pictures. Sexual posing in this context means to participate in or perform a sexual act or to openly expose the body to one or more people or in front of a camera. Similarly, Article 21 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse exploitation includes offences "concerning the participation of a child in pornographic performances".

TRAFFICKING AS A PROCESS LEADING TO EXPLOITATION

There are several international agreements that address child trafficking. Article 35 of the CRC stipulates that “States parties shall take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” However, the key international legal instrument on trafficking is the Trafficking Protocol,⁹³ and offers the definition below.

“For the purposes of this Protocol:

- (a) ‘Trafficking in persons’ shall mean 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. Exploitation shall include, at 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;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age”.⁹⁴

⁹³ The CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not address child trafficking, as the CoE has another convention on this issue.

⁹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

According to the above definition, trafficking is:

- A process (recruitment, transportation, etc)
- Involving deceptive/coercive/fraudulent means – **except when the victim is a child**
- Where the purpose is exploitation

The main characteristics of the international definition under the Trafficking Protocol are presented below.

First, the Trafficking Protocol expressly mentions a range of activities in the chain of trafficking that must be made criminal under national law where the ultimate purpose is exploitation. These activities are recruitment, transportation, transfer, harbouring and receipt of adults or children. The table below illustrates how the different elements of the trafficking offence would apply to children.

Trafficking Protocol Act	Interpretation
Recruitment	Relates to the search for and physical conscription of one or more children with the sole objective of trafficking for exploitation.
Transportation	Relates to the means by which children are moved from one place to another.
Transfer	Refers to the process of moving children from one place to another. It does not necessarily require the use of transportation vehicles.
Harbouring	Relates to the process of keeping child victims of trafficking hidden (usually in the short term) by a person or persons until arrangements are made for their transfer or transportation by someone else.
Receipt	Refers to the act by which a person comes to be in possession of a trafficked child.

National legal provisions must criminalise each of the above acts so that any action in the chain of the movement of a child qualifies as an act of trafficking when the ultimate intent is exploitation. Unfortunately, there are many countries which have not yet legislated to cover the spectrum of activities contained in the Trafficking Protocol.

Second, the definition of trafficking in the Trafficking Protocol, which illustrates the process leading to exploitation, is central (even if the ultimate intended exploitation does not actually take place). It will be necessary to prove

at least intent of exploitation for a prosecution for human trafficking to succeed. Therefore legislation drafted to comply with the requirements of the Trafficking Protocol should allow for flexibility in establishing intent. Then, even if no actual exploitation can be established, all persons in the chain of trafficking will be included as accessories to the crime.

It is important that the definition of 'exploitation' include, at a minimum, sexual exploitation. Once children are trafficked, they may be subjected to many forms of exploitation, including child labour, debt bondage, domestic work, begging, involvement in illicit activities (such as drug trafficking), illegal adoptions, marriage and trafficking in organs. The forms of exploitation tend to reflect changes in demand and in opportunities. Laws should therefore take into account the different forms of exploitation that victims may be subjected to, including sexual exploitation.

Harmonisation of child trafficking law in Australia

Before the Trafficking Protocol was agreed to, **Australian** law addressed trafficking through its laws on slavery⁹⁵ which were subsequently amended to deal with the growing international trade in persons for the purpose of sexual exploitation. Following the entry into force of the Trafficking Protocol, the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* created a specific offence of international trafficking in children, which complies with the international standard definition and provides that a person commits an offence of trafficking in children if he or she organises or facilitates the entry, receipt or exit from Australia of a child under the age of 18 years, for the purpose of providing sexual services or any other form of exploitation after that entry, receipt or exit.⁹⁶ 'Sexual services' is at the same time broadly defined as the use or display of the body of the person providing the service for the sexual gratification of others.

Third, the Trafficking Protocol considers children to be victims of trafficking from the moment they are recruited, transported, transferred, harboured or received for the purposes of exploitation. Whereas in the case of an adult, the international definition of trafficking requires the use of coercion or deceit, this does not apply when the victim is a child under the age of 18 years. That is, the consent of a child, or the means used to obtain such consent, is irrelevant, as long as the overall objective of the operation is the exploitation of the child. Unfortunately, few countries' national laws reflect this principle; but there are encouraging developments.

⁹⁵ Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999. Australia.

⁹⁶ Criminal Code Amendment (Trafficking in Persons Offences) Act 2005, art. 271.4. Australia

Ghana has expressly laid down in its *Trafficking Act of 2004* that where children are trafficked, the consent of the child, parents or guardian of the child cannot be used as a defence in a prosecution.⁹⁷ In contrast, **South Korea, Belarus and Bolivia**, among others, have legal provisions requiring a ‘deceptive scheme’ to be established, which appears to be quite an onerous burden of proof. An example worthy of emulation is **Norway**, whose *Penal Code* specifically provides that any person who commits any of the punishable acts against a person who is under 18 years of age shall be liable to imprisonment independent of any use of force or threats, misuse of a person’s vulnerability or other improper conduct.

Fourth, although the Trafficking Protocol does not expressly make this point clear, it must be understood that both international and internal trafficking fall within the scope of the treaty. The Trafficking Protocol has been interpreted as requiring the offence to be transnational and committed by an international criminal network. The most direct consequence of this narrow interpretation is that internal trafficking is not always considered as falling within its scope.⁹⁸ ECPAT would urge all countries to ensure that their anti-trafficking laws cover both internal and cross-border trafficking.

Fifth, the definition in the Trafficking Protocol clarifies the distinction between trafficking and migrant smuggling, the latter being the subject of a separate protocol to the Convention. For adults, trafficking involves elements of coercion, deception, violence and physical and/or psychological force against persons who never consented or, if they initially consented, that consent was obtained by deception. Smuggling, on the other hand, involves migrants who have consented to be transported into another country. The distinction is that whereas smuggling is a migration issue, trafficking is a human rights issue. Nevertheless, the vulnerability of children who are smuggled often results in them being trafficked: once smuggled across the border, they may find themselves abducted into a trafficking network, unable to escape and without access to legal advice or protection.

“Smuggling of migrants refers to the procurement, in order to obtain, directly or indirectly, a financial or other benefit, of the illegal entry of a person into a State [...] While smuggling does not inherently involve exploitation, smuggled persons are often at risk of injury or death. Trafficking, on the other hand, specifically targets the trafficked person as an object of exploitation and inherently involves a violation of human rights.”⁹⁹

⁹⁷ Human Trafficking Act of 2004. Ghana.

⁹⁸ Scarpa, Silvia. Child Trafficking: the worst face of the world. *Global Migration Perspectives, No. 40*, September 2005. Global Commission on International Migration. Geneva, Switzerland. Accessed on 26 September 2008 from: <http://www.gcim.org/attachements/GMP%20No%2040.pdf>.

⁹⁹ Stefánsson, Gudmundur Árni. *The Fight Against Children Trafficking*. Committee Report, Sub-Committee on Democratic Governance. NATO Parliamentary Assembly. November 2004. Accessed on 26 September 2008 from: <http://www.nato-pa.int/Default.asp?SHORTCUT=501>.

The above statement is based on the definition of smuggling of migrants provided in Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁰⁰ of 2000, which supplements the UN Convention against Transnational Organized Crime, and provides ratifying States with a tool to combat and prevent the smuggling of human cargo.

WHO IS RESPONSIBLE FOR CHILDREN? OBLIGATIONS OF PARENTS AND LEGAL GUARDIANS

As mentioned above, child sex offenders are often people who know their victim and have some responsibility towards the child. As parents and legal guardians have primary responsibility for the upbringing and development of children in their care,¹⁰¹ it is important that national laws clearly define parents' and guardians' obligations to protect children under their care from all forms of sexual abuse and exploitation.

In some jurisdictions, a parent who knows that another person is abusing his/her child and takes no action to stop the abuse is liable to criminal prosecution. The law may also require individuals in certain occupations to report suspected child abuse. These occupations may include teachers, doctors and social service workers. At any rate, the involvement of parents and guardians in the commission or facilitation of child sexual abuse and child sexual exploitation should always attract punishment under national law.

WHO IS A CHILD? THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE IMPORTANCE OF CONSISTENT DEFINITIONS WITHIN AND ACROSS LEGAL SYSTEMS

The CRC sets out the numerous rights of children but leaves it up to States to decide who is a child. More precisely, it defines a child as any person below the age of 18 years while at the same time allowing States to determine an earlier age of majority. Majority is generally understood as a legal concept defining the age at which a person becomes a full adult.¹⁰²

Under the CRC, a child is thus defined as *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*.¹⁰³

¹⁰⁰Entered into force the 28 January 2004, in accordance with Article 22. The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the UN.

¹⁰¹Convention on the Rights of the Child, art. 18. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹⁰²Definition of 'majority' from the *Compact Oxford English Dictionary* available at AskOxford.com. Accessed on 26 September 2008 from: http://www.askoxford.com/concise_oed/majority?view=uk.

¹⁰³Convention on the Rights of the Child, art. 1. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

In practical terms, a person who has attained the age of majority is considered able to do certain things such as marry, without the consent of others, as well as vote or enter into a legally binding contract. National laws provide for different ages of majority and there are significant variations within and across jurisdictions.

When a State establishes a low age of majority - for example, 14 years – one of the most direct consequences is that persons aged between 14 and 18 years may be excluded from the scope of the CRC’s protection because they will not be considered as ‘children’ in their national jurisdictions. The issue has been raised by the Committee on the Rights of the Child, which has repeatedly stated that the provisions of the CRC should benefit all children up to the age of 18 years, as illustrated by the example below.

“The Committee reiterates its deep concern that the age of majority is set at pre-defined ages of puberty for boys at 15 and for girls at 9, because it implies that boys from 15 to 18 years and girls from 9 to 18 years are not covered by the provisions and principles of the Convention.”¹⁰⁴

In its Concluding Observations, the Committee urged the Government of Iran to review its legislation so that the age of majority is set at 18 years of age.¹⁰⁵

In harmonising their laws with international standards to better protect children from sexual abuse and exploitation, States should seek consistency across all their laws containing age references so as to reduce children’s vulnerability to sexual exploitation and abuse. This would include a review of the following:

The age of sexual consent

The age of sexual consent refers to the time at which a person is considered able to legally engage in and consent to sexual activity (which may range from kissing to sexual intercourse) with another person. The age of sexual consent in a given country can often be inferred from looking at its legal provisions on sexual offences.

In practice, the age of sexual consent may vary according to the context. For example, in many countries the age of sexual consent varies depending on the sex of both partners.

¹⁰⁴Committee on the Rights of the Child. *Concluding observations: The Islamic Republic of Iran*, para. 22. UN Convention on the Rights of the Child. 31 March 2005. Accessed on 26 September 2008 from: [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/816601ca7398c9b3c1257021004d0583/\\$FILE/G0540872.DOC](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/816601ca7398c9b3c1257021004d0583/$FILE/G0540872.DOC).

¹⁰⁵*Ibid.* para. 23.

In other jurisdictions, so-called ‘close in age’ exemptions may apply, whereby a child who is younger than the age of consent may nonetheless engage in sexual activity with another person who is of a similar age.¹⁰⁶ For example in some **United States** states a lower age applies when the age gap between partners is minimal, or when the older partner is below a certain age (usually 18 or 21 years). On the other hand, laws on the age of consent may not apply if the partners are married to one another.

As illustrated by the table below there is no consensus as to what constitutes an ‘appropriate’ age of sexual consent. The question has generated much debate worldwide; on occasion exposing the inconsistencies between the age of majority applicable in different situations (for e.g. voting, getting married and driving a car) and the age of consent to sexual activity.

AGE OF SEXUAL CONSENT ¹⁰⁷	
Algeria ¹⁰⁸	16 years
Angola ¹⁰⁹	14 years
Canada ¹¹⁰	16 / 18 years
Colombia ¹¹¹	14 years
El Salvador ¹¹²	18 years
Egypt ¹¹³	18 years
Fiji ¹¹⁴	16 years
Japan ¹¹⁵	13 years
Spain ¹¹⁶	13 years

¹⁰⁶It is the case for Finland and Norway.

¹⁰⁷Compilation of ages of consent worldwide available from Interpol website. Interpol. *Legislation of INTERPOL member states on sexual offences against children*. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/>.

¹⁰⁸Crimes et Delits et Leurs Sanctions [Penal Code], art. 334. Algeria. Accessed on 26 September 2008 from: http://www.lexinter.net/DZ/crimes_et_delits_et_leurs_sanctions.htm.

¹⁰⁹Código Penal [Penal Code], art. 179. Angola. Accessed on 26 September 2008 from: <http://www.angola-portal.ao/PortalDoGovern0/LegislacaoD.aspx?Codigo=76>.

¹¹⁰Criminal Code, art. 151. Canada. Accessed on 26 September 2008 from: http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_V//en#anchorbo-ga:l_V. The age of sexual consent was raised to 16 years in 2008, However the Code extends protection to children up to the age of 18 years in cases of sexual exploitation.

¹¹¹Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal [Penal Code], arts. 208-209. Colombia. Accessed on 26 September 2008 from: http://www.ramajudicial.gov.co/csj_portal/Min/15992000.htm.

¹¹²Interpol. *Legislation of Interpol member states on sexual offences against children: El Salvador*. Updated Spring 2006. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaElSalvador.pdf>.

¹¹³Interpol. *Legislation of Interpol member states on sexual offences against children: Egypt*. Updated Spring 2006. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaEgypt.pdf>.

¹¹⁴Penal Code, arts. 155-156. Fiji. Accessed on 26 September 2008 from: http://www.itc.gov.fj/lawnet/fiji_act/penal_code.html.

¹¹⁵Penal Code (Act No. 45 of 1907), art. 177. Unofficial English translation. Japan. Accessed on 26 September 2008 from: <http://www.cas.go.jp/ip/seisaku/hourei/data/PC.pdf>. We are, however, told that this is the federal age of consent and that the latter is higher in the prefectures (Japan’s territorial divisions).

¹¹⁶Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 181(2). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l218.html#c2.

In countries where the age of sexual consent is low, children who have reached that age are particularly vulnerable to abuse and exploitation, especially when there are no legal provisions that define and prohibit the different manifestations of child sexual exploitation.

In reviewing their laws, States should thus take into account the distinction between: (1) sexual activity taking place in the context of a child's sexual development and in the course of which consent is most relevant; and (2) sexual activity which is exploitative in its very nature.

In this regard **Canada** has enacted two different ages of consent: 18 years is the threshold where the sexual activity involves exploitative activity, such as prostitution, pornography or where there is a relationship of trust, authority or dependency; while for other sexual activity, in 2008 the age of consent was raised from 14 to 16 years.¹¹⁷ The Committee on the Rights of the Child expressed its concern to the Government of **Iceland**, noting that:

“The rather low age of sexual consent” of 14 years old may not “provide adequate protection for children older than 14 years old against sexual exploitation”.¹¹⁸

The principle that children up to the age of 18 years should be protected from sexual exploitation not only stems from the provisions of the CRC but is also clearly reflected in other international instruments such as the Trafficking Protocol, which extends special protection to all children up to the age of 18 years¹¹⁹ and ILO Convention 182, pursuant to which all those aged below 18 years are to be regarded as children, without exception¹²⁰.

Marriageable age

Where a child has been given in marriage in exchange for cash, goods or benefits in kind, the transaction could be considered a form of CSEC. It happens when parents or family members having authority over a child marry the child into another family in order to get some benefit or support for the child's family.¹²¹

¹¹⁷Criminal Code, art. 153(2). Canada. Accessed on 26 September 2008 from:

http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_v//en#anchorbo-ga:l_v

¹¹⁸Committee on the Rights of the Child. *Concluding observations: Iceland*, para. 13. UN Convention on the Rights of the Child. 21 June 2006. Accessed on 26 September 2008 from: http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.ISL.CO.1_En.pdf.

¹¹⁹Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(d). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

¹²⁰ILO Convention No. 138 (Minimum Age Convention), art. 2. Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

¹²¹Subgroup Against the Sexual Exploitation of Children, NGO Group for the Convention on the Rights of the Child. *Semantics or Substance? Towards a shared understanding of terminology referring to the sexual abuse and exploitation of children*, p. 22. January 2005. Accessed on 26 September 2008 from: http://www.crin.org/docs/resources/publications/Subgroup_Sexual_Exploitation_Semantics.pdf.

In some countries, the age at which individuals are allowed to marry is very low. Sometimes the age of marriage is different from the age of sexual consent. This is the case in **Tanzania**, where the age permitted for marriage is actually lower than the age of sexual consent.¹²² It may also be the case that the laws on the age of capacity to marry are overridden by customary laws and traditions.¹²³

The definition of a child may therefore require a review of the ages set for capacity to marry.

Age of criminal responsibility

Around the world children are often treated as criminals as a result of their involvement in activities such as prostitution. This problem is exacerbated when the age of criminal responsibility is low; in such cases children are at risk of being treated as offenders by law enforcement when in fact they are victims in need of care and protection.¹²⁴

Minimum age for employment

Children may also be commercially sexually exploited through domestic servitude or bonded labour. A child may be contracted to work as a household servant, but the employer assumes that the child can also be used for sexual purposes. In countries with a very low threshold for employment, children are especially vulnerable. All countries should observe the ILO standards for the minimum age of employment.

Definitions based on sex, gender or ethnicity

In spite of the CRC's fundamental principle of non-discrimination, in several countries children are treated differently on the basis of sex, gender or ethnicity. In some cases, laws only recognise the rape, sexual exploitation or prostitution of females, leaving boys with no legal protection. Some legislations criminalise underage sex 'with members of the opposite sex', which means that where the act is performed with children of the same sex as the perpetrator, the child is not protected.

¹²²The African Child Policy Forum. *In the best interests of the child: Harmonising laws in Eastern and Southern Africa*, p. 4. Accessed on 29 September 2008 from [http://www.africanchild.info/documents/Report%20\(Harmonising%20Laws\).pdf](http://www.africanchild.info/documents/Report%20(Harmonising%20Laws).pdf).

¹²³*Ibid.* p. 75.

¹²⁴The Committee on the Rights of the Child has often expressed concern in this regard. See for example *Concluding Observations of the Committee on the Rights of the Child, Lithuania, U.N. Doc. CRC/C/15/Add.146 (2001)*. Reprint of document available from the University of Minnesota Human Rights Library. University of Minnesota Human Rights Library. Accessed on 5 March 2007 from: <http://www1.umn.edu/humanrts/crc/lithuania2001.html>.

Misperceptions that boys cannot fall victim to prostitution are sometimes reflected in national laws that afford different protections to boys and girls. In **Bangladesh**, not only do laws fall short of the minimum requirements set by international law, but the margin of protection for boys is reduced.¹²⁵ ECPAT research has also revealed that the prostitution of boys is on the rise in many countries and the need to address such legal gaps in their protection must be addressed as a matter of urgency.

While the **Indian Penal Code** prohibits importing a foreign girl for purposes of illicit sex, this provision offers no protection to girls from India or boys from any country. Thus, the *Penal Code* provisions on child trafficking need review so as to protect Indian girls - instead of only foreign girls - and boys - who do not enjoy any protection whatsoever.

Birth registration

Article 7 of the CRC provides that every child has the right to have his/her birth registered immediately after birth. The lack of a birth certificate may prevent a child from receiving health care, nutritional supplements and social assistance, and from being enrolled in school. Later in childhood, identity documents also help protect children from child labour, premature enlistment in the armed forces and, if accused of a crime, prosecution as an adult.

Without birth registration systems in place, children are also generally more vulnerable to sexual abuse and exploitation as they cannot prove their age. Without proof of age, girl children may fall victim to forced marriage before they are legally eligible;¹²⁶ a tactic frequently used to traffic and prostitute children. Girls exploited in prostitution may also be claimed by pimps to be over 18 years of age.¹²⁷

¹²⁵The only provisions that apply to the prostitution of boys are the *Penal Code* sections on transferring or possessing a person under 18 years of age for the purpose of prostitution or any unlawful or immoral purpose (Penal Code, Sections 372 and 373) and the *Women and Child Repression Prevention Act's (WCRPA)* child trafficking section (Act No. VIII of 2000. The *WCRPA* was enacted in 2000 and amended in 2003).

¹²⁶Unicef. *Childinfo.org: Statistics by Area – Birth Registration*. Accessed on 26 September 2008 from: <http://www.childinfo.org/areas/birthregistration/>.

¹²⁷IRIN, UN Office for the Coordination of Humanitarian Affairs. *Bangladesh: Moving towards universal birth registration*. 15 July 2008. Accessed on 26 September 2008 from: <http://www.irinnews.org/report.aspx?ReportId=79258>.

CONCLUSION

As a final observation, we emphasise the importance of consistent definitions for the offences of child sexual abuse and exploitation:

- First, definitions that have been internationally agreed upon will reflect a shared understanding of a given issue;
- Second, the scope of an offence revolves around how it is defined. Definitions that are clear and consistent are more conducive to efficient law enforcement;
- Third, given the transnational nature of many sexual exploitation crimes, common definitions will facilitate collaboration and cooperation in fighting these crimes, for instance through extradition and the provision of mutual assistance. In many countries, extradition for a given offence is conditional upon the act being considered criminal in both jurisdictions;
- Finally, common definitions can help curb ‘forum shopping’, that is the choosing of a jurisdiction because the prevailing legal rules are more advantageous to a particular claim or defence. Harmonisation of States’ domestic laws is a way to thwart criminals seeking out jurisdictions with more lenient rules, which seems to be a trend as far as sexual tourism is concerned.

The mere presence of clear and consistent definitions is not necessarily an indicator of good child protection schemes in any country. There may be gaps between the written law and its actual enforcement. However, ECPAT believes that common definitions provide a solid foundation for a better understanding of sexual crimes against children and for more adequate responses. **ECPAT urges governments to enact laws that define and prohibit the sexual abuse of children, the sexual exploitation of children and their various manifestations.**

LEGAL REFORM CHECKLIST

- √ National law establishes offences and penalties relating to the sexual abuse of children
- √ Sexual abuse includes:
 - (1) sexual activities with a child who has not yet reached the age of sexual consent
 - (2) sexual activities with a child up to the age of 18 years where use is made of coercion, force or threats, or when the offender abuses a position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child
- √ National law addresses the conduct of making a child watch sexual acts or performing such acts in the presence of children, which could result in harm to the psychological health of the victim
- √ National law establishes offences and penalties for the sexual exploitation of children
- √ Sexual exploitation includes:
 - (1) child prostitution
 - (2) child pornography
 - (3) coercing/recruiting children to participate in pornographic performances/sexual posing
- √ National law criminalises aiding or abetting and attempts to commit the above offences
- √ National law establishes offences of child trafficking for sexual purposes including the process leading to sexual exploitation, in accordance with the Trafficking Protocol
- √ States should conduct a comprehensive review of existing legislation to ensure that:
 - (1) The law provides for a nationally consistent definition of a child as anyone up to the age of 18 years
 - (2) Laws on the sexual exploitation of children protect children up to the age of 18 years, irrespective of the age of sexual consent

- (3) The law establishes a clear age of sexual consent for the purpose of legal certainty. States with low ages of sexual consent, should amend the laws to raise that age
 - (4) In order to avoid punishing consensual sexual activity between peers, States should consider providing a 'close in age' exemption in the law
 - (5) Laws establish the responsibilities of parents and legal guardians to protect children under their care from abuse and exploitation. Reporting of suspected sexual abuse/exploitation should be mandatory for persons in positions of responsibility
- √ States should review the minimum ages established for:
- (1) Marriage
 - (2) Criminal responsibility
 - (3) Employment
- and if necessary increase them in line with international standards
- √ States should establish mandatory birth registration systems

SECTION 3

THE PROSTITUTION OF CHILDREN

Objectives:

- To define child prostitution with reference to international standards and map out elements for an enhanced definition
- To clarify 'who and what' should be subject to criminal law

Key Provisions:

- Article 34 of the CRC and OPSC
- Article 2(b) of the ILO Convention 182
- Article 19 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

CHILD PROSTITUTION AND THE NEED FOR A TARGETED LEGAL RESPONSE

Child prostitution occurs when someone benefits from a commercial transaction in which a child is made available for sexual purposes. Children may be controlled by an intermediary who manages or oversees the transaction, or by an exploiter who negotiates directly with a child.

Children are also involved in prostitution when they engage in sex in return for basic needs such as food, shelter or safety, or for favours such as higher grades at school or extra pocket money to purchase consumer goods. The sex acts may occur in many different locations such as brothels, bars, clubs, homes, hotels or on the street. Sometimes child prostitution is not an organised activity, but usually it is; either on a small scale through individual pimps or on a large scale through criminal networks.

The Committee on the Rights of the Child has found that many countries do not yet have adequate legal provisions to define and criminalise child prostitution in accordance with the definition in the OPSC.

The prostitution of children vs. adult prostitution: the need for separate offences

When the term ‘child prostitute’ or ‘child sex worker’ is used, the implication is that a child has somehow chosen to make prostitution a profession. This line of thinking masks the reality that it is adults who create a demand for children as sexual objects, and are prepared to misuse their power and their desire for profit. Any State that has ratified the CRC, must consider that such children are the victims of criminal sexual exploitation.

This distinction must be reflected in national laws. In countries where prostitution is legalised or decriminalised, national law must contain distinct provisions prohibiting child prostitution and imposing penalties upon those who exploit children.

Child prostitution in a jurisdiction where adult prostitution has been decriminalised – New Zealand

Although the *Prostitution Reform Act* 2003 decriminalised adult prostitution, it prohibits child prostitution as required under international standards. Under the Act, “commercial sexual services” include a person’s physical participation in sexual acts with and for another person’s gratification, for payment or other reward to the person providing sexual services or a third party.¹²⁸ Regarding criminalised activities, the Act makes it illegal to “cause, assist, facilitate, encourage, contract for or arrange” the prostitution of a person under 18 years of age.¹²⁹ Nor may any person receive a payment or other reward that she or he reasonably should know is directly or indirectly a result of commercial sexual services provided by a person under the age of 18 years.¹³⁰ It is also illegal to receive commercial sexual services from a person below the age of 18 years.¹³¹

¹²⁸Prostitution Reform Act 2003, s. 4(1). New Zealand. Accessed on 29 September 2008 from: <http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html>.

¹²⁹*Ibid.* ss. 20 & 22(1).

¹³⁰*Ibid.* s. 21.

¹³¹*Ibid.* s. 22(2).

Regrettably, this legislation is poorly enforced. In the first two years following the enactment of the *Prostitution Reform Act 2003*, there were 48 charges laid for the use in prostitution of persons under the age of 18 years and only five people convicted, with sentences ranging from two years in prison to a fine and community service. The first conviction of a perpetrator of underage prostitution occurred in 2005. The police force has been criticised by NGOs, such as ECPAT New Zealand and the STOP Demand Foundation, for the low level of prosecutions of people who pay for sex with children under the Act.¹³²

In June 2006, the *Crimes Act* was amended to include provisions on child sexual exploitation, including child prostitution. Under the *Crimes Act*, anyone who sells, buys, transfers, barter, rents, hires or in any other way enters into a dealing involving a person under the age of 18 years for the purpose of sexual exploitation is liable to a maximum of 14 years' imprisonment.¹³³ The first charges under this provision of the *Crimes Act* were brought in July 2008 when a Christchurch brothel madam was charged for exploiting two girls aged 16 and 17 years.¹³⁴

Child prostitution, pornography and trafficking: three intertwined phenomena

Child prostitution and child trafficking are closely linked. Children may end up being prostituted as the outcome of the trafficking process if they are transported within or across borders for the purpose of sexual exploitation. Child prostitution may also be the objective of a trafficking process.

Children exploited in prostitution may also be used in the production of pornographic materials, or further exploited by being used in pornographic performances.

¹³²ECPAT International. *Global Monitoring Report on the status of action against commercial sexual exploitation of children: New Zealand*, p. 17. 2006. Accessed on 29 September 2008 from: http://www.ecpat.net/A4A_2005/PDF/EAP/Global_Monitoring_Report-NEWZEALAND.pdf.

¹³³Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, art. 90AA(1)(a)(i). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act. Section 98AA was inserted by section 6 of the *Crimes Amendment Act 2005*. Crimes Amendment Act 2005 No 41 (as at 26 June 2008), Public Act. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/2005/0041/latest/DLM346172.html?search=ts_act_Crimes+Act#DLM346172.

¹³⁴Steward, Ian & Calcott, Dean. Brothel madam on sex-slavery charges. *The Press*, 29 July 2008. Accessed on 29 September 2008 from: <http://www.stuff.co.nz/stuff/4634499a12855.html>.

THE INTERNATIONAL LEGAL RESPONSE TO THE PROSTITUTION OF CHILDREN

International legal framework

There is extensive international human rights law prohibiting child prostitution. The CRC requires States parties to protect children from exploitation in prostitution¹³⁵, but does not provide a definition of child prostitution (see page 15).

Other international standards are in ILO Convention 182, which includes prostitution as one of the worst forms of child labour and calls upon States parties to prioritise its elimination. The Convention requires States parties to condemn child prostitution and adopt penal sanctions to eliminate it.¹³⁶ Similarly, the Trafficking Protocol calls for the elimination of the exploitation of the prostitution of others and other forms of sexual exploitation.¹³⁷

The OPSC offers the first international definition of child prostitution as follows:

“Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration.”¹³⁸

In addition, it requires States parties to prohibit and criminalise child prostitution¹³⁹ and to ensure that as a minimum, the following acts are fully covered under their criminal or penal laws:

“Offering, obtaining, procuring or providing a child for child prostitution”

In the next part of this section, the different elements of the above mentioned OPSC provisions are broken down and their different components explained. Suggestions are also made on how to strengthen existing legislation towards better child protection.

¹³⁵Convention on the Rights of the Child, art. 34. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹³⁶ILO Convention 182 (Worst Forms of Child Labour), art. 7. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

¹³⁷Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

¹³⁸*Ibid.* art. 2.

¹³⁹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The constitutive elements of the international offence of child prostitution, examples of national laws and issues of concern

The irrelevance of consent

As mentioned in Section 2 above, under the CRC, a child means any person up to the age of 18 years. However, in some countries, children who have reached the age of sexual consent are also considered capable of entering into exploitative sexual activities such as prostitution. This leads to a situation in which law enforcement officers may be reluctant to take action against clients/exploiters if a child is older than the age of consent, but younger than 18 years of age.¹⁴⁰ Consequently, there needs to be some differentiation in law between the capacity to enter into consensual sexual activity, and involvement in sexual activities that are exploitative by their very nature. **Protection from exploitation in prostitution must be extended to all children up to the age of 18 years, and consent in such circumstances should be an irrelevant consideration.**

'Sexual activities' as contemplated by the OPSC

In the context of child prostitution, 'sexual activities' should be understood broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Sexual intercourse should be included, but also sexual touching and masturbation, without discrimination in relation to the sex of the parties. ECPAT would also urge States to consider the inclusion of other non-contact acts, such as sexual posing, in order to better protect children from exploitation.

In **Bangladesh** for instance, the *Suppression of Immoral Traffic Act (SITA) of 1933*, defines prostitution as "promiscuous sexual intercourse for hire, whether in payment or in kind"¹⁴¹ a definition which does not reflect the breadth of the OPSC definition. Although the *SITA* includes the element of remuneration, its limited definition restricts its application from situations where children are sexually exploited by acts that are sexual, but do not amount to sexual intercourse, such as oral sex, sexual touching and fondling, posing and acts relating to the making of child pornography.

¹⁴⁰Muntarbhorn, Vitiit. International Perspectives and Child Prostitution in Asia, p. 10. In *Forced Labor: The Prostitution of Children* (p. 9). US Department of Labor, Bureau of International Labor Affairs. 1996. Accessed on 29 September 2008 from: http://departments.bloomu.edu/crimjust/pages/articles/Child_Labor.pdf.

¹⁴¹Suppression of Immoral Trafficking Act of 1933, s. 3(3). Bangladesh.

Remuneration or consideration: the commercial element of exploitation

As indicated above, children are sometimes involved in prostitution in return for basic needs or favours; therefore 'remuneration or other form of consideration' should include any form of reward whether promised or given to the child or to a third party. The 'consideration' needs to be able to include food, shelter, drugs, drinks, consumer goods, etc. The inclusion of such 'indirect' forms of remuneration is crucial, as many children originally become involved in prostitution because they are homeless, runaways or experiencing substance abuse problems. They become subject to exploitation in order to satisfy their basic needs (food, shelter, belonging to a group of people).¹⁴² States should therefore adopt a broad definition of 'remuneration and consideration' in order to capture all forms of exploitation.

Offences covered under the OPSC

The OPSC delineates activities that each State party is required to fully cover under its criminal or penal law, whether the offences are committed "domestically or transnationally, or on an individual or organized basis".¹⁴³ These are the "offering, delivering or accepting, by whatever means" of a child for the purpose of sexual exploitation¹⁴⁴ and with specific regards to child prostitution, all acts of "offering, obtaining, procuring or providing a child for child prostitution".¹⁴⁵

Interpretation of these terms varies among different countries and there are different understandings and concepts of the issue. Unfortunately, not many countries have provisions dealing with the prostitution of children which are broad enough to encompass the full range of acts contemplated by the OPSC.

Below is an attempt to explain these acts by giving concrete examples of what they may include.

¹⁴²Hickey, Eric W. *Sex Crimes and Paraphilia*, p. 42. Pearson Education. 2006. It should be noted that it is precisely the incapacity to fulfil these needs independently that makes it so hard for children to get out of their situation of exploitation.

¹⁴³Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(1). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

¹⁴⁴*Ibid.* art. 3(1)(a).

¹⁴⁵*Ibid.* art. 2(b).

OPSC Act	Interpretation
Offering	To ask someone if they would like a child for sex; to advertise the availability of children as sexual partners. An offer may occur in a range of ways, including verbally or via newspapers, internet, mobile phone or any other form of communication.
Obtaining	The prohibition on obtaining a child for prostitution targets the client of a prostituted child. It refers to the transaction by which a person acquires the sexual services of a child.
Procuring	To arrange for a child victim to be made available to a customer, for example by 'buying' a child for someone, or arranging for a child to be brought to a particular place for them. This activity is commonly referred to as 'pimping'.
Providing	To make a child available to someone who so requests. This can be illustrated by a parent or a relative who sells a child for the purposes of prostitution or to a brothel owner who provides a customer with access to a child.

Addressing demand and supply: criminalising clients, recruiters, managers of premises and other intermediaries

The client/exploiter: counteracting demand

Child prostitution can never be eradicated without tackling the demand for it. In several countries, national laws on prostitution criminalise the prostitute and the intermediary but leave out those purchasing sexual services. In some instances, laws apply to those who force a child into prostitution or live off the prostitution of others, but fail to make the client subject to criminal liability. For example, in **Brazil**, "subjugating" and/or "obliging" a child to practice prostitution is a crime but neither the *Estatuto da Criança e do Adolescente (ECA)*¹⁴⁶ nor the Brazilian *Penal Code* of 1940¹⁴⁷ criminalise the acts of 'clients'.

It is important to criminalise the 'client' of prostituted children and the purchase of sexual services from children, and this matter must be addressed independently of the question of decriminalising adult prostitution. **The purchase of sexual services from children should always be considered as a crime.**

¹⁴⁶Estatuto da Criança e do Adolescente, Lei N° 8.089, de 13 de julho de 1990, art. 244-A. Brazil. Accessed on 29 September 2008 from: <http://www.planalto.gov.br/ccivil/LEIS/L8069.htm>.

¹⁴⁷Código Penal [Penal Code], art. 218. Brazil. Accessed on 29 September 2008 from: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm.

On an encouraging note, a few countries in Latin America are beginning to reform their laws in this direction. Promising practices may be found in the codes of **Chile**¹⁴⁸ and **Costa Rica**¹⁴⁹. In Europe, some countries have specific provisions targeting the ‘client/exploiter’. For example, the penal code of **Norway** provides that any person who, for payment, engages in sexual activity or commits a sexual act with a person under the age of 18 is liable to fines or to two years’ imprisonment.¹⁵⁰

The mere fact of engaging the sexual services of a minor should trigger criminal responsibility, meaning the offering of money with intent to involve a minor in sexual activities, and not just the actual performance of the sexual activities. A new **South African** law is very much on point:

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

“17. (1) A person (“A”) who unlawfully and intentionally engages the services of a child complainant (“B”), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person (“C”)—

- (a) for the purpose of engaging in a sexual act with B, **irrespective of whether the sexual act is committed or not;** or
- (b) by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the **sexual exploitation of a child.**¹⁵¹
[emphasis added]

¹⁴⁸Chile’s *Penal Code* now directly criminalises the client. Note however that this article illustrates the discrepancies of the protection offered to children who have attained the age of the consent and those below the age of consent: “Artículo 367 ter.- El que, a cambio de dinero o otras prestaciones de cualquier naturaleza, obtuviere servicios sexuales por parte de personas mayores de catorce pero menores de dieciocho años de edad, sin que medien las circunstancias de los delitos de violación o estupro, será castigado con presidio menor en su grado máximo.” Código Penal [Penal Code], art. 367 ter. Chile. Accessed on 29 September 2008 from: <http://www.bcn.cl/leyes/pdf/actualizado/1984.pdf>.

¹⁴⁹Código Penal [Penal Code], art. 160. Costa Rica. Accessed on 29 September 2008 from: http://www.oas.org/juridico/MLA/sp/cri/sp_cri-int-text-cpenal.pdf.

“Artículo 160 – Quien pague a una persona menor de edad de cualquier sexo o prometa pagarle o darle a cambio una ventaja económica o de otra naturaleza, para que ejecute actos sexuales o eróticos, será sancionado (...)”

¹⁵⁰Penal Code, section 19. Norway. Accessed on 19 September from:

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csanorway.pdf>.

¹⁵¹Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, ch. 3, pt. 2. South Africa. Accessed on 29 September 2008 from: <http://www.info.gov.za/gazette/acts/2007/a32-07.pdf>.

Finally, the 'client/exploiter' must be subject to severe penalties. One must remember that clients are the ones who fuel the demand for children and hence should be liable on conviction to exemplary prison sentences.

Recruiters/suppliers

Recruiters prey on vulnerable children by taking advantage of their distress. Recruiters may induce or coerce children into prostitution; they may make children available to others by offering them for sale or bringing them to a particular place; or they may hand a child over to another exploiter. They may also facilitate child prostitution, for example by providing someone with information on where to find children available for prostitution. Laws must be broad enough to enable the prosecution of persons involved in any such scenarios.

Owners, occupiers, managers of premises used for prostitution of children

The owners of bars, brothels, hotels and other places where children are prostituted must also be amenable to prosecution. Again, while in some countries prostitution is legal and the law allows for the keeping or letting of premises for prostitution, this should never exempt their owners or managers from criminal liability if children are involved. Accordingly, every owner, occupier or manager of premises, or any other person who has control of premises or assists in the management or control of premises, who knowingly permits a person under the age of 18 years to engage in prostitution or to be on the premises for the purpose of engaging in child prostitution must be liable to severe criminal sanctions.¹⁵²

Moreover, States should impose a legal duty on owners and occupiers to report such activities as soon as they become aware of the sexual exploitation of children.¹⁵³

AVOIDING THE CRIMINALISATION OF CHILDREN INVOLVED IN PROSTITUTION

Children involved in prostitution or other forms of sexual exploitation may end up in a justice system designed for adults where they are treated as criminals rather than victims. What is even worse, if illegally in another country, children may be subjected to arrest, detention and deportation.¹⁵⁴ Criminalising young people engaged in prostitution

¹⁵²Criminal Code, s. 171. Canada. Accessed on 29 September 2008 from: <http://www.canlii.org/eliisa/highlight.do?text=171&language=en&searchTitle=R.S.C.+1985%2C+c.+C-46&path=/ca/sta/c-46/sec171.html>. This section provides for such liability on the owner.

¹⁵³South Africa's *Child Care Act, 1983*, s. 50A(2), provides: "(...) Any person who is an owner, lessor, manager, tenant or occupier of the property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence (...)." Interpol. *Legislation of Interpol member states on sexual offences against children: South Africa*. Updated Spring 2006. Accessed on 29 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws//csaSouthAfrica.pdf>.

¹⁵⁴Skinnider, Eileen. *Violence against children: International criminal justice norms and strategies*. International Centre for Criminal Law Reform and Criminal Justice Policy. Accessed on 29 September 2008 from: <http://137.82.153.100/Publications/Reports/VACChildren.pdf>.

provides their exploiter with the opportunity to use the threat of prosecution to coerce the child. In addition, children who risk prosecution are unlikely to report the crime of their exploitation to law enforcement agents.¹⁵⁵

It is sometimes argued that arresting or detaining prostituted children helps them to leave prostitution and escape their pimps. However, this is usually only a temporary measure, and children return to the exploitative situation on release.

Children are sometimes arrested under public order laws. A child found begging or 'loitering', may be the victim of exploitation in prostitution and should never be considered as being in conflict with the law. A national law that criminalises children for such acts is not in compliance with international human rights standards.¹⁵⁶

The *Model Guidelines for the Effective Prosecution of Crimes Against Children* state that "[c]hildren who engage in criminal activities through coercion by others who profit by their acts should be considered victims of exploitation rather than perpetrators of crime."¹⁵⁷ This same principle is expressed in other instruments such as the UN's *Resolution on the Instrumental Use of Children in Criminal Activities*.¹⁵⁸ The outcome document of the Second World Congress against CSEC in Yokohama also stated that action to criminalise CSEC in all its forms should not criminalise or penalise child victims.¹⁵⁹

New Zealand has expressly recognised this principle. Its *Prostitution Reform Act* 2003 protects persons under the age of 18 years from prosecution as a party to any of the prostitution related offences. Section 23(3) of the Act reads "[n]o person under 18 years of age may be charged as a party to an offence committed on or with that person against this section."

The OPSC does not expressly call for the non-criminalisation of children victims of sexual exploitation. This legal loophole carries important consequences for child protection, with one observer noting that "by not exempting them from criminal liability for offences relating to prostitution, the law considers them complicit with their own exploitation."¹⁶⁰ In jurisdictions where the age of criminal liability is low, children are even more vulnerable.

¹⁵⁵Gillespie, Alisdair A. Diverting Children Involved in Prostitution. *Web Journal of Current Legal Issues*, 2007. Accessed on 21 May 2007 from: <http://webjcli.ncl.ac.uk/2007/issue2/gillespie2.html>.

¹⁵⁶ECPAT International. *Combating the Trafficking in Children for Sexual Purposes. Questions and Answers*. 2006.

¹⁵⁷The International Centre for Criminal Law Reform and Criminal Justice Policy. *Model Guidelines for the Effective Prosecution of Crimes against Children*, p. 15. August 2001. Accessed on 29 September 2008 from: <http://www.icclr.law.ubc.ca/Publications/Reports/modelguidelines-2001.pdf>.

¹⁵⁸UN General Assembly Resolution 45/115 (Resolution on the Instrumental Use of Children in Criminal Activities). 3 April 1991.

¹⁵⁹The Yokohama Global Commitment 2001. Outcome document of the 2002 World Congress against CSEC. Accessed on 1 October 2008 from: <http://www.csecworldcongress.org/en/yokohama/Outcome/index.htm>.

¹⁶⁰Gillespie, Alisdair A. Diverting Children Involved in Prostitution. *Web Journal of Current Legal Issues*, 2007. Accessed on 21 May 2007 from: <http://webjcli.ncl.ac.uk/2007/issue2/gillespie2.html>.

In its Concluding Observations on **Lithuania's** periodic State report on the implementation of the CRC,¹⁶¹ the Committee on the Rights of the Child expressed concern about the fact that some legal provisions resulted in the punishment of victims. The Committee encouraged the State party to abolish every legal provision resulting in administrative or other punishment of the victims of sexual abuse and exploitation and to prevent other forms of stigmatisation of the victims.¹⁶²

In its Concluding Observations on the report of the Government of **Morocco**, the Committee on the Rights of the Child stated “the Committee is further concerned at the status of child victims of sexual exploitation who may be treated as offenders”.¹⁶³

Mr. Juan Miguel Petit, former Special Rapporteur on the sale of children, child prostitution and child pornography, observes:

“Where children fear being arrested, they are unlikely to seek medical attention, and given the high risk amongst prostitutes of contracting sexually transmitted diseases, being raped, or suffering other forms of violence, this can have very serious consequences. The same fear often also prevents such children from reaching out for assistance from relevant organisations or individuals who may be able to help them. When the child is considered to be a criminal, the chances of the real perpetrator of the offence namely the child’s client or trafficker – being apprehended are minimal. In receiving countries for victims of trafficking, children are regularly rounded up from brothels and from the streets, locked in detention cells which may also hold adults, and then deported back to the very place from which they were sold. The whole process involving the same child often repeats itself.”¹⁶⁴

The criminalisation of children involved in prostitution or other forms of sexual exploitation raises serious concern and ECPAT would urge governments to review criminal and administrative measures applying to such children.

¹⁶¹Reprint of document available from the University of Minnesota Human Rights Library. *Concluding Observations of the Committee on the Rights of the Child, Lithuania, U.N. Doc. CRC/C/15/Add.146 (2001)*. University of Minnesota Human Rights Library. Accessed on 5 March 2007 from: <http://www1.umn.edu/humanrts/crc/lithuania2001.html>.

¹⁶²See *Ibid.* paras. 53 & 54.

¹⁶³Reprint of document available from the University of Minnesota Human Rights Library. *Concluding Observations of the Committee on the Rights of the Child, Morocco, U.N. Doc. CRC/C/15/Add.211 (2003)*. University of Minnesota Human Rights Library. Accessed on 1 October 2007 from: <http://www1.umn.edu/humanrts/crc/morocco2003.html>.

¹⁶⁴Petit, Juan Miguel, Special Rapporteur on the sale of children, child prostitution and child pornography. *Rights of the Child*. Report submitted to the UN Economic and Social Council Commission on Human Rights. 6 January 2003. Accessed on 2 October 2008 from: <http://www.unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/217511d4440fc9d6c1256cda003c3a00?Opendocument>.

Promising Practice in the UK?

The UK Department of Health and the Home Office issued guidelines in 2000 entitled *Safeguarding Children Involved in Prostitution (SCIP)*,¹⁶⁵ which fundamentally altered previous policy and practice with regard to young people in prostitution. Instead of being arrested and punished for prostitution-related offences, those under 18 years of age are to be considered as children 'in need' and offered welfare-based interventions.¹⁶⁶

SCIP is welcome, as it constitutes an official recognition of the fact that children in prostitution are crime victims rather than criminals and should be treated as such and afforded protection. The UK Government, however, provided for a significant exception to the general rule, and expressly states that:

"[...] it would be wrong to say that a boy or girl under 18 never (sic) freely chooses to continue to solicit, loiter or importune in a public place for the purposes of prostitution, and does not knowingly and willingly break the law. In such cases the police should only start to consider whether criminal justice action is required[...] The criminal justice process should only be considered if the child persistently and voluntarily continues to solicit, loiter or importune in a public place for the purposes of prostitution".¹⁶⁷

¹⁶⁵Department of Health, Home Office, Department of Education and Employment, National Assembly for Wales. *Safeguarding Children Involved in Prostitution*. Crown. May 2000. Accessed on 21 May 2007 from: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4057858.pdf.

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.* pp. 27-28.

LEGAL REFORM CHECKLIST

- ✓ National legislation has adopted a clear definition of 'child prostitution'
- ✓ The use of children in prostitution is defined as an offence distinct from adult prostitution (if adult prostitution has not been legalised or decriminalised), and the penalties are more stringent to reflect the gravity and impact of this crime on the lives of child victims
- ✓ If adult prostitution has been decriminalised or legalised, the use of children in prostitution remains a criminal offence
- ✓ Children are protected from exploitation until the age of 18 years
- ✓ In the context of child prostitution, 'sexual activities' are defined broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Activities covered include not only sexual intercourse, but also sexual touching, masturbation and sexual posing, without distinction for the sex of the victim or perpetrator
- ✓ The element of consideration is construed broadly so as to include any form of compensation
- ✓ The law criminalises all acts of offering, obtaining, procuring and providing a child for prostitution so as to capture the whole spectrum of child exploiters
- ✓ The client/exploiter is subject to the criminal law; any form of compensation to obtain sexual services from a minor is a criminal transaction
- ✓ Recruiters and those who own, lease or manage premises where prostitution of children occurs are criminalised; there is a duty to report the use of premises for child prostitution
- ✓ Criminal/administrative measures applicable to a child found in prostitution are reviewed. Administrative/criminal codes addressing 'delinquency' or 'anti-social behaviour' on the part of children are reviewed. Legal provisions that result in administrative or other punishment of the victims are abolished
- ✓ Guidelines/rules are available to the police and judicial authorities to deal with children found in prostitution

SECTION 4

CHILD PORNOGRAPHY AND OTHER CHILD ABUSE MATERIALS

Objectives:

- To emphasise the importance of eradicating child pornography as one of the most abhorrent violations of children's rights
- To analyse the international definition of child pornography and map out elements for an enhanced definition
- To provide guidance for the drafting of an efficient definition of child pornography and related offences under national law
- To highlight the need for reporting obligations for designated individuals and the private sector, including ISPs and financial companies

Key Provisions:

- Article 34(c) of the CRC
- Article 2(c) of the OPSC
- Article 3(b) of ILO Convention 182
- Article 9(2) of the Convention on Cybercrime
- Article 20(2) of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

CHILD PORNOGRAPHY: VISUAL, AUDIO AND WRITTEN MATERIALS DEPICTING CHILD ABUSE

Child pornography in the broader context of commercial sexual exploitation of children

Child pornography, including child sexual abuse imagery is a severe violation of children's rights. It involves sexual abuse and the exploitation of children and is linked to the prostitution of children, child sex tourism and the trafficking of children for sexual purposes. Its most obvious use is sexual arousal and gratification. However, it is also used to validate that the behaviours and beliefs of child abusers are normal, establish trust among those interested in abusing children, gain entrance to private clubs and to make a profit. At a societal level, child pornography - whether it involves real or simulated images of children - continues to cultivate a demand that involves the sexual abuse and exploitation of children.

Child pornography exploits children in many ways:

- Children may be tricked or coerced into engaging in sexual acts for the production of pornography or images may be made in the process of sexually exploiting a child without the child's knowledge. These images are then sold, traded or otherwise distributed.
- Secondly, the demand for images of children maintains the incentive to produce such materials. Thus, those who 'consume' and/or possess pornographic depictions of children continue to exploit these children.
- Thirdly, pornographic materials are frequently used by child abusers to diminish a child's inhibitions and to convey the impression that sex between adults and children is normal, acceptable and enjoyable. This is part of the 'grooming' process.
- Fourthly, the makers of pornography commonly use their 'products' to coerce, intimidate or blackmail the children used in the making of such material.

In those rare cases where investigators are able to identify the children depicted in pornography, the abuser is commonly found to be a member or associate of the child's family or to be providing care or guardianship. However, children who are especially vulnerable, such as children living or spending time on the streets, as well as those already forced into prostitution or those who have been trafficked, are also at risk of being used in the production of pornography.

The link between the use of child pornography and the commission of offences against the child

The causal link between the consumption of child pornography and the commission of sexual offences against the child remains an issue of controversy among mental health professionals. Among the many obstacles to proving a relationship are the lack of empirical data (many studies fail to make a distinction between child pornography – which amounts to a criminal offence in many jurisdictions – and adult pornography) and the predominance of anecdotal evidence from convicted offenders, which is generally not representative of the profile of the average child pornography consumer.¹⁶⁸

Moreover, the reliability of self-reporting data may be questioned as it is difficult to determine whether offenders are truthful about their habits. Studies have shown that sex offenders tend to minimise the full extent of their sexually aberrant behaviour.¹⁶⁹ This is even more likely in a law enforcement setting, as offenders may fear the consequences of admitting behaviour that would amount to an additional offence.¹⁷⁰

¹⁶⁸Rettinger, L. Jill. *The Relationship between Child Pornography and the Commission of Sexual Offences Against Children: A review of the Literature*, p. 3/18. Canada Department of Justice. March 2000. Accessed on 7 October 2008 from: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_5.html.

¹⁶⁹*Ibid.* p. 8/18.

¹⁷⁰*Ibid.*

Child pornography is also seldom used in a single way by child sex offenders. Hence, even if it may be claimed to be used as a way to ease the tension and avoid offending, it may also be used as stimuli to establish relationships with a child or to diminish a child's resistance (as part of the 'grooming' process).¹⁷¹

Even if a direct causal link between the consumption of child pornography and the commission of offences against the child remains to be unequivocally established (in fact absolute statistics may be impossible to draw on that issue), research has clearly demonstrated that "exposure to pornography is one important factor which contributes directly to the development of sexually dysfunctional attitudes and behaviours", in part because viewers of pornography may believe that the representation is a normal and appropriate portrayal of reality.¹⁷² **ECPAT believes that child pornography serves as a way to legitimise behaviours that victimise vulnerable children.**

The impact of information technology on the use and dissemination of child pornography

It is common knowledge that child pornography is often produced and distributed using information and communication technologies (ICT) and the Internet. New technologies and the growth of the Internet are creating more commercial opportunities for child exploiters and child pornography users, facilitating the development and extending the reach of distribution networks. The use of ICT also facilitates organised sexual abuse and violence against children by networks of commercial buyers, sex tourists, paedophiles and traffickers, as well as various forms of prostitution of children and young people. Children who use ICT in their daily lives are at risk of sexual exploitation.

ICT and the Internet are used by child sex exploiters to gain access to both child pornography and children directly. Child pornographers use file sharing networks, newsgroups, peer2peer systems and other technologies to share and sell child pornography and child sex exploiters use mobile phones, chat rooms and other online social spaces to lure and 'groom' children with the intent of abusing and exploiting them.

The global distribution of child abuse images over the Internet without uniform laws to protect children makes it difficult for national law enforcement authorities to prosecute offenders locally. As the Internet is not confined to national boundaries, specific provisions taking ICT into account, harmonised legislation, international police cooperation and industry responsibility are required to effectively tackle the problem.

¹⁷¹*Ibid.* p. 9/18.

¹⁷²Paolucci, Eliabeth Oddone, Genuis, Mark, & Violato, Claudio. *A Meta-Analysis of the Published Research on the Effects of Pornography*, p. 3. National Foundation for Family Research and Education, University of Calgary, Alberta. 2000. Accessed on 7 October 2008 from: <http://www.ccoso.org/library%20articles/Meta-analysis.pdf>.

THE INTERNATIONAL LEGAL RESPONSE TO CHILD PORNOGRAPHY

International legal framework

While individual and community understandings of child pornography may vary within and between societies, Article 34 of the CRC commits signatories to act to prevent “the exploitative use of children in pornographic performances and materials.”

Article 34 CRC

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”¹⁷³

ILO Convention 182 provides that “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performance” constitutes one of the “worst forms of child labour”.¹⁷⁴ Article 7(1) obliges governments to apply “all necessary measures... including the provision and application of penal sanctions” to enforce the Convention, in order to eliminate child pornography.¹⁷⁵

The OPSC expands on this to offer a general description of child pornography, as illustrated below.

¹⁷³Convention on the Rights of the Child, art. 34. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹⁷⁴ILO Convention 182 (Worst Forms of Child Labour), art. 3. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

¹⁷⁵*Ibid.*

Article 2(c) OPSC

"[...] 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 sexual purposes"¹⁷⁶

The OPSC definition and the constitutive elements of the international offence of child pornography

Understanding the OPSC definition: 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 sexual purposes

"[A]ny representations by whatever means"

There are many different kinds of child pornography materials, made available through a variety of media, but essentially they all involve depictions of a child or children in a manner that is intended to aid sexual arousal and gratification. The variety of materials was taken into consideration by the drafters of the OPSC when including the expression 'by whatever means', which clearly indicates that child pornography may be embodied not only in visual materials such as photographs and images but also in audio representations and writings which can then be distributed through magazines, books, drawings, movies, videotapes, mobile phones and computer disks or files. The broad scope of prohibited materials must be kept in mind by national law-makers when enacting criminal legislation aimed at combating and eradicating child pornography. To date, there exist significant variations in national laws, which are symptomatic of different understandings of the issue and which result in insufficient legal protections for children.

¹⁷⁶Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 2(c). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

“[E]ngaged in real or simulated explicit sexual activities” – the limiting effect of the word “explicit”

Generally speaking, there are two categories of pornography: pornography which is not sexually explicit but involves naked and seductive images of children and pornography which presents images of children engaged in explicit sexual activity. One of the shortcomings of international law is that it does not directly prohibit the former, restricting itself to representations of “explicit sexual activity”.

ECPAT urges States to adopt a broad interpretation of the term “explicit sexual activities” such as the one established under the CoE Convention. This term should encompass at least the following real or simulated acts: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; and e) lascivious exhibition of the genitals or the pubic area of a child. It is not relevant whether the conduct depicted is real or simulated.¹⁷⁷

“[O]r any representation of the sexual parts of a child for sexual purposes”

Representations of the sexual parts of the child fall within the international definition when they have a “sexual purpose”. This means that, for example, a photo of the sexual parts of a child would not necessarily be considered child pornography unless it was produced for sexual purposes as opposed to, for example, so-called scientific purposes.

Offences covered by the OPSC

The OPSC requires States Parties to criminalise and penalise a number of activities in relation to child pornography, as illustrated in the table below. It is up to countries to define these terms within their laws but harmonisation should be sought.

Below is an attempt to explain these acts by giving concrete examples of what they may include.

¹⁷⁷CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 143. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

OPSC Offence	Interpretation
Production	Producing child pornography refers to its creation or making, by whatever means. This may include taking photographs of a child, morphing ¹⁷⁸ images, organising and/or directing films or audio recordings, sexual posing, etc.
Offering	<p>This may be done through a range of different means whether verbally or via newspapers, the Internet (for example through a website), mobile phones or other forms of ICT. It does not matter whether a subsequent transaction actually take place.</p> <p>The CoE Convention on the Protection of children against sexual exploitation and sexual abuse establishes an offence of making available child pornography¹⁷⁹ to cover, for instance, the creation of child pornography websites and the creation or compilation of hyperlinks to child pornography websites.¹⁸⁰</p>
Distribution and dissemination	This refers to the act of delivering, giving, selling or sending of child pornography materials, including through computer systems (for e.g. file sharing programmes, popular online chat mediums or webpages). This would include the import/export of child pornography.
Possessing	Having child pornography under someone's control or owning the materials. In order to be considered a criminal act, the OPSC requires that possession be coupled with the intent to distribute the materials, or to commit any of the other above acts.

TOWARDS A PROTECTION-BASED DEFINITION OF CHILD PORNOGRAPHY AND THE CRIMINALISATION OF ALL CONDUCTS FROM PRODUCTION TO POSSESSION

ECPAT strongly believes that – as the CoE stressed in its Explanatory Report to its most recent Convention – an effective way to curtail the consumption of child pornography is to attach a criminal consequence to the conduct of each participant in the chain, from production to possession of child pornography. Considerable time and attention should be given to legislative drafting to ensure that all conduct violating the rights of the child fall within the purview of the law.¹⁸¹ Furthermore, in their definitions, States should pay attention to what constitutes child pornography in order to encompass all materials that pose a threat to the appropriate protection of the rights of the child.

¹⁷⁸'Morphed' images refers to digitally created, blended images of adults and children.

¹⁷⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 20(1)(b). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

¹⁸⁰CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 136. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

¹⁸¹*Ibid.* para. 139.

Drafting an efficient definition of child pornography¹⁸²

ECPAT believes that a carefully drafted definition of child pornography plays a crucial role in the protection of children. Hence, law-makers should focus on two particular aspects when undertaking to define the term ‘child pornography’: (1) the materials that should be criminalised; and (2) the type of depicted activities that should be criminalised. We will consider these in turn.

Material support

A child-safe definition should include visual representations embodied in photographs, films, video cassettes, DVDs, drawings, paintings, sculptures, as well as tapes, computer disks and other devices on which visual representations can be recorded. Documents should also be covered and should include books, pamphlets, periodicals, and any tape or computer disk on which data capable of conversion is stored. Audio representations should also be covered.

Activities depicted

As we have seen above, the OPSC does not provide much guidance on the specific child pornography materials that should fall within the scope of national criminal legislation. Thus, for greater clarity, vague legal provisions limiting themselves to the prohibition of “indecent” or “obscene” materials could be replaced with provisions describing the specific materials that are the object of criminal consequences.

A child-safe definition of child pornography should ideally include any material:

- Which shows or relates to a person who is a child, or is being depicted as a child, **engaged, or depicted as being engaged, in sexual activity;**
- Which shows a person who is a child, or is being depicted as a **child, witnessing any such activity** by any person(s);
- Which has as a **dominant characteristic the depiction**, for sexual purposes, of the **breasts, genitals or anus of a child, or of a person being depicted as a child;**
- Which is a visual or audio representation that **advocates, encourages or counsels any sexual** activity with children that is an offence under any enactment, or
- Which is any visual representation or description of, or information relating to, a child that indicates or **implies that the child is available for sexual purposes.**

¹⁸²We have based our analysis on Section 2 of Ireland’s *Child Trafficking and Pornography Act, 1998*. Child Trafficking and Pornography Act, 1998. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

These last two elements would encompass what is known as ‘child erotica’, that is sexually suggestive images of children, which remains excluded from the ambit of criminal law in many jurisdictions.¹⁸³

New Zealand has some of the most inclusive child pornography laws in the world.¹⁸⁴ The *Films, Videos, and Publications Classification Amendment Act 2005* considerably broadened offences related to child pornography.¹⁸⁵ It outlines offences related to the creation, possession and distribution of ‘objectionable publications’.

‘Objectionable’ materials include publications that describe, depict, express or otherwise relate to sex. More specifically, a publication deals with sex where it contains one or more visual images of one or more children or young persons who are nude or partially nude and these images, alone or together, can reasonably be regarded as sexual in nature.¹⁸⁶

Other factors that determine if a publication is ‘objectionable’ include:

- Whether it promotes, supports or tends to promote or support the exploitation of children or young persons for sexual purposes;¹⁸⁷
- Describes, depicts or otherwise deals with sexual conduct by children or young persons;¹⁸⁸
- Exploits the nudity of children or young persons.¹⁸⁹

¹⁸³The term ‘Corporate Paedophilia’ has been used to describe the sexualisation of children and its harmful consequences. See for example Rush, Emma & La Nauze, Andrea. *Corporate Paedophilia: Sexualisation of children in Australia*. The Australia Institute. October 2006. Accessed on 7 October 2008 from: <http://www.tai.org.au/documents/downloads/DP90.pdf>. While sexualised images of children do not strictly fall under the OPSC definition, governments are encouraged to consider the harm caused to children through their production and dissemination. Sexualised images of children send the wrong message that children are available and ready for sexual activity with adults. It serves to validate paedophiles’ cognitive distortions that children are interested in sex. It is also well known to law enforcement that paedophiles are often found in possession of collections of images including more ‘innocent’ images of children. Of course, addressing this problem calls for a broad range of measures, including media regulation, in order to curb the sexualisation pressure exerted by advertisers and marketers. When enacting legislation targeting ‘child pornography’ governments are urged to consider a definition that is broader and counteracts one of the root causes of this form of abuse: distorted perceptions that children are sexual commodities.

¹⁸⁴See also Child Trafficking and Pornography Act, 1998, s. 2. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

¹⁸⁵Films, Videos, and Publications Classification Amendment Act 2005. New Zealand. The main body of legislation is the *Films, Videos, and Publication Classification Act 1993*. Films, Videos, and Publications Classification Act 1993. New Zealand. Accessed on 7 October 2008 from: http://www.legislation.govt.nz/act/public/1993/0094/latest/DLM312895.html?search=qs_act_films&sr=1.

¹⁸⁶*Ibid.* s. 3(1A).

¹⁸⁷*Ibid.* s. 3(2)(a).

¹⁸⁸*Ibid.* s. 3(3)(a)(iv).

¹⁸⁹*Ibid.* s. 3(3)(b).

'Publications' include: printed matter, film, sound recordings, photographs, negatives, plates or slides; or anything, including a disk or electronic or computer file, on which information is recorded or stored and (using a computer or other device) can be reproduced or shown as one or more images, representations, signs, statements or words.¹⁹⁰ This broad interpretation of child pornography allows for a wide range of materials to fall within the scope of the Act.

The criminalisation of materials promoting and supporting the sexual exploitation of children is also a laudable feature of **New Zealand** law, and one that should be found much more often in national laws.

The 'real child' requirement and the issue of 'virtual' child pornography

It is disappointing to observe that the international community is still divided on the question of whether the use of a 'real' child victim is required before any material can be considered prohibited. When a real child has been used in making the materials (e.g. in a picture), it is generally agreed that its possession amounts to an offence and, therefore, prosecution must ensue. There is no consensus however, around the urgency to criminalise virtual images, or 'virtual pornography'.¹⁹¹ These are cartoons, computer generated images (CGIs), created through the process of morphing for instance or drawings that graphically depict children in a sexually abusive way and which are generally found alongside photographs of actual children. One of the most cited examples of such materials is the Japanese *Manga*.

ECPAT's position concerning cartoons, drawings, CGIs and other virtual representations is that, although they may not harm real children in the same way as taking a photograph of the abuse of a child, the related risks bear very real outcomes. Such images fuel the abuse of real children by reinforcing abusers' inappropriate feelings towards children. Moreover, there is a genuine risk that these materials, taking the form of cartoon or fantasy-style format, are used in the 'grooming' process.¹⁹² These risks bear very tangible consequences and do not depend in any way on the use of a 'real' child. Again, when considering the implication of these materials a protection-based approach is needed in order to curb demand and break the cycle of exploitation.

¹⁹⁰*Ibid.* s. 2, "Publication".

¹⁹¹When talking about pseudo-child pornography, however, 'pseudo' should be used warily because its synonymic link to 'false' could have the effect of downplaying the exploitative significance of such imagery and its power to normalize images of CSA under the pretext of it not being 'real', as well as to incite sexual exploitation of children. It is with reference to these kind of images that the *Convention on Cybercrime's* definition is worthy of emulation.

¹⁹²*Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, p. 6. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

Fortunately, some jurisdictions have adopted powerful legislation in order to deal with virtual pornography. For instance, **Canada**¹⁹³ and **Ireland**¹⁹⁴ have adopted definitions of child pornography that clearly seek to include such ‘virtual child pornography’. In the case of Irish law, this is done by putting aside the requirement that an actual child be used in the material.

Section 2(2) *Child Trafficking and Pornography Act 1998 (Ireland)*

“The reference in paragraph (a) of the definition of child pornography to a person shall be construed as including a reference to a figure resembling a person that has been generated or modified by computer-graphics or otherwise, and in such a case the fact, if it is a fact, that some of the principal characteristics shown are those of an adult shall be disregarded if the predominant impression conveyed is that the figure shown is a child.”¹⁹⁵

Italy’s Penal Code also criminalises pornographic images representing simulated children or only parts of real children created and/or modified using morphing software.¹⁹⁶ **Spain’s Penal Code**,¹⁹⁷ criminalises pornographic materials in which the voices of children, or their modified images are utilised for pornographic purposes. Therefore, the direct participation of children in pornography is not required for the act to amount to a crime.

The **United Kingdom (UK)** is now contemplating the possibility of criminalising the possession of cartoons, CGIs, or drawings that graphically depict children in a sexually abusive way. In its recent *Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*,¹⁹⁸ the Home Office of the Government of the UK sought to address this issue. It is interesting to note that the Consultation paper addresses

¹⁹³Criminal Code, s. 163.1. Canada. Accessed on 7 October 2008 from: <http://www.canlii.org/ca/sta/c-46/sec163.1.html>.

¹⁹⁴Child Trafficking and Pornography Act, 1998. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

¹⁹⁵*Ibid.* s. 2(2).

¹⁹⁶Codice Penale, art. 600-quarter. Italy. Accessed on 7 October 2008: <http://www.altalex.com/index.php?idnot=36774>.

¹⁹⁷Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 189(7). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995_1218.html#c5.

¹⁹⁸*Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

the issue of whether virtual pornography should be integrated in the current definition of child pornography or whether a distinct offence should be created. The paper concludes that a stand alone offence should be created for which the threshold for conviction would be higher than indecency, which is typically used for depictions of actual children. ECPAT agrees that this adequately reflects the gravity of the offence compared to that of possession of images of abuse of actual children.¹⁹⁹

In some countries, the criminalisation of virtual child pornography has been challenged as a violation of a constitutional guarantee of freedom of expression. One oft-cited example is the **United States (US)** landmark case of *Ashcroft v. Free Speech Coalition*²⁰⁰ in which the US Supreme Court addressed the question of whether a law prohibiting virtual child pornography – sexually explicit material that appears to depict children but was produced without the use of children – was a violation of the freedom of speech. The Court concluded that the law was overbroad, extending its prohibition to non-obscene material that might have serious redeeming value and that is, therefore, protected by the First Amendment of the US Constitution. The US Congress has since enacted new legislation which has survived constitutional scrutiny to date.²⁰¹

The *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act)* allows federal prosecutors to pursue cases involving visual depictions of minors engaging in sexually explicit conduct, provided that the depiction is obscene.²⁰² The *PROTECT Act's* prohibition encompasses visual depictions not involving real children.²⁰³ Dwight Whorley was the first person sentenced under the *PROTECT Act*.²⁰⁴ Following the rejection of Whorley's motions to dismiss by the US District Court for the Eastern District of Virginia, he was convicted "on twenty counts of knowingly receiving obscene visual depictions of the sexual abuse of children... based on his accessing [...] obscene Japanese anime cartoons via the Internet."²⁰⁵ For these and related crimes, Whorley was sentenced to 240 months' imprisonment.²⁰⁶ The November 2006 US Attorneys' Bulletin, published by the Department of Justice, suggests that prosecutors should use provisions of the *PROTECT Act* not only in cases involving cartoons, but also in cases where it is difficult to establish that the children depicted in sexually explicit images are real.²⁰⁷

¹⁹⁹ *Ibid.*, p. 7.

²⁰⁰ *Ashcroft v. Free Speech Coalition*. United States Supreme Court. 16 April 2002. Accessed on 7 October 2008 from: <http://supct.law.cornell.edu/supct/html/00-795.ZS.html>.

²⁰¹ See for example *United States v. Williams*. United States Supreme Court. 2008.

²⁰² Amendments brought by the *PROTECT Act* have been incorporated to US Law. US Code, Title 18, s. 1466A. United States. Accessed on 7 October 2008 from: http://supct.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00001466---A000-.html; see also Flannery, Sara E. & King, Damon A. Prosecuting Obscene Representations of the Sexual Abuse of Children. *United States Attorney's Bulletin on Internet Pornography and Child Exploitation*, 54(7), November 2006, 49. Accessed on 7 October 2008 from: http://justice.gov/usao/eousa/foia_reading_room/usab5407.pdf.

²⁰³ *Ibid.*

²⁰⁴ *United States v. Whorley*. US District Court for the Eastern District of Virginia. 23 March 2005.

²⁰⁵ Flannery, Sara E. & King, Damon A. Prosecuting Obscene Representations of the Sexual Abuse of Children. *United States Attorney's Bulletin on Internet Pornography and Child Exploitation*, 54(7), November 2006, 49. Accessed on 7 October 2008 from: http://justice.gov/usao/eousa/foia_reading_room/usab5407.pdf.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

Finally, the Convention on Cybercrime should be used as a model when reforming child pornography legislation on this particular aspect. This Convention provides a comprehensive definition of child pornography encompassing CGIs. It defines child pornography as pornographic materials which visually depict, not only minors engaged in sexually explicit conduct, but also persons appearing to be minors, as well as realistic images representing minors. It obliges all parties to criminalise, not only the production, offering or making available, distributing or transmitting and procuring of child pornography through computer systems, but also the possession of child pornography in computer systems.²⁰⁸

Criminalised conduct

Simple possession of child pornography

The OPSC identifies the possession of child pornography-related material as a punishable act only when the material is intended to be distributed. However, bearing in mind that every representation of child pornography encourages the further growth of this industry (fuelling demand and victimising the child depicted), it is important that national law also cover its mere possession for private use. Furthermore, in practical terms, the outlawing of simple possession allows law enforcement to seize the images, thereby taking materials depicting child abuse out of circulation to the clear benefit of the victims.²⁰⁹

In keeping with the Stockholm Agenda for Action, ECPAT therefore urges States to adopt higher protection standards by making sure that mere possession is treated as a criminal act, regardless of whether the material is destined for private use or distribution.²¹⁰

As discussed in the beginning of this section, child pornography produces a number of harms and, thus, there are many reasons for criminalising possession: it promotes the notion that sexual activities with children are acceptable; it victimises the child subjects; it fuels the demand for child exploitation; and the images are used to 'groom' children for sexual exploitation.

²⁰⁸Council of Europe Convention on Cybercrime, art. 2. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

²⁰⁹Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, p. 7. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

²¹⁰The protection section of the *Stockholm Agenda for Action* reads in its Paragraph b as follows: "develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, child pornography, including possession of child pornography, and other unlawful sexual activity".

In the **Canadian** case of *R. v. Steadman*, Justice Gallant, from Alberta's Queen's Bench court, made the following commentary which very well sums up the above:

“Child pornography promotes cognitive distortions. It fuels fantasies that incite offenders to offend. It is used for grooming and seducing victims. Children are abused in the production of child pornography. Child pornography is inherently harmful to children and society. That type of pornography by its very existence violates the dignity and rights of children. Harmful attitudes are reinforced by such pornography. Possession of child pornography reinforces the erroneous belief that sexual activity with children is acceptable. It fuels pedophiles fantasies which constitutes the motivating force behind their sexually deviant behaviour.”²¹¹

Following this line of thinking some countries have created offences of mere possession of child pornography. This is the case in **Italy**,²¹² the **United States**,²¹³ **Australia**,²¹⁴ **New Zealand**,²¹⁵ **Spain**,²¹⁶ **Austria**,²¹⁷ **Canada**²¹⁸ and, very recently, the **Czech Republic**.²¹⁹ It is hoped that other countries worldwide will follow the same path.

Pornographic images produced and retained by consenting children

How to deal with a situation of a couple below the age of 18 years taking and possessing pornographic photos of themselves? If the children have reached the age of consent, then legally they can enter into sexual activity which may include the production of images of a pornographic nature and their retention. However, under the law these images may constitute child pornography.

²¹¹ *R. v. Steadman*, para. 2. The Court of Queen's Bench of Alberta. 2001.

²¹² Codice Penale, s. 600-4. Italy. Accessed on 7 October 2008: <http://www.altalex.com/index.php?idnot=36774>.

²¹³ US Code, Title 18, s. 2252. Accessed on 7 October 2008 from:

http://www4.law.cornell.edu/uscode/18/usc_sec_18_00002252----000-.html.

²¹⁴ Criminal Code Act 1995, s. 474.20. Australia. Accessed on 8 October 2008 from: <http://law.ato.gov.au/atolaw/print.htm?DocID=PAC%2F19950012%2F5ch-Ch10-Pt10.6-Div474-SDivC-474.20&PiT=99991231235958>.

²¹⁵ Films, Videos, and Publications Classification Act 1993, s. 131. New Zealand. Accessed on 7 October 2008 from: http://www.legislation.govt.nz/act/public/1993/0094/latest/DLM312895.html?search=qs_act_films&sr=1.

²¹⁶ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 189(2). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.1218.html#c5.

²¹⁷ Strafgesetzbuch (StGB) [Penal Code], art. 207(a)(3). Austria. Accessed on 29 September 2008 from: http://www.sbg.ac.at/ssk/docs/stgb/stgb_index.htm.

²¹⁸ Criminal Code, s. 163.1(4). Canada. Accessed on 8 October 2008 from: <http://laws.justice.gc.ca/en/C-46/>.

²¹⁹ Parliament's lower house has recently outvoted the Senate's veto against the amendment to the Czech Republic's *Criminal Code* in order to criminalise mere possession of child pornography. The amendment took effect 1 December 2007. Veling, Jan. Lower house overrules senate, making possession of child porn a criminal offence. *Radio Praha*, 26 September 2007. Accessed on 8 October 2008 from: <http://www.radio.cz/en/news/95880#9>.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse has created an exemption to the possession offence for such cases. States parties to the Convention may reserve their right not to criminalise the possession of images involving children who have reached the age of consent, where the images are produced and possessed by them, with their consent and solely for their own use. This exception should however be strictly interpreted: if the images are subsequently distributed in any way, this should constitute a criminal offence.

Possession in the context of ICT – the issue of downloading child pornography

The fact that child pornography is often produced and transmitted using ICT calls for specific measures to criminalise related conduct. The Council of Europe’s Convention on Cybercrime²²⁰ and its new Convention on the Protection of children against sexual exploitation and sexual abuse²²¹ specifically address the possession of child pornography in computers. Some countries have followed this trend and enacted related provisions; however the debates around the definition of what constitutes possession in the context of computer materials and the need to create distinct offences for **accessing, viewing and downloading** child pornography, have raised new issues.

In the 2004 **United States** case of *State v. Jack P. Lindgren*, the Court had to determine whether the evidence at hand was sufficient to sustain a conviction for possessing child pornography, in light of the defence expert’s testimony that “no evidence of any child pornography had been saved on Lindgren’s computer.”²²²

The Wisconsin Court upheld the conviction on appeal, adopting the reasoning of the 2003 federal case of *United States v. Tucker*. In that case, the defendant had unsuccessfully argued that because the images were only temporarily displayed on his computer screen, he did not intend to save them on his hard drive, and therefore was not guilty of possession. Tucker also argued that the automatic computer process of saving thumbnail pictures to a temporary Internet cache file could not be held

²²⁰Article 9 of the *Convention on Cybercrime* requires States to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct... (e) possessing child pornography in a computer system or on a computer storage medium”. Council of Europe Convention on Cybercrime, art. 9. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

²²¹Article 19 provides for the criminalisation of accessing child pornography through ICT, albeit with one significant exception: States parties may reserve their right to apply this provision or not. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, arts. 19. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²²²*State v. Jack P. Lindgren*, para. 23. Court of Appeals of Wisconsin (US). 21 July 2004. Accessed on 7 October 2008 from: <http://www.wicourts.gov/html/ca/03/03-1869.htm>.

against a computer user. In its ruling, the Court nevertheless found that the accused did have control over the files present in his web browser cache file, and that was enough to constitute possession. It relied on the Government's computer-expert testimony that an image in a cache file could be attached to an e-mail, posted to a newsgroup, placed on a web site or printed to a hard copy. The Court expressly held the following :

“Tucker ... intentionally sought out and viewed child pornography knowing that the images would be saved on his computer. Tucker may have wished that his Web browser did not automatically cache viewed images on his computer's hard drive, but he concedes he knew the Web browser was doing so. Tucker continued to view child pornography knowing that the pornography was being saved, if only temporarily, on his computer. In such circumstances, his possession was voluntary. Since he knew his browser cached the image files, each time he intentionally sought out and viewed child pornography with his Web browser he knowingly acquired and possessed the images.”²²³

The same line of reasoning was applied by the Court in the *Lindgren* case. The Court concluded that there was sufficient evidence on file to demonstrate that the defendant knowingly possessed child pornography images on his computer, because the images could only be saved if the defendant actually manipulated the images, by clicking on and enlarging the thumbnail images.²²⁴

Nonetheless, the judicial recognition that temporary files suffice to constitute possession did not attract consensus among US courts. For example, in the 2006 case of *Commonwealth of Pennsylvania vs. Anthoni Diodoro*, the Court annulled a conviction on a count of possession of child pornography because it found that the prosecutor had not proven that the accused consciously possessed the material in his computer because the images were automatically stored in the temporary files.²²⁵ The Court determined that in order to amount to possession, active downloading to the hard disk was required.

²²³ *United States v. Tucker*, s. IV. US Court of Appeals for the Tenth Circuit. 16 September 2002. Accessed on 7 October 2008 from: <http://wings.buffalo.edu/law/bclc/web/apptuckerposs.html>.

²²⁴ *State v. Jack P. Lindgren*, para. 27. Court of Appeals of Wisconsin (US). 21 July 2004. Accessed on 7 October 2008 from: <http://www.wicourts.gov/html/ca/03/03-1869.htm>.

²²⁵ *Commonwealth of Pennsylvania v. Anthoni Diodoro*, para. 1. Superior Court of Pennsylvania (US). 2 November 2006. Accessed on 7 October 2008 from: http://www.superior.court.state.pa.us/opinions/a23036_06.PDF. Note that in this case charges were pressed on the basis of the Pennsylvania state law.

The above debates on the constitutive elements of the possession offence reflect the difficulties in reaching a compromise between punishing ill-intentioned offenders, and protecting those individuals who ‘accidentally’ access child pornography. For example, those who accidentally browse a website and immediately cancel the navigation. In such a case, images could still be saved in a computer’s temporary folders, albeit in the absence of a *mens rea* or ‘guilty mind’, which is a necessary element of the crime.

Courts have, on occasion, displayed judicial creativity in an effort to circumvent the possession loopholes. In a key **United Kingdom** ruling on Internet pornography in *R. v. Bowden*, the Court ruled that the downloading and/or printing out of computer data of indecent images of children from the Internet could amount to an offence under Section 1(1)(a) of the *Protection of Children Act* of 1978, which provides that “it is an offence for a person to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child”. Three judges ruled that the acts of downloading and printing amounted to the “making” of an indecent photograph or pseudo-photograph of a child, even though the material created was for private use, and therefore constituted an offence under the Act. It is interesting to note the Court’s policy rationale in making the decision:

“The Act is not only concerned with the original creation of images, but also their proliferation. Photographs or pseudo-photographs found on the Internet may have originated from outside the United Kingdom; to download or print within the jurisdiction is to create new material which hitherto may not have existed therein.”

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Such judicial interpretation certainly emphasises the importance of clear and concise criminal law. Legal provisions should spell out all prohibited activities related to child pornography, giving law enforcement a clear indication of what activities amount to a criminal offence.

According to the Committee on the Rights of the Child, while the use of children in pornography may be prohibited under children’s acts, States should nevertheless specifically criminalise the production, distribution, dissemination, importation, exportation, offer, sale and possession of child pornography as it is defined in the OPSC.²²⁷

²²⁶*R. v. Jonathan Bowden*. 1 Cr. App. R. 438 (UK). 2000. Accessed on 7 October 2008 from: http://www.geocities.com/pca_1978/reference/bowden2000.html.

²²⁷Committee on the Rights of the Child. *Concluding observations: Sudan*, para. 23(b). UN Convention on the Rights of the Child. 8 June 2007.

Accessing and viewing offences- solving the problem of possession without the downloading requirement

As stated above, the offence of possession has given rise to debate when applied to the act of obtaining child pornography via computer; most notably on the question of whether the actual downloading of images onto a computer hard drive is required to establish possession. As a way to circumvent potential evidentiary problems, ECPAT believes that States should include a separate offence of “viewing and accessing” child pornography in their national body of laws.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse establishes a new offence of **“knowingly obtaining access, through information and communication technology, to child pornography”**, which is intended to catch those who access child pornography websites without downloading. The act must be intentional, meaning that it would not cover those who come across child pornography websites inadvertently.²²⁸ The foregoing is subject to an important caveat: States may reserve their right not to criminalise this conduct.²²⁹

Canadian Parliament amended its *Criminal Code* by the adoption in 2001 of *Bill C-15A: An Act to Amend the Criminal Code*, which created an offence of accessing child pornography punishable by up to 5 years’ imprisonment.²³⁰ In contrast to the offence of possession, which, in the context of the Internet, arguably requires that the accused download the material to a computer hard drive, disk or printer, the offence of accessing covers the mere viewing of the material through an Internet browser. However, the accessing must be intentional. In other words, the accused must know before viewing the material, or causing its transmission to himself or herself, that it contains child pornography.²³¹

Canadian legislation thus not only takes into consideration the difference between downloading and viewing an image from the Internet but, it also makes criminal both acts as separate and distinct offences. While this will hopefully shed some light on the interpretation of the possession of child pornography material in the context of computer systems, further debates on the notions of ‘accessing’ and ‘viewing’ are to be expected.

²²⁸CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 140. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²²⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 2(4). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²³⁰This amendment is now embodied in Section 163.1(4.1) of Canada’s Criminal Code.

²³¹Parliament of Canada. *LEGISinfo: 37th Parliament – 1st Session (Jan. 29, 2001-Sept. 16, 2002): Legislative Summary: Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts.*, Accessed on 7 October 2008 from: <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=2979&Session=9&List=ls>.

Procuring child pornography

National laws should also include an offence of procuring child pornography for oneself or for another person, meaning actively seeking such material. Because child pornography is a crime, the process of actively seeking such material should also be considered a crime. In practical terms, this should cover the downloading of computer data as well as the purchase of child pornographic material online.²³²

Defences available to the accused in child pornography cases

ECPAT is increasingly concerned that, despite the adoption of appropriate child pornography legislation by some States, some accused may avail themselves of statutory defences to exonerate themselves from criminal liability for acts that violate the rights of the child. ECPAT is particularly concerned with the defence of ‘artistic merit’ (as opposed to defences of ‘scientific’ or ‘medical’ merit, which are harder to satisfy). In the 2002 **Canadian Sharpe** case, the accused used the defence of ‘artistic merit’ to escape criminal liability for materials written by the accused describing man-boy and boy-boy sexual encounters. The Court held that the writings did have artistic merit; a finding supported by literature professors.²³³ It is necessary to recall that at the time *Sharpe* was decided, Canadian law provided that any objectively established artistic value, however small, could support such a defence.²³⁴

Fortunately, Canada amended its *Criminal Code* and adopted a protection-based defence to charges of child pornography. A defence is now only available where an act in relation to child pornography satisfies a two-step harm-based test: the act in question must have a legitimate purpose related to the administration of justice, or to science, medicine, education or art; and the act must not pose an undue risk of harm to children.²³⁵

ECPAT welcomes this new approach which builds in a child protection component, but remains concerned with the future interpretation of these provisions that may be given by Canadian courts; especially in light of their very broad interpretation, just a few years ago, of the defence of artistic merit.²³⁶ In fact, the terms ‘legitimate purpose’ and ‘undue risk of harm to children’ have yet to be defined.

²³²CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 138. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²³³*R. v. Sharpe*. Supreme Court of British Columbia (Canada). 2002.

²³⁴*Ibid.* para. 121.

²³⁵Criminal Code, s. 163.1(6), online: <http://laws.justice.gc.ca/en/C-46/>

²³⁶*R. v. Sharpe*. Supreme Court of Canada. 2001.

The defence of artistic merit still prevails in many common law jurisdictions, for instance in many states of **Australia**.²³⁷ Bills have also been introduced to create the defence of 'artistic merit' in child pornography cases in some countries of civil law traditions, such as **Mexico**²³⁸ and **Peru**²³⁹. These bills have not, however, been adopted.

REPORTING CHILD PORNOGRAPHY: A UNIVERSAL DUTY

Who should be subject to reporting obligations?

In Section 2 the notion of reporting obligations was briefly introduced. The obligation to report a suspicion of child sexual abuse or exploitation stems from the duty of care that different stakeholders owe to children and serves to illustrate that all segments of society share the responsibility to protect children. In many jurisdictions, the law imposes reporting obligations upon different categories of individuals. Failure to report by such individuals may lead to prosecution and conviction.

In some jurisdictions the parents and legal guardians of children are legally obliged to report suspicions of child sexual abuse. Similarly, several jurisdictions impose reporting obligations on different categories of professionals such as physicians, social workers, health-care workers, professors and law-enforcement officers. Many jurisdictions have adopted laws imposing the obligation to report abuse on individuals such as professors and nurses, including **Australia**,²⁴⁰ the **United States**²⁴¹ and **Canada**²⁴². As these are federal States, legislation significantly varies between federal units (that is province or state), and hence offers different levels of child protection.

²³⁷In fact the state of New South Wales provides a very broad defense of artistic merit. See Crimes Act 1900, s. 91H(4)(c). Australia. Accessed on 7 October 2008 from: http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol_act/ca190082/s91h.html?query=child%20pornography; see also Sections 70(2)(b) and 70(3) of Victoria state's *Crimes Act, 1958*, in which the defense of artistic merit cannot be relied on if prosecution proves that the person depicted was in fact a minor. Crimes Act 1958, ss. 70(2)(b) & 70(3). Australia. Accessed on 7 October 2008 from: [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/B9CFD00D1D50542BCA2573B70022E3D1/\\$FILE/58-6231a195.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/B9CFD00D1D50542BCA2573B70022E3D1/$FILE/58-6231a195.pdf). Finally, it is interesting to note that Australian Federal law – Section 474.21(2)(d) of the *Criminal Code Act, 1995*, provides a defense of 'public benefit' that includes scientific, medical or educational research but does not mention the artistic merit.

²³⁸Secretaría de Servicios Parlamentarios. *Con proyecto de decreto por el que se reforma y adiciona el artículo 201 Bis del Código Penal Federal, en materia de pornografía infantil en Internet*. Diputada Laura Pavón Jaramillo (PRI). Accessed on 7 October 2008 from: <http://www.cddhcu.gob.mx/servicios/datorele/cmprtvs/1po2/oct/201bisodpenalfed.htm>.

²³⁹Delitosinformaticos.com. *Legislación Sobre Delitos Informaticos Perú: Proyecto de Ley de Delitos Informaticos (Perú)*. Accessed on 7 October 2008 from: <http://www.delitosinformaticos.com/legislacion/peru.shtml>.

²⁴⁰See the fact sheet published by the Australian Institute of Family Studies, an agency of the federal government. Higgins, Daryl, Bromfield, Leah and Richardson, Nick. *Mandatory reporting of child abuse*. Resource Sheet Number 3 August 2007. Australian Institute of Family Studies. Accessed on 7 October 2008 from: <http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.html>.

²⁴¹See the very useful compilation by the Child Welfare Information Gateway, an agency of the US Department of Health and Human Services, of the existing law in the US states and territories. Child Welfare Information Gateway. *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws*. January 2008. Accessed on 7 October 2008 from: http://www.childwelfare.gov/systemwide/laws_policies/statutes/mandaall.pdf.

²⁴²Proposed legislation in Manitoba would also impose such an obligation on all citizens, including IT technicians. Canada: First mandatory reporting law for child pornography. *Globe and Mail*, 28 November 2007. Accessed on 7 October 2008 from: <http://www.crin.org/resources/infoDetail.asp?ID=15687>.

The obligation to report child pornography is usually subsumed under the obligation to report child abuse, and that obligation is, in some jurisdictions, imposed on each and every citizen, whatever their connection to the child.

In addition to “individuals who in their every day professional capacity come into contact with children and owe a certain duty of care to those children”, the International Centre for Missing and Exploited Children (ICMEC) has identified two categories of physical or legal persons²⁴³ which should also be subject to reporting obligations that are specific to child pornography.²⁴⁴ These categories will be used to exemplify how national jurisdiction can foster good child protection practices.

As a general comment, the CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not by itself impose reporting obligations. Neither does it suggest categories of professionals that should bear such obligations, nor specify which competent authorities should handle reports and how they should be handled.

Individuals who, in their professional capacity, do not come into contact with children, but may be exposed to child pornography as a result of their job responsibilities

This category includes any person, from photo developers to IT technicians, who might come across child pornography images in the course of their activities. An obligation to report any suspicion of child abuse is often imposed upon such individuals as part of a comprehensive reporting obligation.

Interestingly, in a recent decision a New Jersey (**United States**) court imposed on an employer a duty to monitor and investigate employee activity when the employer knows or has reason to know that the employee is using a workplace computer to access child pornography.

²⁴³Legal persons' refers to the legal construct which permits entities, such as corporations, to be treated in the same manner as real person. In this, case, for example, a tour company might be subject to prosecution for promoting child sex tourism in the same manner that an individual could be subject to prosecution for such activities.

²⁴⁴International Center for Missing and Exploited Children. *Child Pornography: Model Legislation and Global Review*, p. 4. 2006.

Monitoring employees in the workplace?

In *Doe v. XYZ Corporation*,²⁴⁵ an individual, who had been reprimanded by his employer a number of times over a period of three years for accessing pornography websites, was arrested on child pornography charges. Following his arrest, his computer was searched and many images and child pornography oriented emails were discovered. The individual admitted to downloading over 1,000 images at his workplace and to storing nude photos of his stepdaughter on his office computer. The mother of the stepdaughter brought suit against the employer, claiming that her daughter had suffered severe and permanent harm because the employer failed to report the employee's unlawful conduct to the police.

The Court found that the company knew or at least had reason to know that the employee was downloading child pornography and held that an employer who is on notice that one of their employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties.

This decision is important as it emphasises the very privileged position of employers when it comes to tackling the problem of using computers to access child pornography. Employers may monitor the activities of their employee and easily identify child pornography viewers, which is not usually the case when material is accessed from home or some other 'anonymous' location.²⁴⁶ The Court noted in the above ruling that there is no reasonable expectation of privacy for the use of a computer in the workplace, and therefore an employer should not fear any prosecution arising from the denunciation of an employee.²⁴⁷

Organisations or corporations whose services are being used to proliferate child pornography Internet providers and financial companies

Internet Service Providers (ISPs), Internet content hosts (ICHs), financial companies and institutions do access a great deal of information regarding consumers of child pornography and may facilitate the commission of crimes by providing channels for the exchange of illegal material. These actors should also be subject to reporting obligations.

²⁴⁵ *Doe v. XYZ Corporation*. Superior Court of New Jersey (US). 27 December 2005. Accessed on 7 October 2008 from: <http://lawlibrary.rutgers.edu/courts/wordperfect/appellate/A2909-04.DOC>.

²⁴⁶ *Ibid.* pp. 7-8.

²⁴⁷ *Ibid.* pp. 17-21.

ECPAT has long sought to collaborate with the private sector on different matters relating to child sexual exploitation, and this collaboration has proven successful in many respects.²⁴⁸ Unfortunately, in the case of reporting child pornography, it is impossible to establish partnerships with every single actor (some of which are very small in size), and national law-makers are encouraged to address the problem.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse only minimally contemplates the responsibility of the private sector at its Article 9(2), pursuant to which States should “encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation.”²⁴⁹

In this section, an overview of legislation imposing reporting obligation on different stakeholders pertaining to the private sector will be provided and, where no legislation exists, recommendations on how legal reform could be conducted in that respect will be made.

Overview of legislation imposing reporting obligations on Internet providers and financial companies

ISPs and ICHs²⁵⁰

Legislation in place

When it comes to regulating the legality of the content displayed on Internet, different approaches may be taken by law-makers, each of them placing a more or less heavy burden on both Internet providers and government. These approaches range from imposing a ‘notice and take down requirement’, to the imposition on Internet providers of an obligation to report child pornography, to the more intense and proactive obligation to monitor content displayed on their pages.

²⁴⁸In the fight against child sex tourism, ECPAT has teamed up with various companies from the hospitality sector (see www.thecode.org). Note that the implication of this industry on the issue of sexual exploitation of children will be dealt with in the chapter on child sexual tourism.

²⁴⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 9(2). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²⁵⁰Collectively referred to as ‘Internet providers’.

The ‘notice and take down’ procedure typically involves a denunciation of illegal content on a given webpage, to a tip line or directly to law enforcement authorities. Law enforcement authorities then communicate with the hosting Internet provider and require it to either block access to the site or remove the offending content. This procedure has been adopted in the **United Kingdom**, under the supervision of the Internet Watch Foundation (to which the public may report illegal content). A similar mechanism exists in **Canada** (users can report offending material to a national tip line: www.cybertip.ca).

The imposition of a monitoring obligation that would require ISPs to monitor the content of sites under their control on a continuous basis sounds ideal at first glance. This solution has, however, proven to be problematic in terms of resources and in terms of the availability of the technology to undertake such monitoring.²⁵¹

To date, only a few countries have adopted legislation specifically requiring Internet providers to report child pornography and child abuse material. These countries are **Australia**,²⁵² **Colombia**,²⁵³ **France**,²⁵⁴ **South Africa**²⁵⁵ and the **United States**.²⁵⁶ Among these jurisdictions, only **South African** law imposes an obligation to “take all reasonable steps to preserve evidence of crime for purposes of investigation or prosecution by the relevant authorities”.²⁵⁷ Other jurisdictions have struggled to impose a retention obligation as it sometimes collides with the enforcement of privacy laws.

²⁵¹It should be noted, however, that Sweden has enacted in 1998 the *Bulletin Board System (BBS) Liability Act*, which aims to prevent the spread of child pornography by obligating BBS providers to supervise BBS content. BBS providers are obligated to remove or in some ways prevent the dissemination of messages with criminal content, including those with child pornography. International Centre for Missing & Exploited Children. *Child Pornography: Model Legislation & Global Review*, p. 25. 2006. Accessed on 7 October 2008 from: http://www.icmec.org/en_X1/pdf/ModelLegislationFINAL.pdf.

²⁵²Criminal Code Act 1995, s. 474.25. Australia. Accessed 7 October 2008 from:

<http://law.ato.gov.au/atoLaw/view.htm?docid=PAC/19950012/Sch-Ch10-Pt10.6-Div474-SDivC-474.25>.

²⁵³Ley 679 de 2001 por medio de la cual se expide un estatuto para prevenir y contrarrestar la explotación, la pornografía y el turismo sexual con menores, en desarrollo del artículo 44 de la Constitución, art. 8. Columbia.

²⁵⁴Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, art. 6(1)(7). France. Accessed on 7 October 2008 from: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005789847&dateTexte=20080212>.

²⁵⁵Act No. 18 of 2004: Films and Publications Amendment Act, 2004, s. 27A. South Africa. Accessed on 7 October 2008 from: <http://www.info.gov.za/gazette/acts/2004/a18-04.pdf>.

²⁵⁶US Code, Title 42, s. 13032. United States. Accessed on 7 October 2008 from:

http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00013032----000-.html. It is interesting to note that the provision specifically mentions that it cannot be construed as requiring the provider to monitor the content of communication.

²⁵⁷Act No. 18 of 2004: Films and Publications Amendment Act, 2004, s. 27A(2)(c). South Africa. Accessed on 7 October 2008 from: <http://www.info.gov.za/gazette/acts/2004/a18-04.pdf>.

Panama has enacted a reporting obligation that requires anyone who has knowledge of the use of minors in pornography or sexual activities to report such abuse to the authorities.²⁵⁸ The obligation is not specific to internet providers and exists without regard to whether the knowledge was obtained in the course of an individual's duty, functions, business or employment, or through any other means.²⁵⁹ Failure to report may result in the imposition of a prison sentence of 6 months to 2 years.²⁶⁰

In summary, very few jurisdictions impose obligations on ISPs and ICHs. Although this is problematic, some private sector initiatives are encouraging.

Private, public sector and NGO initiatives

Fortunately enough, some private sector stakeholders have been very proactive in combating the dissemination of child pornography. Efficient initiatives include the blocking by Internet providers of websites that have been previously blacklisted by the authorities or any agencies responsible for monitoring illegal activities on the web. Typically, a customer trying to access a blocked site would get an error message from their web browser, as if the page had failed to load. In the **United Kingdom**, British Telecom has implemented the Cleanfeed system and blocked websites flagged by the Internet Watch Foundation. This initiative has proven successful in cracking down on online child abuse.²⁶¹ Similar initiatives have been set up in **Spain**,²⁶² **Canada**²⁶³ and **New Zealand**.²⁶⁴

Although such initiatives from the private sector are commendable, ECPAT is concerned that the 'voluntary' approach of self-regulation leaves cracking down on child pornography wholly dependant on the good will of the Internet providers. Although some companies have efficiently implemented blocking procedures, some smaller players remain free to collaborate or not with the authorities. **ECPAT believes that legislation should address this issue by creating an offence for the failure to report child abuse material. Moreover, Internet providers should have the obligation to retain information about customers in order to facilitate investigations.**²⁶⁵

²⁵⁸Código Penal [Penal Code], art. 231-I. Panama. Accessed on 7 October 2008 from: <http://www.iin.oea.org/iin/versi%C3%B3n%20final/Panama%20vf.htm>.

²⁵⁹*Ibid.*

²⁶⁰*Ibid.*

²⁶¹See Bright, Martin. BT puts block on child porn sites. *The Observer*, 6 June 2004. Accessed on 7 October 2008 from: <http://www.guardian.co.uk/technology/2004/jun/06/childreansexservices.childprotection>; see also BT sounds child web porn warning. *BBC News*, 7 February 2006. Accessed on 7 October 2008 from: <http://news.bbc.co.uk/1/hi/uk/4687904.stm>.

²⁶²See Proveedores de servicios y contenidos de Internet se unen para defender los derechos de los menores en la Red. *Consumer Eroski*, 8 February 2005. Accessed on 7 October 2008 from: <http://www.consumer.es/web/es/tecnologia/2005/02/08/116485.php>.

²⁶³Canada has also implemented the Cleanfeed project. See Cybertip.ca. *Cleanfeed Canada*. Accessed on 7 October 2008 from: <http://www.cybertip.ca/app/en/cleanfeed>.

²⁶⁴See Society for the Promotion of Community Standards. Society Applauds ISP blocks on Child Porn. *Scoop*, 13 November 2007. Accessed on 7 October 2008 from: <http://www.scoop.co.nz/stories/PO0711/S00223.htm>.

²⁶⁵This possibility has been advocated by the ECPAT group in Canada, Beyond Borders. See Toughen ISP rules on child porn, advocate says. *CBC News*, 18 January 2008 from: <http://www.cbc.ca/canada/manitoba/story/2008/01/18/isp-disclose.html?ref=rss>.

Financial companies facilitating the distribution of child pornography

Legislation in place

So far, the banking and finance sectors seem to have escaped legal scrutiny when it comes to their role in the dissemination and commercial production of child pornography. In fact, while these actors have the possibility of disrupting the functioning of financial mechanisms supporting child pornography websites, very few legal instruments explicitly refer to a bank's or a credit card company's obligation to report suspicious transactions. Although **United States** law, as mentioned above, has imposed a duty to report on Internet providers, a similar obligation remains to be imposed on financial institutions.²⁶⁶

As previously mentioned, Article 9(2) of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse only cautiously contemplates potential reporting obligations for the finance and banking sectors.

Private, public sector and NGOs initiatives

Beyond the law making arena, some interesting initiatives have resulted from the collaboration of NGOs, governmental agencies and the private sector. These initiatives illustrate how financial institutions can be very powerful allies of law enforcement officials in the fight against child pornography. In fact, banks, credit card institutions (Visa, AmEx, Mastercard) and payment gateways (Pay Pal, Pro Pay) often possess key information to identify users and track funds related to the buying and selling of online child pornography. This was demonstrated in the *Regpay* case, in which federal prosecutors cracked down on a child pornography ring in **Belarus** in collaboration with Visa, MasterCard and Morgan Chase.²⁶⁷

In July 2005, the Financial Coalition Against Child Pornography was created, following an initiative of ICMEC and its sister organisation, the National Center for Missing and Exploited Children (NCMEC). Officially launched in March 2006, the coalition aimed at drafting a protocol or statement of principles for adoption and implementation by every nation, in order to establish a proactive system to enable the financial industry to deal more effectively with illegal uses of its systems to disseminate child pornography, to create a system for reporting suspected child pornography, to develop a process for performing test transactions to identify parties involved in child pornography, to ensure that current processes in place to identify money laundering and report unusual circumstances are used to identify illegal child pornography and

²⁶⁶US Code, Title 42, s. 13032. United States. Accessed on 7 October 2008 from: http://www.law.cornell.edu/uscode/html/uscode42/uscode42.usc_sec_42_00013032----000-.html.

²⁶⁷See Scherer, Ron. A siege on the child-porn market. *The Christian Science Monitor*, 16 March 2006. Accessed on 7 October 2008 from: <http://www.csmonitor.com/2006/0316/p01s03-ussc.html>.

to implement monitoring and due diligence checks. The coalition has since published the *Internet Merchant Acquisition and Monitoring Best Practices for the Prevention and Detection of Commercial Child Pornography (Best Practices)*.²⁶⁸ While the coalition targets the organisations or individuals distributing child pornography for money, it does not target individual customers.²⁶⁹

One impressive feature of this initiative is how the coalition has managed to gather key players of the financial world, some of which are otherwise ferocious competitors, to unite forces, share knowledge and eventually cooperate with law enforcement.²⁷⁰ A strong collaboration with law enforcement is critical as it is typically illegal for anyone other than law enforcement officers to view child pornography, thus making it difficult for companies to proceed with their internal controls.²⁷¹ Visa has a program for eradicating child pornography, which includes monitoring the Internet to identify child pornography sites and working with law enforcement.²⁷²

It should also be highlighted that the coalition has managed to disseminate its *Best Practices* through national institutions such as the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC); institutions which regulate different aspects of all US chartered and foreign banks located in the US.²⁷³ The coalition has also recently extended its reach beyond US borders by rallying the Association of Banks in **Singapore**²⁷⁴ and the European Banking Federation.²⁷⁵

The issue of non-traditional payment methods

Although these initiatives take us one step further in the fight against child pornography, they fall short of reaching all those involved in processing payments for child pornography. The voluntary nature of the coalition leaves out many novel forms of

²⁶⁸ See International Centre for Missing & Exploited Children. *Financial Coalition Against Child Pornography*. Accessed on 7 October 2008 from: http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&Pagel=3064.

²⁶⁹ See Child Focus. *Le blocage des paiements via les canaux bancaires habituels soutient la lutte contre la pornographie enfantine sur l'Internet* Child Focus se réjouit de la réaction positive des banques européennes. 4 May 2006. Accessed on 7 October 2008 from: <http://www.childfocus-net-alert.be/fr/BlocagePaiements.pdf>.

²⁷⁰ The list of coalition members can be found on ICMEC's website. International Centre for Missing & Exploited Children. *Financial Coalition Against Child Pornography*. Accessed on 7 October 2008 from: http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&Pagel=3064.

²⁷¹ See Scherer, Ron. A siege on the child-porn market. *The Christian Science Monitor*, 16 March 2006. Accessed on 7 October 2008 from: <http://www.csmonitor.com/2006/0316/p01s03-ussc.html>.

²⁷² Visa has demonstrated numerous elements of good practice. See Visa. *Fighting Internet Child Pornography*. Accessed on 7 October 2008 from: <http://www.visa-asia.com/ap/sea/cardholders/society/acp.shtml>.

²⁷³ See Comptroller Distributes Booklet to Help Banks Fight Child Pornography. *Comptroller of the Currency Administrator of National Banks*, 9 August 2007. Accessed on 7 October 2008 from: <http://www.occ.treas.gov/ftp/release/2007-81.htm>; see also *Preventing and Detecting Child Pornography: Best Practices from the Financial Coalition Against Child Pornography*. Federal Deposit Insurance Corporation Financial Institution Letter. 24 August 2007. Accessed on 7 October 2008 from: <http://www.fdic.gov/news/news/financial/2007/fil07072.html>.

²⁷⁴ See Association of Banks in Singapore. Singapore Banks Join Global Battle Against Child Pornography. *National Center for Missing and Exploited Children*. 17 January 2007. Accessed on 7 October 2008 from: http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&Pagel=3041.

²⁷⁵ See Child Focus. *Le blocage des paiements via les canaux bancaires habituels soutient la lutte contre la pornographie enfantine sur l'Internet* Child Focus se réjouit de la réaction positive des banques européennes. 4 May 2006. Accessed on 7 October 2008 from: <http://www.childfocus-net-alert.be/fr/BlocagePaiements.pdf>.

electronic payment, such as the popular 'digital currencies'. The peculiarity of this method of payment resides in the very anonymous way in which units are traded and materials acquired. In fact, only a few clicks of a mouse allows the user to open an account, many times with a bogus name, and to convert actual money to units which can thereafter be freely traded in absolute anonymity. As a result, even if the initial purchase of units can be tracked down through a credit card number or a bank account wire number, further transactions in the digital units are virtually untraceable.²⁷⁶ It has been noted that some sites featuring child pornography are dropping Visa and MasterCard in favour of more 'anonymous' methods of payment.²⁷⁷

Digital currencies came under public and law enforcement scrutiny recently when a US Grand Jury indicted the company E-Gold and its founders on charges of conspiracy to engage in monetary transactions derived from child exploitation. The indictment contends that officers of the company knew of the illicit nature of the transfers but nevertheless refused to denounce the actions to the authorities. The future will tell us how the case will be handled.²⁷⁸

In summary, strong laws are needed to curtail the operations of such companies, including laws that impose strong reporting obligations on those providing a platform of exchange for online merchants and stronger obligations on merchants to collect reliable data so that no crime of sexual exploitation of children remains unpunished.

²⁷⁶See Gold Rush: Online payment systems like e-gold Ltd. are becoming the currency of choice for cybercrooks. *Business Week*, 9 January 2006. Accessed on 7 October 2008 from:
http://www.businessweek.com/print/magazine/content/06_02/b3966094.htm?chan=gl.

²⁷⁷*Ibid.*

²⁷⁸The indictment can be viewed at the website of the US Department of Justice. *United States v. E-Gold, Ltd. et al.* Indictment. US District Court for the District of Columbia. 24 April 2007. Accessed on 7 October 2008 from:
www.usdoj.gov/criminal/ceos/Press%20Releases/DC%20egold%20indictment.pdf.

LEGAL REFORM CHECKLIST

- √ National legislation has adopted a clear definition of 'Child Pornography', excluding vague terms such as 'obscene' or 'indecent'
- √ The definition encompasses a broad spectrum of depictions, whether fixed in visual, audio or electronic support
- √ National legislation includes 'virtual child pornography' and there is no requirement to prove that a 'real' child has been used
- √ National legislation criminalises a broad range of activities including simple possession, procuring, accessing and viewing, producing and making, distributing, disseminating, importing, exporting and offering
- √ Reporting of suspected sexual abuse/exploitation is mandatory for persons in positions of responsibility (see section 2, pages 47 and 55)
- √ Individuals and professionals who may be exposed to child pornography because of the nature of their work are subject to reporting obligations
- √ Internet providers and financial companies are subject to reporting obligations

SECTION 5

CHILD SEX TOURISM

Objectives:

- To offer an overview of the phenomenon of child sex tourism and legal responses
- To discuss extraterritorial legislation as a tool in the fight against child sex tourism; to explain some of the difficulties associated with its implementation
- To suggest how extraterritorial laws can be strengthened
- To discuss tourism industry liability and how to bring tour operators and travel agents to account
- To emphasise the importance of the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism and related legal responses

Key Provisions:

- Preamble and Articles 3(2), 4 and 10(1)(3) of the OPSC
- Explanatory Report of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse²⁷⁹
- The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism²⁸⁰

This section examines the phenomenon of child sex tourism and offers an assessment of some of the legal responses generated by the international community and their implementation at country level. It also discusses some of the roles of the tourism sector as a key ally in the fight against child sex tourism and the need to impose corporate liability in order to strengthen existing legal frameworks.

CHILD SEX TOURISM: AN OVERVIEW²⁸¹

The problem of child sex tourism was first brought to the world's attention in the early 90's, largely as a result of the work of ECPAT and other NGOs. The international community's recognition of and concern for "the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale

²⁷⁹Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²⁸⁰The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism. Accessed on 1 October 2008 from: <http://www.thecode.org/>.

²⁸¹For a more detailed overview of child sex tourism see ECPAT International. *Combating Child Sex Tourism: Questions & Answers*. 2008.

of the children, child prostitution and child pornography” was also clearly stated in the OPSC preamble.²⁸² While in past years measures to counter these crimes have been delineated and made binding upon States parties, little progress has been achieved to effectively halt the problem.

A definition of child sex tourism

ECPAT defines child sex tourism as the sexual exploitation of children by a person or persons who travel from their home district, home geographical region or home country in order to have sexual contact with children. Despite what the term suggests, child sex tourists can be domestic travellers or they can be international tourists. Offenders often travel from a richer country (‘sending countries’) to one that is less developed (‘destination countries’), but they may also be travellers within their own countries or regions.

Child sex tourism often involves the use of accommodation, transportation and other tourism-related services that facilitate contact with children and enable the perpetrator to remain fairly inconspicuous in the surrounding population and environment.

In spite of some progress in enacting measures to counter child sex tourism in recent years, the problem persists. In fact child sex tourism is a growing phenomenon which seriously harms countless children around the world; often with irreparable consequences.

No destination immune: from the US to Canada

Lynn Winslow, a US Army retiree, was arrested in 2005 as he attempted to board a plane to Australia. He believed that he was travelling there to have sexual relations with a six year old girl, which had in fact been arranged for him by an undercover Australian policeman.²⁸³ In another case, a 31 year old American named Elisha Pasdeck was indicted in Springfield, IL, for allegedly travelling to Saskatchewan, Canada, in July 2002 and engaging in sexual conduct with a 12 year old.²⁸⁴ Also, Saudi Arabian citizen Nabil Al Rowais was arrested and charged for travelling to the US with the alleged intent to molest a two and a half year old girl.²⁸⁵

²⁸²Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

²⁸³Scarcella, Michael A. Sex Offender’s Trip Cut Short at Airport. *Herald Tribune*, 9 August 2005.

²⁸⁴Montgomery County man pleads guilty to international child sex exploitation, transporting child pornography. *US Immigration and Customs Enforcement News Releases*, 16 April 2006, available at: <http://www.ice.gov/pi/news/newsreleases/articles/060417illinois.htm?searchstring=Montgomery%20AND%20child%20AND%20exploitation>.

²⁸⁵Molestation Sting Nets Saudi Tourist, *The Associated Press*, 28 April 2006. Accessed on 29 September 2008 from available at <http://www.msnbc.msn.com/id/12538200/>.

Underlying factors and driving forces

Poverty is often cited as the main driving force behind the different manifestations of CSEC. Other factors such as social inaction, living and working on the streets, domestic abuse of children and neglect also play a significant role in increasing children's vulnerability to sexual exploitation.

Destinations tend to shift from one country or region to another with the opening up of transportation routes and markets, unregulated mass tourism development and accentuated wealth discrepancies. As protection and prevention strategies increase in certain countries, child sex tourists easily adapt and change destinations. Long affected destinations include **Brazil, Mexico, the Philippines and Thailand**. Emerging destinations include **Argentina, Cambodia, Colombia, Czech Republic, India, Kenya, Laos, Mongolia, Peru, South Africa and Vietnam**.

Weak legal frameworks are one of the factors that increase children's vulnerability and encourage demand. In fact, child sex offenders tend to choose destinations known for their lenient laws. In this context, the importance of severe laws coupled with strict penalties that reflect the gravity of the offences committed and also act as efficient deterrents cannot be overemphasised.

Tourism is not the cause of child sexual exploitation, but through their use of the numerous tourism services that have increasingly opened up travel destinations around the world (for example budget accommodation, local travel agencies, online booking services and low-cost carriers) tourists can easily gain access to destinations and locations where they are able to have direct contact with vulnerable children. The tourism industry is therefore an important player and a valuable ally in the protection of children from sexual exploitation in tourism. Many national travel and tourism organisations have recognised this danger to children and are working together to take action against people who sexually exploit children in tourism.

Who are the child sex tourists? A classification of child sex offenders in the context of child sex tourism

Child sex tourists come from all walks of life: they may be married or single, male or female, wealthy tourists or budget travellers, national or international travellers.

Preferential offenders and **paedophiles** target children specifically, but most child sex tourists are **situational offenders**, individuals who do not usually have a sexual preference for children but take advantage of a situation in which a child is made available to them.

Child sex tourists often justify their behaviour by claiming that children freely chose this type of 'employment' for themselves. Offenders may also try to rationalise their actions by claiming that sex with a child is culturally acceptable at a destination and may also display well-rooted racist views which regard 'less developed cultures' as inferior and, therefore, do not consider any stigma or moral reprehension as attached to it.²⁸⁶

Another common misperception among sex tourists is that through the provision of money or the exchange of gifts for sexual access to a child, they are benefiting the victims and their families by helping them out of poverty.

Not all child sex tourists fall neatly into the above described categories. However, some cases display features which help illustrate the classifications described above.

a) The situational child sex tourist/offender

Situational offenders abuse children by way of experimentation or through the anonymity and impunity afforded to them by being in a foreign destination. They do not have an exclusive sexual inclination for children. Often the situational offender is an indiscriminate sex tourist who is presented with the opportunity to interact sexually with a person under 18 years of age and takes it. Contrary to popular belief, the majority of child sex tourists are situational offenders, which calls for legal responses that target not only the more organised forms of child sex tourism but also the many instances of more spontaneous, opportunistic abuse.

Very few situational child sex tourists are arrested, tried and sentenced. This may be because they do not necessarily produce imagery of the abuse carried out nor do they go to extreme means to harm children such as contacting paedophile networks or exchanging pornography. As they are often more involved in the sexual exploitation of adolescents rather than young children, they may benefit from a social tolerance in both sending and destination countries around sexual exploitation of minors, which is seen as less of a crime (sometimes not seen as a crime at all) than abusing children.

Arrested following an investigation into a child pornography ring, French national Amnon Chemouil was tried in 2001 for having sexually abused an 11 year old girl in Pattaya, Thailand when he was presented with the opportunity to do so.²⁸⁷ The abuse

²⁸⁶The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced International Studies. *International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*. January 2007.

²⁸⁷Tiberghien, Nathalie. Un Touriste Sexuel aux Assises. *L'Express*, 19 October 2000. Accessed on 30 September 2008 from: <http://www.lexpress.fr/info/societe/dossier/pedophilie/dossier.asp?id=418775>.

had been filmed by one of two Swiss men who were with Chemouil. During the trial, Chemouil presented his acts as a moment of weakness, apologizing for “stealing [the girl’s] childhood.”²⁸⁸ He also placed all responsibility on himself, in contrast with statements from preferential child sex offenders and paedophiles, who often place the blame on the victim for having seduced the offender. Experts present at the trial did not classify Chemouil as a paedophile. It was the first case in France to be tried under extraterritorial legislation aimed at prosecuting offenders who carry out abuse in a foreign country.

b) The preferential child sex tourist/offender

Preferential offenders have an active sexual preference for children. They are fewer in numbers than situational offenders, but can potentially abuse larger numbers of children as this is their desire and intention. Preferential child sex tourists will generally actively search for pubescent or adolescent children. This category of child sex offender represents a minority of the overall total. It is important to distinguish the preferential child sex tourist from the paedophile described below.

In April 2005, in Thailand, Singaporean national Darwis Rianto Lim, 31, a teacher at Temasek Polytechnic School of Applied Science, was arrested by Thai police in a hotel room for allegedly trying to buy sex with underage boys over the Internet.²⁸⁹

Following tip-offs from US Immigration and Custom Enforcement special agents and Australian Interpol officers who had monitored the teacher’s attempts to buy sex with Thai boys over the Internet, undercover police officers from Thailand’s Central Investigation Bureau posed as sex agents to entrap the teacher.

Shortly after arriving in Bangkok, Lim allegedly posted messages on the Internet offering US\$200 for sex with a boy aged between 12 and 16 years.²⁹⁰ After being told about three boys, he allegedly picked a 16 year old and was arrested while paying the undercover police 8,000 Thai Baht.²⁹¹

²⁸⁸ *Ibid.*

²⁸⁹ Nu-Wen, Seto. Special US Police Unit Spies on Suspected Paedophiles. *The Electronic New Paper*, 21 August 2005.

²⁹⁰ Wee, Eugene. Thai Child Sex Case: Arrested Man Poly Lecturer. *The Electronic New Paper*, 30 April 2005.

²⁹¹ *Ibid.*

While in some situations the boundaries between the categorisations of preferential and situational abusers are blurred, in this case Lim actively sought sexual contact with adolescent minors (but not with pre-pubescent children), most likely placing him in the preferential child sex offender category.

c) The paedophile

The paedophile manifests an exclusive sexual inclination for pre-pubescent children. Usually considered as someone suffering from a clinical disorder, the paedophile may not necessarily show any preference for the gender of children and may not view sexual contact with children as harmful. Paedophiles and preferential abusers constitute a minority of child sex tourists.²⁹²

Therefore, in spite of the extensive media coverage around so-called paedophile child sex tourists, it is not necessarily accurate to call a person who sexually exploits or abuses a child as such. The term 'child sex offender' is preferred as it includes, but is not limited to paedophiles.

EXTRATERRITORIAL LEGISLATION : A TOOL TO FIGHT CHILD SEX TOURISM

From a legal perspective, the alarmingly high incidence of child sex tourism worldwide can be linked to weak laws that fail to adequately prevent and punish sexual offences against children in destination countries. In some cases laws do exist, but they are not sufficiently enforced. In sending countries, the perception of impunity is also fuelled by the ease with which child sex tourists may evade prosecution simply by returning home.

Recognising the global nature of a growing problem and acknowledging that their own nationals do engage in the sexual exploitation of children, some sending countries have opted to strengthen their legal frameworks through the enactment of **extraterritorial legislation** or the application of an existing jurisdiction to offences against children. As of October 2007, over 40 countries have enacted, or will apply, such laws, with varying levels of success in their implementation.

²⁹²ECPAT is aware that there is a discussion in psychological and medical circles around the categorisation of paedophilia as a clinical or pathological condition. However, for the purposes of this publication, ECPAT seeks to underline a particular pattern of behaviour targeting pre-pubescent children. This is not to engage in a debate regarding chemical, psychological or social factors behind paedophilia and the sexual abuse of children.

Through extraterritorial jurisdiction, countries can deem an offence committed abroad as an offence committed within their borders. In other words, the prosecution of a country's nationals at home, under national laws is made possible, even for offences committed abroad.

Extraterritorial jurisdiction is particularly useful because:

- It provides a basis for arresting and prosecuting offenders who escape from the destination countries and return to their countries of origin trying to get away from prosecution.
- It sends a clear message that countries will not let their citizens take a 'holiday' from their own legal systems.

ECPAT believes that extraterritorial jurisdiction is a key element of national legal frameworks aimed at combating child sex tourism.

This section explains the foundations and functioning of extraterritorial jurisdiction. As the very low rates of arrests and prosecutions worldwide point to the urgent need for improvement of existing extraterritorial jurisdiction schemes, recommendations for strengthening such jurisdiction are also provided.

Basic principles of criminal jurisdiction

The term jurisdiction generally refers to the power or right of a State to exercise legal authority over a particular individual or matter. Under international law, there is a recognition that in order for a State to assert jurisdiction over a crime, i.e. to proceed to arrest and prosecution, there must be a sufficient link, or 'nexus', between the alleged acts and the State claiming jurisdiction.

Criminal jurisdiction may be based on a number of principles. These include first and foremost the **territorial principle** and four other principles underlying extraterritorial jurisdiction namely (1) the active personality principle; (2) the passive personality principle; (3) the protective principle and (4) the universality principle.²⁹³

²⁹³Amnesty International. Universal Jurisdiction: *The duty of States to enact and enforce legislation*, ch. 1. 1 September 2001. Accessed on 30 September 2008 from: <http://web.amnesty.org/library/index/engior530032001?OpenDocument>.

Territorial jurisdiction: the general rule

For the prosecution of crimes, the primary and most widely accepted form of jurisdiction is territorial jurisdiction, which implies that States may prosecute crimes committed in their territory irrespective of the offender's and/or victim's nationality.²⁹⁴ Thus, as a general rule, if a crime is committed in a given country, it is this country that will be the primary 'jurisdiction holder' with the authority to arrest and prosecute the offender at the place the crime was allegedly committed.

The OPSC makes this principle mandatory:

Article 4 OPSC

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State."²⁹⁵

As the territorial State is the one where victims, witnesses, written and material evidence and the suspect are usually located,²⁹⁶ in many instances it constitutes the most appropriate forum for investigation and prosecution. However, as we also know, in many instances the country where the crime is committed may be unwilling or unable to prosecute for a variety of reasons. In such cases extraterritorial jurisdiction may provide a solution.

²⁹⁴Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

²⁹⁵Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

²⁹⁶Amnesty International. *Universal Jurisdiction: The duty of States to enact and enforce legislation*, ch. 1. 1 September 2001. Accessed on 30 September 2008 from: <http://web.amnesty.org/library/index/engior530032001?OpenDocument>.

Extraterritorial jurisdiction: the exception

Extraterritoriality can be seen as the jurisdictional element that allows for prosecution of citizens for crimes committed outside of one's country.²⁹⁷

Extraterritorial provisions may be based on different principles of international law, some of which are briefly explained below. There is no universally accepted basis for the provisions, but all countries will base their extraterritorial jurisdiction on one or more of these principles.

- **The Passive Personality Principle**

The Passive Personality Principle prescribes that States may assert jurisdiction on the basis of the nationality of the victim. It derives from the idea that States must protect their own nationals, even when abroad.²⁹⁸ In practice, this means that State A could prosecute a crime committed by a national of State B against a child who is a national of State A, even if the offence was committed outside of the borders of State A.

Both the OPSC and the recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse²⁹⁹ encourage States to prescribe jurisdiction under this principle, but none actually makes it mandatory.

Article 4 OPSC

"2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases [...]

(b) When the victim is a national of that State"³⁰⁰

Bearing in mind that one of the objectives of the OPSC is to counter child sex tourism, in many cases it would make sense to ensure that jurisdiction is as broad as possible in order to allow maximum ground for prosecution.

²⁹⁷ See Fraley, Amy. Child Sex Tourism Legislation under the Protect Act: does it really protect? *St. John's Law Review*, vol. 79:445, April 2005, p. 462.

²⁹⁸ Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 7. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/L-1%20Tom%20Vander%20Beken.pdf>.

²⁹⁹ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

³⁰⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

- **The Nationality Principle (Active Personality Principle)**

The Nationality Principle (Active Personality Principle) is particularly important as it allows States to exercise jurisdiction on the basis of the nationality of the suspect, e.g. over offences committed abroad by their own nationals. The Nationality Principle is reflected in several extraterritorial laws worldwide and serves as a good basis to prosecute child sex tourists, allowing States to prosecute their own nationals under their own laws for crimes committed outside their borders. For example, the Government of Canada could prosecute a Canadian citizen under Canadian law for a crime committed against a child in any other country.

The OPSC encourages the exercise of extraterritorial jurisdiction based on the Nationality Principle but does not compel States to establish jurisdiction based on this principle.

Article 4 OPSC

"2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases:

- (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory"³⁰¹

As the OPSC suggests, the Nationality Principle should be interpreted broadly to allow States to exercise jurisdiction over offences committed abroad not only by their nationals, but also by their residents. The CoE Convention on the Protection of children against sexual exploitation and sexual abuse, on the other hand, makes mandatory the establishment of jurisdiction over offences committed by a State's national or habitual resident.³⁰²

³⁰¹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁰²Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25(1)(d) & (e). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>. Note, however, that the application of this jurisdiction rule to habitual residents is subject to reservation, see art. 25(3).

- **Aut Dedere Aut Judicare**

Article 4 OPSC

“3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.”³⁰³

The OPSC reiterates and makes mandatory the application of the *Aut Dedere Aut Judicare* principle (‘extradite or prosecute’). This principle serves to ensure that countries that do not extradite their citizens take action to ensure culprits do not go unpunished.

- **The Universality Principle**

The Universality Principle is based on the idea that there are crimes so heinous by their very nature that they justify prosecution regardless of the place of their commission or the nationality of the perpetrator or victim. Its application is understood to be reserved for crimes considered “[so] universally repugnant that every State has jurisdiction over them.”³⁰⁴

The Universality Principle is not based on the link between the crime and the State willing to prosecute (as in the case of *locus delicti*, or the status of the victim or the offender). The only element that renders prosecution legitimate is the heinous nature of the crime. To sum up, universality differs from other principles of jurisdiction in that,

³⁰³Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁰⁴Watson, Geoffrey R. Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction, p. 45. *Yale Journal of International Law*, 17, 1992, p. 41.

“Universality does not require a direct connection such as the place of the offence, the nationality of the offender, or the effects of the offence on the prescribing State. The required connection is more abstract. Universal jurisdiction over the specific offences is a result of the universal condemnation of those activities. They are subject to universal jurisdiction as a matter of customary law or as a matter of international agreements.”³⁰⁵

In the realm of customary international law, universal jurisdiction extends to crimes of “piracy, slave trading, war crimes, hijacking and sabotage of aircraft, hostage-taking, crimes against internationally protected persons, apartheid, torture and genocide”,³⁰⁶ although there is no final consensus on a list of crimes to which the Universality Principle could be applied.³⁰⁷

There have been some indications by the international community that sexual crimes against children fall under the category described above. However, this very far from having gained universal acceptance and recent trends in international law are not indicative of such acceptance. In fact, the recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not mention universal jurisdiction.

The Committee on the Rights of the Child has welcomed the Government of **Spain's** affirmation that offences covered by the OPSC are subject to extraterritorial jurisdiction and the principle of universal justice and, in particular, that prosecution is not conditional on the perpetrator being Spanish, resident in Spain or whether the act is classified as a crime in the State in which it was committed.³⁰⁸

³⁰⁵Wilske, Stephen & Schiller, Teresa. International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, pp. 131-132. *Federal Communications Law Journal*, 50, 1997, p. 117.

³⁰⁶Watson, Geoffrey R. Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction, p. 44. *Yale Journal of International Law*, 17, 1992, p. 41. Quoting Randall, Kenneth C. Universal Jurisdiction Under International Law, p. 839. *Texas Law Review*, 66, 1988, p. 785.

³⁰⁷Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 8. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

³⁰⁸Committee on the Rights of the Child. *Concluding observations: Spain*, para. 29. UN Convention on the Rights of the Child. 17 October 2007. Accessed on 30 September 2008 from: <http://www2.ohchr.org/english/bodies/crc/crcs46.htm>.

In Spain, one of the most innovative aspects introduced by the *Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999* was to extend the Universality Principle so that Spanish tribunals would be vested with the required competence to hear cases of ‘child prostitution’ and ‘corruption of minors’ committed by Spanish nationals or aliens outside its territory.

But, as of June 2008, the principle of universal jurisdiction does not extend to cases of ‘sexual abuse’ and ‘sexual assault’. Accordingly, the Spanish clients/exploiters of children under the age of 13 years outside of Spanish territory would not be punished because under Spanish law these are considered acts of sexual abuse/assault, which are not subject to extraterritorial jurisdiction.

In order to address these gaps, a proposal for legal reform was introduced by an *Anteproyecto* of July 2006, recommending the criminalisation of the acts of client-exploiter. The proposal had not been approved as of June 2008.

ECPAT believes that states should ensure jurisdiction over crimes to the maximum extent possible on the basis of the above territorial and extraterritorial jurisdiction principles.

Summary of the basic forms of jurisdiction in the context of the OPSC	
Type of Jurisdiction	OPSC Requirements
Territorial If a crime is committed in country A, this country is the primary ‘jurisdiction holder’ with the authority to arrest and prosecute.	States <i>must</i> exercise territorial jurisdiction. In addition, States who do not extradite must prosecute.
Extraterritorial <ul style="list-style-type: none"> • If the victim is a national of country A • If the suspect is a national of country A • If the national interests of country A are threatened • If country A applies the principle of universal jurisdiction 	States <i>may</i> chose to exercise jurisdiction based on any of these principles but are not legally bound to do so.

EXTRATERRITORIAL LEGISLATION REGARDING OFFENCES AGAINST CHILDREN AS IMPLEMENTED IN SELECTED DOMESTIC JURISDICTIONS

A comparative study of the domestic legal systems of a number of States that have enacted extraterritorial laws reveals the existence of three types of extraterritorial jurisdiction applicable to offences against children committed abroad.

Extraterritoriality as a general principle for certain serious crimes

Extraterritorial laws are not a new phenomenon. In fact, several countries such as **Japan**, the **Netherlands**, **Norway**, **Sweden** and **Switzerland** apply extraterritorial jurisdiction, as a general principle, to offences committed abroad by their nationals. There may not be any distinct provisions to deal with crimes related to child sex tourism; the jurisdiction is simply there under the general category of crimes that can be prosecuted at home even though they were committed abroad.

For example, the **Swedish** *Penal Code* establishes the principle of extraterritoriality of Swedish crimes committed abroad by Swedish citizens and other Nordic citizens.

Extraterritoriality under the Swedish *Penal Code*

“Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden;
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or [...]”³⁰⁹

³⁰⁹Penal Code, pt. 1, ch. 2. English translation. Sweden. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/2707/a/15194>; see also Ministry of Justice of Sweden. *New legislation on sexual crimes*. Fact Sheet. June 2005. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/5076/a/46797>.

Extraterritoriality in Swedish law is based in part on the Nationality Principle. The law's scope is not restricted to Swedish citizens, but also reaches other individuals, such as those residing in Sweden.

Extraterritoriality as applied specifically to sexual offences against children

As will be explained below, the application of extraterritorial jurisdiction is often subject to a number of conditions, such as the requirement of double (or dual) criminality. Such conditions may present some practical obstacles to the prosecution of crimes in the country of the suspect.

Fortunately, over the past years, countries that apply extraterritorial jurisdiction as a matter of general principle have amended their laws to address child sex tourism and to facilitate the prosecution of offences committed against children.

Other countries have enacted new, comprehensive laws to target the problem. In 1994, **Australia** enacted Part IIIA of the *Crimes Act 1914*, which contains offences that apply where Australian citizens and residents engage in sexual activity with children under the age of 16 years while overseas.³¹⁰

Crimes Act 1914

Part IIIA – Child Sex Tourism

Division 2 - Sexual offences against children overseas

50BA. Sexual intercourse with a child under 16

"A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16.

Penalty: Imprisonment for 17 years."³¹¹

50BB. Inducing child under 16 to engage in sexual intercourse

"A person must not induce a person who is under 16 to engage in sexual intercourse with a third person outside Australia and in the presence of the first – mentioned person.

Penalty: Imprisonment for 17 years."³¹²

³¹⁰Crimes (Child Sex Tourism) Amendment Act 1994 No. 105, 1994. Australia. Accessed on 30 September 2008 from: <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/framelodgmentattachments/332EE746136CDDF6CA256F720018338C>.

³¹¹*Ibid.*

³¹²*Ibid.*

Extraterritoriality applied even for attempted crimes

Some countries have chosen to set the bar higher and criminalise even the acts preceding the actual commission of sexual offences with children, e.g. the making of travel arrangements for that purpose. This broadens the scope of extraterritoriality and serves to strengthen preventive measures and stop child sex tourists before they act upon their malevolent intents.

In April 2003, **United States** President George W. Bush signed into law the *Prosecuting Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act)*.³¹³ The *PROTECT Act* criminalises not only sexual acts committed with children abroad, but also:

“Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”³¹⁴

It also criminalises the intent to do so.³¹⁵ As such, it allows for prosecution based on evidence of intent to travel abroad with the purpose of having sexual intercourse with a child. Therefore, evidence that the misconduct actually took place is not an element of the offence. The term “illicit sexual conduct” includes sexual acts with a person under 18 years of age that would be a crime under US law, as well as any commercial sex act (as defined in the law) with a person under 18 years of age.³¹⁶

John W. Seljan was arrested in October 2003 by US government agents in Los Angeles airport as he attempted to board a flight to the Philippines where he intended to have sex with two girls aged 9 and 12 years. Federal agents arrested Seljan after customs inspectors conducting routine checks discovered sexually suggestive letters in internationally bound packages sent by Seljan. Seljan was eventually convicted and sentenced to 20 years’ imprisonment on multiple counts, including attempting to travel to engage in sexual acts with minors and possessing and producing child pornography.³¹⁷

³¹³Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003. United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³¹⁴*Ibid.* s. 105(c).

³¹⁵Before the *PROTECT Act* became law in 2003, the law required the Government to prove that the defendant traveled to a foreign destination for the purpose of engaging in specified sexual conduct with a person under the age of 18 years. The *PROTECT Act* removed the intent requirement so that the Government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.

³¹⁶Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003, s. 105(f). United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³¹⁷*United States v. Seljan*. US Court of Appeals for the Ninth Circuit. 14 August 2007. Accessed on 30 September 2008 from: [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/CB77EE6802F2B37F8825733700587A8B/\\$file/0550236opiniononly.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/CB77EE6802F2B37F8825733700587A8B/$file/0550236opiniononly.pdf?openement).

The Department of Homeland Security's Office of Immigration and Customs Enforcement (ICE) developed Operation Predator, an initiative launched in 2003 to identify, investigate and arrest child predators. Operation Predator draws on ICE's unique investigative and enforcement authority to safeguard children from foreign national paedophiles, human traffickers, international sex tourists and other predatory criminals. Coordinated nationally and internationally through ICE's headquarters, Operation Predator brings together an array of ICE disciplines and resources to target these child sexual abusers. As part of the effort, ICE agents stationed abroad are working with foreign governments and their foreign law enforcement counterparts to enhance coordination and cooperation in the investigation and prosecution of transnational crimes.³¹⁸ Through cooperation with local police forces in Southeast Asia, the US Immigration and Customs Enforcement agency has made 67 arrests under the child sex tourism provisions of the *PROTECT Act*. Of those, 47 have been convicted and others are still being prosecuted.³¹⁹

ECPAT adopts the view that domestic legal systems should criminalise both the acts of travelling with intent to commit a sexual offence against a child and the actual commission of sexual offences against children abroad, thus targeting both predatory and situational/opportunistic offenders.

SOME OBSTACLES TO EXTRATERRITORIAL JURISDICTION

Practical difficulties

Extraterritorial jurisdiction is difficult to apply in practice. It is complicated to obtain evidence across jurisdictions due to associated costs, differences in language, delays in transferring or exchanging documents, support needed for child witnesses, etc.³²⁰

It is also difficult to know how States that have applied extraterritorial jurisdiction have managed, because there is very little data available on arrests and convictions in 'destination' countries, with separate information on cases prosecuted in the 'sending' country.

The Committee on the Rights of the Child asks States who are reporting to it under the OPSC to submit disaggregated data, including data on prosecutions and convictions.³²¹ However, even if a State submits its figures for arrests and convictions, the convictions recorded in the 'sending' country would not be part of the criminal statistics of the 'destination' country; although the arrest might be.

³¹⁸The White House, President George W. Bush. *Fact Sheet: Operation Predator*. 7 July 2004. Accessed on 30 September 2008 from: <http://www.whitehouse.gov/news/releases/2004/07/20040707-10.html>.

³¹⁹US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

³²⁰See Muntarbhorn, V. *Extraterritorial Criminal Laws against Child Sexual Exploitation*. UNICEF. Geneva. 1998.

³²¹Committee on the Rights of the Child. *Revised Guidelines Regarding Initial Reports to be Submitted by States Parties under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. UN Convention on the Rights of the Child. 3 November 2006. Accessed on 30 September 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRC/C/OPSC/2&Lang=E>.

From the information available from the Committee’s reports and other sources, it would appear that, although it is known that many sexual offences are committed by tourists and visitors, not many offenders are actually arrested or convicted, and there are certainly very few known cases of convictions in a ‘sending’ country. The following table is not exhaustive, but it provides a snapshot of experiences from around the world in applying extraterritorial jurisdiction. **Australia**, the **United States** and **France** stand out for the numbers of convictions they have achieved.

Country	Law	Description	Number of Convictions ³²²
Australia	<i>Crimes Act 1914</i> , as amended by the <i>Crimes (Child Sex Tourism) Amendment Act 1994</i> ³²³	The <i>Crimes Act 1914</i> contains a chapter entitled “Child Sex Tourism” which contains offences applying to Australian citizens and residents who engage in sexual activity with children under the age of 16 years while overseas. ³²⁴	20 convictions ³²⁵
Canada	<i>Criminal Code</i> ³²⁶	Since 1997, under section 7(4.1) of the <i>Criminal Code</i> , Canadian citizens and permanent residents can be prosecuted in Canada for certain sexual offences committed against children in other countries. ³²⁷	1 ³²⁸

³²²As of January 2008. Based on research conducted by ECPAT International.

³²³Crimes (Child Sex Tourism) Amendment Act 1994 No. 105, 1994. Australia. Accessed on 30 September 2008 from: <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/frameLodgmentAttachments/332EE746136CDDF6CA256F720018338C>.

³²⁴*Ibid.*

³²⁵Information provided to ECPAT International by the Australian Federal Police Transnational Sexual Exploitation & Trafficking Team Intelligence. October 2007.

³²⁶Criminal Code. Canada. Accessed on 30 September 2008 from: <http://laws.justice.gc.ca/en/showtdm/cs/C-46>.

³²⁷Including offences of sexual interference, invitation to sexual touching, sexual exploitation, incest, child pornography and obtaining the sexual services of a child under 18 years of age. *Ibid.* s. 7(4.1).

³²⁸Donald Bakker of Vancouver was the first to be prosecuted and convicted under Section 7 (4.1). In May 2005, he pleaded guilty to, among other domestic crimes, 7 counts of sexual interference involving children younger than 14 years of age in Cambodia. After he was arrested on sexual assault charges in Vancouver, videotapes were found in his possession depicting him sexually assaulting 7 to 12 year old girls in Svay Pak, Cambodia, between February and March 2003. As of February 2008, there had also been 2 arrests. Kenneth Robert Klassen was charged in 2007 for alleged sex crimes in Cambodia, Colombia and the Philippines. That case has not yet gone to trial. In February 2008, two Quebec humanitarian workers were charged under Canadian extraterritorial law with multiple counts of sexual assaults on minors in a Haitian orphanage.

Country	Law	Description	Number of Convictions
France	<i>Penal Code</i> ³²⁹	French penal law applies to crimes and misdemeanours committed by French persons outside of the French territory. This includes sexual offences against children. ³³⁰	6 convictions ³³¹
Italy	<i>Penal Code</i>	Under Article 604 of the <i>Penal Code</i> , crimes related to CSEC committed abroad by an Italian citizen can be prosecuted in Italy. ³³²	2 convictions ³³³
Japan	<i>Act Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children</i> ³³⁴	Under the first law, crimes of child prostitution and child pornography committed by Japanese nationals outside of Japan are subject to extraterritorial jurisdiction. ³³⁵	4 arrests, 0 convictions ³³⁶

³²⁹Code Pénal [Penal Code], arts. 113-6 to 113-9. France. Accessed on 30 September 2008 from: <http://www.legifrance.gouv.fr>.

³³⁰*Ibid.*

³³¹Information provided by ECPAT France as of December 2007.

³³²*Initial reports of States parties due in 2004: Italy*, para. 19. UN Convention on the Rights of the Child. 15 July 2005. Accessed on 1 October 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.OPSA.ITA.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.OPSA.ITA.1.En?OpenDocument).

³³³Gruppo di Lavoro per la Convenzione sui diritti dell'infanzia e dell'adolescenza. *I diritti dell'infanzia e dell'adolescenza in Italia*, p. 103. Terzo rapporto di aggiornamento sul monitoraggio della convenzione sui diritti dell'infanzia e dell'adolescenza in Italia 2006-2007.

³³⁴As amended by the Law Amending a Part of the Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children (Law No. 106 of 2004) Unofficial English translation. Japan. Accessed on 30 September 2008 from: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=53924.

³³⁵*Ibid.* art. 10.

³³⁶Japan's extraterritorial law is one of the most structurally complete, however, it is not enforced and, as such, fails to protect children. See Svensson, Naomi L. Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws. *Loyola of Los Angeles International and Comparative Law Review*, vol. 28, p. 641. Accessed on 30 September 2008 from: http://ilr.lls.edu/documents/Article6Svensson_000.pdf.

Country	Law	Description	Number of Convictions
New Zealand	<i>Crimes Amendment Act 2005 and Films, Videos and Publications Classification Act 1993</i>	<p>The <i>Crimes Amendment Act 2005</i> created a new extraterritorial offence that makes it illegal to engage in certain sexual conduct with children overseas that would be an offence if it occurred in New Zealand.³³⁷</p> <p>The 1993 <i>Films, Videos and Publications Classification Act</i> also provides for extraterritorial jurisdiction of offences related to child pornography.³³⁸</p>	4 apprehensions ³³⁹
Spain	<i>Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999</i>	This law extended the principle of universal justice so that Spanish jurisdiction could be exercised over crimes of “prostitution and corruption of minors” committed by Spaniards or foreigners outside of the national territory. ⁴⁰⁰	0
United States	<i>PROTECT Act</i> ³⁴¹	The 2003 <i>PROTECT Act</i> makes it a crime to engage in illicit sexual conduct while travelling abroad, regardless of whether that was the intended purpose of the travel. ³⁴²	Approximately 67 arrests and approximately 47 convictions ³⁴³

³³⁷These offences include sexual intercourse and attempted sexual intercourse with children under 16 years of age. See Crimes Amendment Act 2005 No 41 (as at 26 June 2008), Public Act, s. 144A. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/2005/0041/latest/DLM346172.html?search=ts_act_Crimes+Act#DLM346172.

³³⁸Films, Videos and Publications Classification Act 1993, s. 145A(1) & (2). New Zealand.

³³⁹Statistics New Zealand. *National Annual Apprehensions for the latest 10 Fiscal Years*. Fiscal year 2007/08. Accessed on 1 October 2008 from: <http://www.stats.govt.nz/products-and-services/table-builder/crime-tables/apprehensions/apprehension-fiscal.htm>; New Zealand Ministry of Justice. *Protecting Our Innocence: New Zealand's National Plan of Action against the Commercial Sexual Exploitation of Children*, pp. 11-12. February 2002. Accessed on 1 October 2008 from: <http://www.justice.govt.nz/pubs/reports/2002/protect-innocence/index.html>.

³⁴⁰Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999. Spain.

³⁴¹Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003. United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³⁴²*Ibid.*

³⁴³US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

Procedural obstacles to the application of extraterritorial jurisdiction

Apart from the practical difficulties associated with extraterritorial jurisdiction, it is usually also subject to a number of conditions that further complicate its application. The most common are explained below.

Procedural prerequisites for prosecution: victim's complaint and formal State requests

Some countries make prosecution conditional upon the filing of a complaint by the victim or on a formal request of the State of which the victim is a national. Such formalities can cause delays and, in some cases, a failure to prosecute if the officials in the destination country are unfamiliar with the requirements of the offender's country. Children are also very seldom predisposed to filing complaints against their offenders, and those who are may not have the capacity to do so. Finally, this requirement provides an opportunity for offenders to bargain with the victim or the victim's family, and dissuade them from filing a complaint.

Some countries, mainly in Europe, have eliminated this requirement in recent years. For example, in 2002 **Dutch** extraterritorial jurisdiction was made more effective in child sex tourism cases through the abolition of the requirement for a complaint by the victim for the prosecution of offences of sexual abuse of children between 12 and 16 years of age. Before this change was implemented, the criminal justice authorities could not prosecute such offences without a complaint having first been made.³⁴⁴

The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse fills a gap on this specific issue as well, by prohibiting the subordination of the initiation of proceedings to the complaint of the victim, or to a denunciation from the authorities of the State in which the offence took place, further mentioning that "certain states (...) do not always have the necessary will or resources to carry out investigations."³⁴⁵

ECPAT encourages countries whose laws impose such conditions to repeal them.

³⁴⁴Criminal Code, arts. 245, 247 & 248. Netherlands; Code of Criminal Proceedings, art. 167a. Netherlands.

³⁴⁵CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 173. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf. This paragraph is referring to Article 25(6) of the Convention which reads: "For the prosecution of the offences established in accordance with Articles 18, 19, 20, paragraph 1a, and 21 of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1d and e is not subordinate to the condition that the prosecution can only be initiated following a report from the victim or a denunciation from the state of the place where the offence was committed." Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25(6). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>. This provision affects the offences of sexual abuse, child prostitution, production of child pornography and participation of children in pornographic performances.

The discretionary character of the prosecutor's decision to press charges

In some countries prosecution is discretionary (as opposed to compulsory).³⁴⁶ ECPAT adopts the view that a prosecutor who refuses to prosecute a case involving a child victim should always be required to justify her/his decision. Furthermore, it should be possible in all jurisdictions for a foreign victim, or a person or organisation on their behalf, to initiate a prosecution, even where the State authorities have decided not to do so, or to appeal against a decision not to prosecute.³⁴⁷

The prohibition on double-jeopardy

The principle of double jeopardy is interpreted differently across legal systems. In criminal matters it is generally understood to mean that a person cannot be penalised twice for the same offence. In other words, a child sex offender having served a sentence in a foreign country could not be tried again at home for the same crime.

The requirement of double criminality

Most legal systems require that the alleged facts amount to an offence both in the country where the offence is to be tried as well as in the foreign country.

In the light of the significant discrepancies in legal protections for children worldwide, most notably around the age of consent, the requirement for double criminality may constitute a significant obstacle to the prosecution of child sex tourists. For instance, an offender of country A, where the laws protect children up to the age of 18 years and where double criminality is required, travels to country B, where children are protected only up to the age of 15 years, and there abuses a child aged 16 years. Even though the act amounts to a crime according to the legislation of country A, courts of that country would be barred from prosecuting the offender since the act does not amount to a crime in the legal system of country B.

Apart from constituting an obstacle to prosecution, double criminality may also encourage 'forum shopping' among child sex tourists, as offenders often seek jurisdictions with weaker laws where children are not adequately protected.³⁴⁸

³⁴⁶For example, the Japanese *Code of Criminal Procedure* prescribes standards to be used by prosecutors in deciding whether to institute prosecution in a given case.

³⁴⁷ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

³⁴⁸*Ibid.*

In recent years a number of countries have eliminated the requirement of double criminality for the prosecution of certain sexual offences against children.³⁴⁹

In Europe, a positive feature of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse is its abandoning of the double criminality principle. The stated aim is precisely “to combat the phenomenon of sex tourism, whereby persons are able to go abroad to commit acts which are classified as criminal offences in their country of nationality.”³⁵⁰ At wider level, it is unfortunate that the OPSC does not specifically call for the abolition of the double criminality requirement.

Committee on the Rights of the Child calls for the abolition of double criminality

In its review of initial States reports on the implementation of the OPSC, the Committee on the Rights of the Child recommended to several states including **Sudan, Kazakhstan** and **Iceland** that they abolish the principle of double criminality in order to allow, in any case, the prosecution of its nationals who have committed offences covered under the OPSC abroad.³⁵¹

Statutes of limitation

It is not uncommon for States to impose other conditions for the prosecution of crimes committed abroad such as **limitation periods**, which establish the time during which proceedings must be initiated. Once that period has elapsed, proceedings may not be instituted.

³⁴⁹Among those, Denmark reviewed its extraterritorial legislation in relation to crimes involving sexual abuse of children and since 2006 the principle of double criminality no longer applies. See for example Jones, Vernon. *Protecting Children in Asia against Child Sexual Exploitation: A Focus on Travelling Sex Offenders*. Save the Children, Denmark. Accessed on 30 September 2008 from: http://www.UNICEF-irc.org/research/resource_pages/worldcongress3/vernonjones.pdf. In 2005, Sweden eliminated double criminality for serious sexual crimes committed abroad against children under 18 years of age. Ministry of Justice of Sweden. *New legislation on sexual crimes*. Fact Sheet. June 2005. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/5076/a/46797>. In July 2008, the UK removed the double criminality requirement from the *Sexual Offences Act (2003)*. See Beddoe, Christine. *Return to Sender: British child sex offenders abroad - why more must be done*. ECPAT UK. 2008. Accessed on 1 October 2008 from: http://www.ecpat.org.uk/downloads/Return_to_Sender_2008.pdf.

³⁵⁰CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 171. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf. This paragraph is referring to Article 25(4) of the Convention.

³⁵¹See for example: Committee on the Rights of the Child. *Concluding observations: Sudan*, paras. 25 & 26. UN Convention on the Rights of the Child. 21 June 2007. Accessed on 30 September 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRC/C/OPSC/SDN/CO/1&Lang=E>; See also Committee on the Rights of the Child. *Concluding observations: Kazakhstan*, paras. 17-18. UN Convention on the Rights of the Child. 17 March 2006. Accessed on 30 September 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a4a6425529c05a00c1257154004ea441/\\$FILE/G0641034.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a4a6425529c05a00c1257154004ea441/$FILE/G0641034.pdf); See also Committee on the Rights of the Child. *Concluding observations: Iceland*, paras. 15 & 16. UN Convention on the Rights of the Child. 21 June 2006. Accessed on 26 September 2008 from: http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.ISL.CO.1_En.pdf.

The length of the limitation periods vary from country to country. There has been debate around the necessity to harmonise them so that they only start running from the time the child reaches the age of majority under the CRC (18 years of age), rather than from the moment the crime occurred.³⁵² In addition, once a State receives notice that a competent foreign authority has taken steps to initiate proceedings, time should stop running so that the limitation period cannot expire and prevent the victim from obtaining justice.³⁵³

Flexible time periods for the initiation of a prosecution are important for sexual crimes against children, as in many instances, child victims are unable to speak about their experiences until years after the event.

The application of the most lenient of two national laws

It is a general practice for States exercising extraterritorial jurisdiction to apply their domestic laws even though the events took place in a foreign State. However, in the cases of **Switzerland** and **Sweden**³⁵⁵, it is compulsory for courts to apply whichever is the most lenient of the laws of the jurisdictions involved in relation to the applicable penalty.³⁵⁶

CONCLUSION

Some efforts have been made by ‘sending’ countries in recent years to criminalise the behaviour of persons travelling and engaging in sexual activity with children abroad. However, as the above analysis illustrates, there are many obstacles to the efficient functioning of extraterritorial jurisdiction, and it can never be considered the optimum solution. The best protection for children will always be strong national laws that are enforced where offences have been committed.

³⁵²Svensson, Naomi L. *Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws*. *Loyola of Los Angeles International and Comparative Law Review*, vol. 28, p. 641. Accessed on 30 September 2008 from: http://ilr.lls.edu/documents/Article6Svensson_000.pdf.

³⁵³ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

³⁵⁴See Penal Code, arts. 6 & 6bis. Switzerland.

³⁵⁵See Penal Code, pt. 1, ch. 2, s. 2. English translation. Sweden. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/2707/a/15194>.

³⁵⁶ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

TOURISM INDUSTRY LIABILITY: MAKING TOUR OPERATORS AND TRAVEL AGENTS ACCOUNTABLE

This section examines the role of the tourism professionals as a critical resource in fighting child sex tourism. As individuals who are in direct contact with the tourist, they are in a unique position to actively promote responsible tourism, caution the ill-intentioned tourist against inappropriate behaviour and report incidents. Conversely, they may, in fact, be facilitating the sexual exploitation of children by making travel arrangements or transporting individuals for that purpose.

National laws should thus prohibit: the **advertising** or **promoting** of child sex tours; the **organising/making of travel arrangements** for a person for the purpose of engaging in sexual activity with a child at destination; and the **transporting** of a person for the said purpose.

Liability should extend not only to individuals but also to legal persons,³⁵⁷ thus acknowledging the **corporate liability** of the tourism sector. In this regard the OPSC specifically calls upon States to establish the “criminal, civil or administrative” liability of legal persons.³⁵⁸ The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse follows this legal trend, as will be explained below.

Advertising and promoting child sex tourism

There have been instances of tours organised specifically for the purpose of child abuse, but these are relatively uncommon. There are also several travel agencies organizing ‘pleasure tours’ in the course of which children run the risk of being abused. While the majority of child sex tourists do not travel as part of an organised tour, the global and necessary effort to stop demand, nevertheless, requires that access to sex tours be actively discouraged, and that the individuals and companies involved be subject to severe and dissuasive penalties.

³⁵⁷ ‘Legal persons’ refers to the legal construct which permits entities, such as corporations, to be treated in the same manner as real person. In this, case, for example, a tour company might be subject to prosecution for promoting child sex tourism in the same manner that an individual could be subject to prosecution for such activities.

³⁵⁸ The *Optional Protocol* provides: “Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative”. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(4). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The **New Zealand Crimes Act**³⁵⁹ contains a section entitled “Organising or promoting child sex tours”, pursuant to which anyone who “Prints or publishes any information that is intended to promote conduct that would constitute an offence [of sexual conduct with children and young people outside New Zealand³⁶⁰], or to assist any other person to engage in such conduct” is liable to imprisonment for seven years.³⁶¹ Publication of information by any means is covered by the offence, whether by written, electronic or other form of communication, including the distribution of information.³⁶²

In **Taiwan**, the *Law to Suppress Sexual Transactions with Children and Juveniles* contains broad criminal provisions addressing the publishing or broadcasting of advertisements to facilitate involvement in sexual transactions. Violators are subject to 7 years’ imprisonment and/or a fine of up to NT\$1,000,000³⁶³ (approximately US\$30,090).

Requiring tour operators to take an active stance against child sex tourism

While sanctioning the advertising of child sex tourism is important, Italy has set the bar higher by requiring tour operators to expressly repudiate it in their promotional materials, an initiative that ECPAT encourages and supports. Italian law thus requires any ‘tour operator’ organising collective or individual travel outside of Italy to insert a warning on their printed materials and advertising, itinerary and other travel documents, regarding the existence of criminal liability in Italy for offences of child prostitution and child pornography committed abroad. Violators are subject to fines ranging from 1500 to 6000€.³⁶⁴

³⁵⁹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act.

³⁶⁰The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁶¹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(c). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act.

³⁶²*Ibid.* s. 144C(2)(b).

³⁶³Law to Suppress Sexual Transactions with Children and Juveniles, art. 29. Taiwan.

³⁶⁴Legge 6 febbraio 2006, n. 38:(Disposizioni in materia di lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet). Italy. Accessed on 1 October 2008 from: http://www.ecpat.it/cosafacciamo/leggi/legge38_06.html.

Organising child sex tourism

Tour operators and travel agents should also incur liability for facilitating the travel of persons for the purpose of sexually abusing and exploiting children, for example by making travel arrangements for that purpose. The **New Zealand Crimes Act**³⁶⁵ punishes anyone who “[m]akes or organises any travel arrangements for or on behalf of any other person with the intention of facilitating the commission by that other person of an offence [of sexual conduct with children and young people outside New Zealand] whether or not such an offence is actually committed by that other person.”³⁶⁶ Punishment is imprisonment for a term of seven years.³⁶⁷

The specific acts subject to the law include the purchase or reservation of tickets for travel to a country outside New Zealand as well as the purchase or reservation of accommodation in a country outside New Zealand.³⁶⁸

It is not necessary to prove that an actual offence has been committed in order to incur liability. This is also consistent with the general principle that anyone aiding or abetting another person in criminal acts should always be subject to severe punishment. As recognised in the OPSC, acts of **complicity or participation** should not fall outside the scope of the law.³⁶⁹

Transporting a person for the purpose of child sex tourism

Tour operators and travel agencies not only have the opportunity to make travel arrangements for illicit purposes, but they also transport offenders at destinations, possibly enabling them to commit their crimes. The **New Zealand Crimes Act** addresses this and applies the above mentioned penalties to anyone who “Transports any other person to a place outside New Zealand with the intention of facilitating the commission by that other person of an offence [of sexual conduct with children and young people outside New Zealand] , whether or not such an offence is actually committed by that other person”.³⁷¹

³⁶⁵The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁶⁶Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(a). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html?search=ts_act_Crimes+Act#DLM328588.

³⁶⁷*Ibid.*

³⁶⁸*Ibid.* s. 144C(2)(a)(i) & (ii).

³⁶⁹Article 3(2) of the *Optional Protocol* provides that the criminalisation/penalisation of offences shall also apply, subject to the provisions of the national law, to attempts as well as to complicity or participation. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(2). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁷⁰The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁷¹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(b). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html?search=ts_act_Crimes+Act#DLM328588.

In keeping with the main objective of eradicating child sexual exploitation, acknowledging the responsibility of the various stakeholders involved and upholding the principle that all acts of aiding or abetting another person in criminal acts should always be subject to severe punishment. Liability should also extend to tour operator partners at destination. Tour operators working in partnerships should, thus, be required to ensure that their commercial colleagues also respect their child protection obligations.

Italy has been innovative in addressing the wide spectrum of the tourism business, and its Penal Code now directly addresses tour operators and exposes anyone who “organises or advertises travels promoting prostitution, or is involved in such activities” to imprisonment for 6 to twelve years, in addition to fines.³⁷² Interestingly, this responsibility extends to local partners in the country of destination, thus obliging tour operators to hire local contractors who do not promote the prostitution of children. Involving children less than 14 years of age is considered an aggravating circumstance and attracts a penalty of up to eighteen years’ imprisonment.

Corporate liability

The concept of corporate criminal liability is well established in western legal systems. There are different bases for establishing corporate liability, the discussion of which is beyond the scope of the current work. It is worth noting, however, that there is some recognition at the international level of the need to impose liability on legal persons involved in the commission of sexual offences against children. The need to establish corporate liability was recently affirmed in the CoE Convention on the Protection of children against sexual exploitation and sexual abuse. The treaty seeks to make commercial companies, associations and similar legal entities liable for criminal actions that are performed on their behalf, for the entity’s benefit, by anyone in a leading position in them.³⁷³

Under the CoE Convention, sanctions must be effective, proportionate and dissuasive, including imprisonment. They must include monetary criminal or non-criminal fines. States must also provide measures for the seizure and confiscation of the proceeds derived from the offences committed, and measures to enable the temporary or permanent closure of any establishment used to carry the said offences.³⁷⁴

³⁷²Penal Code, art. 600-*quarter*. Italy. As amended by Law No. 269 of 3 August 1998 (1) Norms Against the Exploitation of Prostitution, Pornography, and Sex Tourism Harmful to Juveniles, as New Forms of Slavery, art. 5. Italy. Accessed on 1 October 2008 from: http://www.minori.it/cd/cd_lucca_2003/4/4.3.4_en.pdf.

³⁷³CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, paras. 177 *et seq.* Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

³⁷⁴Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 27(2) & (3). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

The Convention also contemplates the liability of legal persons where someone in a position of leadership fails to supervise or check on an employee or agent of the entity, thus enabling them to commit one of the offences established in the Convention, for the benefit of that legal person.³⁷⁵

The Protection Project has developed a *Model Law on Combating Child Sex Tourism*.³⁷⁶ It is meant to serve as a guide to countries that wish to enact a comprehensive legal framework against child sex tourism, and to provide a model for harmonisation of existing legislation

Soft law initiatives: The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism

The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (Code of Conduct) is an instrument of self-regulation and corporate social responsibility, which was initiated by the ECPAT network to provide increased protection to children from sexual exploitation in travel and tourism. It is regarded as one of the world's major tools for combating child sex tourism and comprises a set of 6 criteria which participating travel and tourism companies follow in order to provide protection to vulnerable children in tourism destinations. Signatory companies must implement the 6 criteria according to a set of minimum standards, a timeframe and subject to reporting requirements.

The criteria are:

1. To establish an ethical policy regarding CSEC;
2. To train the personnel in the country of origin and travel destinations;
3. To introduce a clause in contracts with suppliers, stating a common repudiation of CSEC;
4. To provide information to travellers by means of catalogues, brochures, in-flight films, ticket slips, homepages, etc.;
5. To provide information to local key persons at the destinations; and
6. To report annually.

³⁷⁵ *Ibid.* art 26(2); see also CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 177. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

³⁷⁶ The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced *International Studies. International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*, p. 187. January 2007.

As of late 2007, the Code of Conduct had been signed globally by nearly 600 tour operators, hotels, travel agents and their associations and tourism workers' unions from 26 countries in Europe, Asia, North America and Central and Latin America. More information on the Code of Conduct can be found at www.thecode.org.

CONCLUSION

The fight against child sex tourism calls for a broad range of legislative measures targeting not only the individual offenders who travel for the purpose of committing sexual offences against children, but also the tourism sector, to dissuade it from facilitating the commission of such offences.

While extraterritorial laws are a necessary tool in combating child sex tourism, and while ECPAT encourages 'sending' countries to strengthen their legal frameworks based on the recommendations made in this section, they are usually not a substitute for a trial in the State in which the offence occurred. In practice several States will only exercise extraterritorial jurisdiction if the State in which the offence was committed is unwilling or unable to prosecute.³⁷⁷ For a variety of reasons, the best solution is generally for the offender to be tried in the country in which he/she committed the offence; that is where the victim is situated, and where witnesses and other evidence are found. For the same reasons, where an offender has escaped the jurisdiction in which he committed the offence, extradition back to that country is the best option.³⁷⁸

Extraterritorial jurisdiction should, therefore, be regarded as a subsidiary tool of international law, available only when other avenues are not open. The availability of extraterritorial jurisdiction in itself does not lessen the obligations of 'destination' countries to strengthen their laws and provide effective law enforcement and prosecutions within their own domestic legal systems. **More support must therefore be given to 'destination' countries by building their capacity to enact and enforce local laws to stop child sex tourism.**

The involvement of the tourism industry is essential and requires specific legislative measures. Those individuals and companies encouraging and promoting child sex tourism must be subject to strict criminal laws coupled with severe punishments that reflect the grave nature of sexual offences against children. There has been some progress in this connection but further discussion is to be expected; most notably in the area of corporate liability.

³⁷⁷Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 5. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

³⁷⁸O Brian, Muireann, ECPAT International. *Extraterritorial Jurisdiction: What's it About?* Accessed on 1 October 2008 from: <http://www.preda.org/archives/research/ecpat031001.html>.

LEGAL REFORM CHECKLIST

- √ Child sex tourism is defined and specifically criminalised/penalised in national legislation
- √ Elements of child sex tourism offences include:
 - (1) Engaging in sexual conduct with a child abroad: includes non-commercial and commercial illicit sexual conduct with a child under 18 years
 - (2) Travelling with the intent of engaging in sexual activities with a child abroad
 - (3) Advertising or promoting child sex tours
 - (4) Organising/making of travel arrangements for a person for the purpose of engaging in sexual activity with a child at destination
 - (5) Transporting of a person for the above purpose. Liability of tour operators should extend to local partners on the ground in order to ensure that the operator's liability does not end once the clients have reached the destination
- √ States exercise jurisdiction over child sex tourism crimes based on the Active and Passive Personality Principles (applying to both nationals and residents) and whenever possible, the Universality Principle. The obligation to 'extradite or prosecute' forms part of the national legal system
- √ Eliminate the requirement of a victim complaint or formal State request
- √ Prosecutors' refusal to proceed requires justification
- √ The principle of double jeopardy should not apply unless the person was acquitted or the sentence was served in full
- √ Eliminate the requirement of double criminality in relation to child sex tourism offences
- √ Flexible limitation periods for the initiation of prosecution of sexual crimes against children
- √ Corporate entities are subject to criminal and non-criminal sanctions

SECTION 6

EXTRADITION AND MUTUAL LEGAL ASSISTANCE AS TOOLS TO FIGHT CHILD SEX TOURISM

This section looks at some measures that are available to strengthen international cooperation in investigating and prosecuting sexual crimes against children.

EXTRADITION ARRANGEMENTS

When offences are committed abroad or when offenders escape to another jurisdiction, the State where the offender is found may be required to send the latter back to the country where the offence was committed in order to stand trial in the prosecuting country. This is known as extradition and is defined as the official process by which one nation or State requests and obtains from another nation or State the surrender of a suspected or convicted criminal. The purpose of extradition is to prevent culprits from evading criminal proceedings.

Under international law states do not have an obligation to extradite in the absence of an extradition treaty. This is because under the principle of sovereignty, the consensus is that every State exercises legal authority over people within its borders. Extradition being an exception to the rule, it is therefore often based on a legally binding instrument such as a bilateral extradition treaty, even though states also extradite on the basis of comity, which is the courteous recognition accorded by one nation to the laws and institutions of another.

Australian national Clinton Rex Betteridge, age 35, was arrested and sentenced *in absentia* to 10 years' imprisonment by a Cambodian court in February 2003 for raping a 14 year old girl and assaulting two girls aged between 15 and 18 years. Betteridge fled back to Australia to escape trial. A Brisbane court ruled that Betteridge was eligible for extradition to Cambodia to serve the sentence imposed.³⁷⁹

³⁷⁹Lyall, K. & Saunders, M. Paedophile on Wednesday, Home Free Today. *The Weekend Australian*, 1-2 February 2003.

As a general rule, it is preferable that offenders be tried at the place where the offences were committed. As outlined in Section 5 above, that is where the victim is situated, and where witnesses and other evidence are available. **Therefore, when an offender has escaped the jurisdiction where he committed the offence, extradition back to that country is usually the best option, provided the country possesses resources to ensure efficient prosecution.**

Most countries make extradition conditional upon the existence of a treaty with the requesting country. Where states have concerns about the human rights record of a country and/or its treatment of prisoners, including its application of the death penalty for crimes, they may not be prepared enter into any such agreement to extradite their citizens to that country. Generally speaking there are two kinds of extradition agreements. The most common is the 'list treaty', under which extradition is only possible for an offence that is named in the treaty. These treaties present some difficulties because of the periodic updating they require. The second type of treaty is the 'dual criminality treaty' and generally allows for extradition if the offence attracts a penalty of more than one (or two) year's imprisonment in both countries.

A **Model Treaty on Extradition** was developed to facilitate the development of extradition treaties and can be used as guidance for states that seek to develop such agreements.

Under the Model:

- "Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence."
- Extraditable offences are offences that "are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty."
- "A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties." The request shall be accompanied by an accurate description of the person sought, the text of the relevant law creating the offence and other documents.

There is no country in the world that has extradition treaties with all other countries. However, when circumstances so require, extradition may still take place upon the basis of national legislation.³⁸⁰ The OPSC encourages extraditions by requiring all the offences under its scope to be deemed included in existing treaties. When a country that makes extradition conditional upon a treaty receives a request from a country with which it does not have a treaty, they are invited to consider the OPSC as a basis for extradition. The conditions of extradition will be determined by the laws of the country receiving the request.

Article 5 OPSC

“1. The offences [of sale of children, child prostitution and child pornography], **shall be deemed to be included as extraditable offences in any extradition treaty** existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in such treaties.

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, **it may consider the present Protocol to be a legal basis for extradition** in respect of such offences. **Extradition shall be subject to the conditions provided by the law of the requested State.**”³⁸¹

Whether extradition takes place pursuant to a treaty or pursuant to national laws, in many countries the double criminality principle applies and serves to restrict jurisdiction to that extent.

³⁸⁰O Brian, Muireann, ECPAT International. *Extraterritorial Jurisdiction: What's it About?* Accessed on 1 October 2008 from: <http://www.preda.org/archives/research/ecpat031001.html>; see also Article 5(3) of the OPSC which provides: “States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.” Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 5. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁸¹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 5. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

Committee on the Rights of the Child on Extradition

In its Concluding Observations to the initial state reports on the implementation of the OPSC, the Committee on the Rights of the Child has noted in many instances that legislation regarding extradition was inadequate.

For example, the Committee welcomed the Government of Spain's affirmation that the offences covered by the OPSC were subject to universal jurisdiction, but nevertheless expressed concern that extradition required acts to be defined in both countries' laws as offences.³⁸²

The Committee has expressed similar concerns to the Governments of **Guatemala, Bangladesh, Sudan, the Syrian Arab Republic, Qatar and Morocco.**

The procedural requirements applying to extradition are many and the process may be lengthy and cumbersome. All States should have clear processes for compliance with extradition requests, and sexual crimes against children should be given priority.

Crimes of child sexual abuse and exploitation should be considered as serious offences worldwide. Therefore the requirement of double criminality should never apply to extradition related to such offences and national laws should be amended to be as supportive as possible of extradition.

When extradition does not take place, the OPSC requires ratifying countries to prosecute their nationals for offences covered by the Protocol committed abroad. If an extradition request is made with respect to an OPSC offence, and the requested State party does not extradite on the basis of the nationality of the offender, that State must take suitable measures to submit the case to its competent authorities for the purpose of prosecution.³⁸³ In such case, extraterritorial provisions could be used to prosecute offenders.

³⁸² *Ibid.*

³⁸³ Article 5(5) of the OPSC reads: "If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution." *Ibid.* art. 5(5).

MUTUAL LEGAL ASSISTANCE

Treaties

Securing the presence of an accused through extradition back to the jurisdiction where a crime was committed is one step in the legal process. There are many other obstacles to investigating and prosecuting transnational sexual crimes against children: difficulties in gathering material evidence and testimony from abroad, additional associated costs, complications resulting from the use of different languages, difficulties to identify the victims or witnesses, additional protections needed where the victims and witnesses are children. A lack of information sharing between national police and prosecution services can increase these problems.

Countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country through a process of Mutual Legal Assistance. It can take the form of a treaty but can also be informal.

A mutual legal assistance treaty is an agreement between two countries, for the purpose of gathering and exchanging information in an effort to enforce criminal laws. As holds true for extradition, human rights concerns and double criminality may prevent the provision of mutual legal assistance.

The UN Office on Drugs and Crime (UNODC) has developed a **Model Treaty on Mutual Assistance in Criminal Matters** for states without such treaties or wishing to revise existing treaties.³⁸⁴ The Model provides a basis for legal assistance in taking evidence or statements executing searches and seizures providing information and evidentiary items etc.

Under the Model:

- Parties shall afford to each other the widest possible measure of mutual assistance in investigations or court proceedings.³⁸⁵
- Mutual legal assistance may include: taking evidence or statements from persons; executing searches and seizures; and examining objects and sites.³⁸⁶

³⁸⁴Model Treaty on Mutual Assistance in Criminal Matters. Adopted by UN General Assembly resolution 45/117, subsequently amended by UN General Assembly resolution 53/112. Accessed on 1 October 2008 from: http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

³⁸⁵*Ibid.* art. 1.

³⁸⁶*Ibid.* art. 2.

- A central authority should be designated to handle requests for mutual legal assistance.³⁸⁷ In order to help practitioners draft effective requests, receive more useful responses and streamline the process, the Legal Advisory Programme of the UNODC has also developed a *Mutual Legal Assistance Request Writer Tool*.³⁸⁸ The Tool can be used for all serious offences in a State, not just those covered by the international conventions.
- A list of grounds for refusal is suggested, for example if “the assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction.”³⁸⁹
- Countries may wish to render assistance even in the absence of dual criminality (if the act on which the request is based is not an offence in the requested State) (absence of dual criminality).

ASEAN now has a Treaty on Mutual Legal Assistance in Criminal Matters. In September 2008 it has been ratified by six ASEAN member countries, namely **Brunei, Indonesia, Laos, Malaysia, Singapore** and **Vietnam**.

Some countries also have laws on the provision of mutual legal assistance. For example, under **Thailand’s** *Mutual Legal Assistance in Criminal Matters Act* of 1992, the Attorney General can provide assistance in criminal matters to foreign countries including taking the testimony and statements of witnesses and providing documents, records and evidence to the requesting State. The Act allows for that kind of cooperation even in the absence of a formal treaty between Thailand and the other country.

In addition, Thailand has entered into bilateral mutual assistance treaties with a number of countries, including Britain, 1994; Canada, 1994; China, 2003; France, 1997; Korea, 2003; India, 2004; Norway, 1999; Poland, 2004; Sri Lanka, 2004; and the United States, 1986.

³⁸⁷ *Ibid.* art. 3.

³⁸⁸ <http://www.unodc.org/mla/>.

³⁸⁹ Model Treaty on Mutual Assistance in Criminal Matters, art. 4. Adopted by UN General Assembly resolution 45/117, subsequently amended by UN General Assembly resolution 53/112. Accessed on 1 October 2008 from: http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

In practice the provision of mutual legal assistance can be subject to a number of constraints such as:

- Requests being unclear and returned to the requesting state for clarifications³⁹⁰
- The lack of specialised law enforcers and prosecutors to handle and execute requests
- Incompatibilities between legal systems (for example concerning the admissibility of evidence)

Requests in relation to sexual crimes committed against children should be handled rapidly and effectively. Unduly restrictive conditions on the provision of mutual legal assistance should be removed, including double criminality.

Other Measures

Over the past years some countries have posted police liaison officers abroad with the mandate to collaborate with other national law enforcement agencies. For example:

- The **Australian Federal Police (AFP)** has liaison offices in several countries. For instance, in Phnom Penh it works with the **Cambodian National Police** to assist effective investigation and prosecution of suspected offenders in Cambodia.³⁹¹
- The **US Immigration and Customs Enforcement** agency cooperates with local police forces in Southeast Asia and has to date made 67 arrests under the child sex tourism provisions of the PROTECT Act. Of those, 47 have been convicted and others are still being prosecuted.³⁹²
- **Cambodian** authorities work together with the **British police** to track down sex tourists travelling from the UK to Cambodia to abuse children. British officers assist their counterparts with advice on how to investigate and prosecute child sex offenders.³⁹³

³⁹⁰Van Thiel, Marita. *Challenges in Mutual Legal Assistance (MLA)*. Background Paper presented at Regional Seminar for Asia-Pacific. Making international anti-corruption standards operational: Asset Recovery and mutual legal assistance. Bali, Indonesia (2007). (Commenting on the experience of the Netherlands with the Asian Pacific region). Accessed on 1 October 2008 from: www.baselgovernance.org/fileadmin/docs/pdfs/Bali/Marita_van_Thiel.pdf.

³⁹¹Australian Government, Department of Foreign Affairs and Trade. *Cambodia Country Brief – August 2008*. Accessed on 1 October 2008 from: http://www.dfat.gov.au/geo/cambodia/cambodia_brief.html.

³⁹²US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

³⁹³The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced International Studies. *International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*. January 2007.

Other more informal cooperation mechanisms can be developed and the facilitation of personal contacts between the law enforcers of countries of origin and destination should also be encouraged.

Note that **Interpol** provides information³⁹⁴ about the police and judicial systems of individual countries in Europe, including information on Liaison Officers.

Group of Eight (G8) Experience in the Implementation of Extraterritorial Jurisdiction for Sexual Crimes against Children

1. Victim and witness statement testimony

Due to their frequent movement, child victims are often difficult to find during the initial investigation. Statements should be taken from victims as soon as possible.³⁹⁵

2. Statements of the offender

Whenever possible, law enforcement in destination countries should also be encouraged to record any interview of the offender. Without such recording on file, it may be impossible to go back and correct any errors in a translated text of what the offender initially said.³⁹⁶

3. Documents from destination country

Documents from destination country, such as customs or border control records, can be key documents in a child sex tourism case as they establish when the offender entered or exited that country. Similarly, hotel records from the destination country may often be crucial in such cases, particularly when the hotel is where the sexual activity took place.³⁹⁷

4. Physical evidence

In international child sexual exploitation cases, relevant physical evidence can include contraception, sexual toys, and items of clothing purchased for children. Where sex tourism is suspected in a specific case, law enforcement authorities investigating child sex tourism crimes should be especially alert for cameras,

³⁹⁴Interpol. *European police and judicial systems*. Accessed on 8 October 2008 from: <http://www.interpol.int/Public/Region/Europe/pjsystems/Default.asp>.

³⁹⁵*G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes Against Children*, pp. 4-5. Document from the Meeting of G8 Justice and Home Affairs Ministers, Munich, 23-25 May 2007. 18 April 2007. Accessed on 1 October 2008 from: <http://www.usdoj.gov/criminal/ceos/Extraterritorial%20Jurisdiction.pdf>.

³⁹⁶*Ibid.* p. 5.

³⁹⁷*Ibid.*

computers and electronic storage equipment. That equipment may contain illegal sexually explicit images of children, including images that were produced by the offender while abroad. There is an increasing connection between sex tourism and the production of such sexually explicit images of minors. Not infrequently, sex tourists not only engage in sex acts with children while abroad, but also film or photograph the victims and return home with those illegal images. Unlike sex tourism cases, which usually require the testimony of the victim, prosecutions for the production of sexually explicit images can sometimes proceed without the victim, as the image can speak for itself.³⁹⁸

5. Preservation procedures

With respect to preservation procedures, law enforcement in destination countries may not have evidence custody procedures that are consistent with requirements for admitting physical evidence in home country courts. Accordingly, when physical evidence is seized, home country law enforcement should consider, to the extent possible, taking steps to ensure its admissibility, such as logging the serial numbers of seized cameras and computers, as soon as possible during the investigation.³⁹⁹

The establishment of **national databases** on incidents of child sexual exploitation should also be considered, in order to facilitate the exchange of information among countries as regards victims and perpetrators. Indeed “the end result of the work undertaken by Interpol should be that member states see the need of sharing information and issue Green Notices⁴⁰⁰ on the offenders that travel to commit their crime.”⁴⁰¹

Sex offenders registries should also be put in place with limitations on high risk convicted offenders from leaving their countries.

- In the **United Kingdom**, all sex offenders who are placed on the Sex Offenders Register must notify the police of their intention to travel outside the country. However this only applies when travelling is intended for over three days. ECPAT UK reports that the three-day loophole has allowed British offenders to easily travel and commit sexual offences against children offences and has lobbied for the obligatory notification of all travel abroad regardless of the length of the stay. In 2008, Ministers have announced their intention to close this loophole.⁴⁰²

³⁹⁸*Ibid.* pp. 5-6.

³⁹⁹*Ibid.*

⁴⁰⁰Green Notices serve to provide warnings or criminal intelligence about persons who have committed criminal offences and are likely to repeat these crimes in other countries.

⁴⁰¹Interpol. *Crimes against children*. Accessed on 1 October 2008 from: <http://www.interpol.int/Public/Children/Default.asp>.

⁴⁰²Beddoe, Christine. *Return to Sender: British child sex offenders abroad - why more must be done*, p. 7. ECPAT UK. 2008. Accessed on 1 October 2008 from: http://www.ecpat.org.uk/downloads/Return_to_Sender_2008.pdf.

Hotlines and online reporting forms should be established to provide channels for the public to report child exploitation. Collaboration between law enforcement agencies and NGOs is particularly important in this regard.

- In **Australia**, the Australian Federal Police is working with government agencies and NGOs including Childwise, the ECPAT representative in Australia. Childwise receives reports relating to CSA in Australia and overseas.⁴⁰³ Child sex tourism concerns may be reported to the Australian Federal Police using an online form.⁴⁰⁴
- In **Cambodia**, the NGO World Vision supports a 24-hour public hotline for reporting child exploitation. It currently operates in five Cambodian provinces and the capital city of Phnom Penh and is publicised in tourist hotspots through leaflets, posters, and key chains. World Vision reports that “in the past two years, 1,217 cases of child sexual exploitation, human trafficking, and rape have been reported to Cambodia’s Ministry of the Interior; of those, 645 were reported through World Vision’s hotline. In the past eight months alone, 349 have been cases reported using this method. More than 1,100 investigations have led to more than 665 prosecutions of both local and foreign sex offenders.”

⁴⁰³ See Childwise. *Report Child Abuse*. Accessed on 8 October 2008 from: http://www.childwise.net/report_child_abuse.php.

⁴⁰⁴ See Australian Federal Police. *Child Sex Tourism: Suspicious Behaviour Report*. Accessed on 8 October 2008 from: https://www.afp.gov.au/online_forms/cst_form.html.

LEGAL REFORM CHECKLIST

- ✓ Sexual crimes against children should always be considered as extraditable offences
- ✓ All States should have clear processes for the execution of extradition and mutual legal assistance requests. Sexual crimes against children should be given special priority
- ✓ All States should rapidly and effectively provide mutual legal assistance in relation to all sexual crimes committed against children and ensure that extradition requests are handled in an expeditious fashion
- ✓ Unduly restrictive conditions on the provision of mutual legal assistance should be removed
- ✓ Dual criminality should never restrict the provision of mutual legal assistance in instances of sexual crimes committed against children, nor should it be a consideration in extradition procedures. At a very minimum, States should allow for extradition in cases where conduct is punishable in both States by a deprivation of liberty in excess of an agreed upon period of time

In addition:

- ✓ Exchange of information among law enforcement agencies must be facilitated and national databases should be established. Sex offenders registries should be put in place and relevant authorities (home and destination) should be notified of registered sex offenders' intents to travel
- ✓ Hotlines and other reporting systems should be established so that the general public can take action against child sexual abuse and exploitation.

STRENGTHENING LAWS TO BETTER PROTECT CHILDREN FROM SEXUAL EXPLOITATION

LEGAL REFORM CHECKLIST

ECPAT encourages States to conduct a comprehensive review of existing legislation in the following areas.

(1) State has signed and ratified international and regional instruments

- √ The CRC
- √ The OPSC
- √ The Trafficking Protocol
- √ ILO Conventions 182 and 138
- √ Other applicable regional instruments (see Section 1)

- √ State has submitted its CRC, OPSC and ILO reports and complied with its reporting obligations under the relevant regional instruments

- √ State has removed any reservations that restrict the scope of child rights treaties

(2) Legal definition of a child

- √ The law includes a nationally consistent definition of a child as anyone up to the age of 18 years

- √ Laws on the sexual exploitation of children protect children up to the age of 18 years, irrespective of the age of sexual consent

- √ The law establishes a clear age of sexual consent for the purpose of legal certainty. States with low ages of sexual consent, should amend the laws to raise that age.

- √ In order to avoid punishing consensual sexual activity between peers, States should consider providing a 'close in age' exemption in the law.

- √ Laws establish the responsibilities of parents and legal guardians to protect children under their care from abuse and exploitation. Reporting of suspected sexual abuse/exploitation should be mandatory for persons in positions of responsibility

- ✓ States should review, and if necessary increase, the minimum ages established for marriage, criminal responsibility and employment
- ✓ States should establish mandatory birth registration systems

(3) Legal provisions addressing the sexual abuse and exploitation of children

- ✓ National law establishes offences and penalties relating to the sexual abuse of children
- ✓ Sexual abuse includes:
 - (1) sexual activities with a child who has not yet reached the age of sexual consent
 - (2) sexual activities with a child up to the age of 18 years where use is made of coercion, force or threats, or when the offender abuses a position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child
- ✓ National law addresses the conduct of making a child watch sexual or performing such acts in the presence of children, which could result in harm to the psychological health of the victim
- ✓ National law establishes offences and penalties for the sexual exploitation of children.
- ✓ Sexual exploitation includes:
 - (1) child prostitution
 - (2) child pornography
 - (3) coercing/recruiting children to participate in pornographic performances/sexual posing
- ✓ National law criminalises aiding or abetting and attempts to commit the above offences
- ✓ National law establishes offences of child trafficking for sexual purposes as a process leading to sexual exploitation, in accordance with the Trafficking Protocol

(4) Provisions addressing child prostitution

- ✓ National legislation has adopted a clear definition of 'child prostitution'
- ✓ The use of children in prostitution is defined as an offence distinct from adult prostitution (if adult prostitution has not been legalised or decriminalised), and the penalties are more stringent to reflect the gravity and impact of this crime on the lives of child victims
- ✓ If adult prostitution has been decriminalised or legalised, the use of children in prostitution remains a criminal offence
- ✓ Children are protected from exploitation until the age of 18 years
- ✓ In the context of child prostitution, 'sexual activities' are defined broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Activities covered include not only sexual intercourse, but also sexual touching, masturbation and sexual posing, without distinction for the sex of the victim or perpetrator
- ✓ The element of consideration is construed broadly so as to include any form of compensation
- ✓ The law criminalises all acts of offering, obtaining, procuring and providing a child for prostitution so as to capture the whole spectrum of child exploiters
- ✓ The client/exploiter must be subject to the criminal law; any form of compensation to obtain sexual services from a minor is a criminal transaction
- ✓ Recruiters and those who own, lease or manage premises where prostitution of children occurs are criminalised; there is a duty to report the use of premises for child prostitution
- ✓ Criminal/administrative measures applicable to a child found in prostitution are reviewed. Administrative/criminal codes addressing 'delinquency' or 'anti-social behaviour' on the part of children are reviewed. Legal provisions that result in administrative or other punishment of the victims of CSEC are abolished
- ✓ Guidelines/rules are available to the police and judicial authorities to deal with children found in prostitution

(5) Legal provisions addressing child pornography

- ✓ National legislation has adopted a clear definition of 'Child Pornography', excluding vague terms such as 'obscene' or 'indecent'
- ✓ The definition encompasses a broad spectrum of representations, whether fixed in visual, audio or electronic support
- ✓ National legislation includes 'virtual child pornography' and there is no requirement to prove that a 'real' child has been used
- ✓ National legislation criminalises a broad range of activities including simple possession, procuring, accessing and viewing, producing and making, distributing, disseminating, importing, exporting and offering child pornography
- ✓ Reporting of suspected sexual abuse/exploitation is mandatory for persons in positions of responsibility (see section 2, pages 47 and 55)
- ✓ Individuals and professionals who may be exposed to child pornography because of the nature of their work are subject to reporting obligations
- ✓ Internet providers and financial companies are subject to reporting obligations

(6) Provisions addressing child sex tourism

- ✓ Child sex tourism is defined and specifically criminalised/penalised in national legislation
- ✓ Elements of child sex tourism offences include:
 - (1) Engaging in sexual conduct with a child abroad: includes non-commercial and commercial illicit sexual conduct with a child under 18 years
 - (2) Travelling with the intent of engaging in sexual activities with a child abroad
 - (3) Advertising or promoting child sex tours
 - (4) Organising/making of travel arrangements for a person for the purpose of engaging in sexual activity with a child at destination

- (5) Transporting of a person for the above purpose. Liability of tour operators should extend to local partners on the ground in order to ensure that the operator's liability does not end once the clients have reached the destination
- ✓ States exercise jurisdiction over child sex tourism crimes based on the Active and Passive Personality Principles (applying to both nationals and residents) and whenever possible, the Universality Principle. The obligation to 'extradite or prosecute' forms part of the national legal system
 - ✓ Eliminate the requirement of a victim complaint or formal State request
 - ✓ Prosecutors' refusal to proceed requires justification
 - ✓ The principle of double jeopardy should not apply unless the person was acquitted or the sentence was served in full
 - ✓ Eliminate the requirement of double criminality in relation to child sex tourism offences
 - ✓ Flexible limitation periods for the initiation of prosecution of sexual crimes against children
 - ✓ Corporate entities are subject to criminal and non-criminal sanctions

(7) Extradition and mutual legal assistance

- ✓ Sexual crimes against children should always be considered as extraditable offences
- ✓ All States should have clear processes for the execution of extradition and mutual assistance requests. Sexual crimes against children should be given special priority
- ✓ All States should rapidly and effectively provide mutual legal assistance in relation to all sexual crimes committed against children and ensure that extradition requests are handled in an expeditious fashion
- ✓ Unduly restrictive conditions on the provision of mutual legal assistance should be removed

- √ Dual criminality should never restrict the provision of mutual legal assistance in instances of sexual crimes committed against children, nor should it be a consideration in extradition procedures. At a very minimum, States should allow for extradition in cases where conduct is punishable in both States by deprivation of liberty in excess of an agreed upon period of time

In addition:

- √ Exchange of information among law enforcement agencies must be facilitated and national databases should be established. Sex offenders registries should be put in place and relevant authorities (home and destination) should be notified of registered sex offenders' intents to travel
- √ Hotlines and other reporting systems should be established so that the general public can take action against child sexual abuse and exploitation.



STRENGTHENING

Laws addressing child sexual exploitation

A Practical Guide



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GLOSSARY OF ACRONYMS & ABBREVIATIONS

ACC:	African Charter on the Rights and Welfare of the Child
ACHPR:	African Court on Human and Peoples' Rights
AFP:	Australian Federal Police
Agenda for Action:	Stockholm Declaration and Agenda for Action
ASEAN:	Association of Southeast Asian Nations
Banjul Charter:	African Charter on Human and Peoples' Rights
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR:	International Covenant on Civil and Political Rights
CDPC:	European Committee on Crime Problems
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CERD:	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR:	International Covenant on Economic, Social and Cultural Rights
CGI:	Computer generated images
Code of Conduct:	Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism
CoE:	Council of Europe
CRC:	Convention on the Rights of the Child
CRIN:	Child Rights Information Network
CSA:	Child Sexual Abuse
CSEC:	Commercial Sexual Exploitation of Children
ECHR:	European Court of Human Rights
ECPAT:	End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes
FDIC:	Federal Deposit Insurance Corporation
FWLD:	Forum for Women, Law and Development
GRETA:	Group of Experts against Trafficking in Human Beings
IACHR:	Inter-American Court of Human Rights
ICE:	US Department of Homeland Security's Office of Immigration and Customs Enforcement
ICH:	Internet content host
ICMEC:	International Centre for Missing and Exploited Children
ICT:	Information and communication technologies
ILO:	International Labour Organization
Internet providers:	ICH and ISP, collectively

ISP:	Internet service provider
IT:	Information technology
MW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
NCMEC:	National Center for Missing and Exploited Children
NGO:	Non-governmental Organisation
OAS:	Organization of American States
OAU:	Organization of African Unity
OCC:	Office of the Comptroller of the Currency
OHCHR:	Office of the UN High Commissioner for Human Rights
OPSC:	Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
PICT:	Project on International Courts and Tribunals
PROTECT Act:	US’s Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003
SAARC:	South Asian Association for Regional Cooperation
SAARC Convention:	SAARC Regional Convention on Preventing and Combating Trafficking of Women and Children for Prostitution
SCIP:	UK’s Safeguarding Children Involved in Prostitution
SITA:	Bangladesh’s Suppression of Immoral Traffic Act
SRSO:	UN Special Representative on violence against children
Trafficking Protocol:	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children
UK:	United Kingdom
UN:	United Nations
UNHCHR:	UN High Commissioner for Human Rights
Unicef:	UN Children’s Fund
UNODC:	UN Office on Drugs and Crime
US:	United States of America

PREFACE

Strong laws, together with effective enforcement procedures which are child sensitive, are of crucial importance to protect children from all forms of sexual exploitation including child prostitution, child pornography, child trafficking for sexual purposes and child sex tourism. While progress has been made through international and regional standard-setting and national law, ECPAT International's work has demonstrated the inadequacy of their implementation. Around the world, basic legal provisions that clearly define and prohibit the different manifestations of child sexual exploitation are still lacking; and when they are in place, their enforcement remains a significant challenge.

This guide was developed to support a necessary transition from aspiration to action. It consolidates and builds upon the ECPAT network's experience monitoring and its systematic assessment of the implementation of international commitments such as the Stockholm Declaration and Agenda for Action and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Through this work, ECPAT has identified major gaps in protection and made concrete recommendations for change. The ECPAT network has also initiated and supported legal reform initiatives around the world which provide a solid foundation upon which it will continue building.

ECPAT is committed to supporting legal reform to ensure that national laws not only comply with international standards but that they are implemented to protect children. In fulfilling this mandate, ECPAT will continue to collaborate with government institutions, international and non-governmental organisations, professionals and all those involved in the protection and promotion of children's rights to live free from all forms of sexual abuse and exploitation. Against this background it is hoped that this guide will serve as a practical tool towards strengthening laws addressing child sexual exploitation so that we can put an end to these inhumane violations.

Purpose of the Guide

ECPAT International's work in combating commercial sexual exploitation of children has revealed the need for more guidance on the implementation of international legal standards, more specifically regarding the enactment of laws addressing the different manifestations of child sexual exploitation. While several international instruments exist, their provisions are far from being uniformly understood and applied and national laws vary substantially. This guide thus examines the international legal framework and provides examples of implementation at national level. It also suggests key elements of national legislation aimed at eliminating the sexual exploitation of children.

The guide was developed for international and non-governmental organisations, government institutions, professionals and all those working to end the sexual exploitation of children. Its purpose is three-fold: (1) to serve as a practical tool in the assessment of national child protection frameworks; (2) to inform the process of harmonising and strengthening legislation; and (3) to support advocacy for legal reform to better protect children. ECPAT International hopes that this guide will generate a dialogue among all concerned stakeholders that will further strengthen action against the sexual exploitation of children.

Some limitations

Comprehensive legal frameworks to better protect children from abuse and exploitation include several interlinked components such as laws regulating the provision of child welfare services and laws establishing juvenile justice systems. This guide focuses primarily on criminal laws to deter and punish child sexual exploitation as a key element of broader child protection frameworks. In this perspective it is meant to complement other existing tools and resources and to be read in conjunction therewith.

Use of definitions and terminology

There is currently some debate in the international community on the use of terms such as child pornography and child prostitution. Suggestions have been made to replace them with terms considered to better capture the abusive and exploitative nature of the crimes committed, such as child abuse images or children exploited in prostitution. While ECPAT welcomes the debate, for the sake of consistency throughout this guide reference will be made mostly to the terms that have been internationally agreed in the main existing conventions.

How to use the guide

The guide has been divided into six sections which can also be used on their own:

- Section 1 offers an overview of the main relevant international and regional legal instruments;
- Section 2 sheds some conceptual clarity on basic terms such as ‘child’, ‘child sexual abuse’ and ‘child sexual exploitation’ and emphasises the importance of consistent legal definitions;
- Sections 3 through 5 address respectively child prostitution, child pornography and child sex tourism as human rights violations;
- Section 6 briefly examines some key international cooperation measures such as extradition and mutual legal assistance.

Each section suggests a ‘legal reform checklist’ that States are encouraged to consider. A suggested ‘global checklist’ is offered at the end, which is not meant to be exhaustive or applicable to every legal system but rather to provide guidance.

For more information on the work of ECPAT please visit our website at www.ecpat.net or contact us at info@ecpat.net.

SECTION 1

THE INTERNATIONAL LEGAL FRAMEWORK

Objectives:

- To provide an overview of the main international and regional human rights legal instruments, in particular those relevant to the sexual exploitation of children
- To outline their main provisions as well as their monitoring and reporting mechanisms
- To provide a basic understanding of the functioning of human rights courts

HUMAN RIGHTS INSTRUMENTS

Universal human rights are those rights considered to be inherent to all human beings, irrespective of nationality, place of residence, sex, national or ethnic origin, colour, religion, age or any other status. Many of these rights are guaranteed by domestic and international law, through treaties and State law as well as through other sources of law.

Treaties are legally binding agreements concluded between States in written form.¹ Binding international legal instruments can also be referred to as **Conventions, Protocols, Agreements, and Covenants. Declarations and resolutions** are also legal instruments. They are not legally binding, but declare the aspirations of the States parties.

The United Nations (UN) human rights treaties lie at the very heart of the international system for promoting and protecting human rights. There are nine core international human rights treaties:

- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The International Covenant on Civil and Political Rights (CCPR) and its two optional protocols;
- The International Covenant on Economic, Social and Cultural Rights (CESCR);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its optional protocol;
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
- The Convention on the Rights of the Child (CRC) and its two protocols;

¹ The Vienna Convention on the Law of Treaties provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties, art. 26. Entered into force 27 January 1980. Accessed on 3 October 2008 from: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MW);
- The International Convention for the Protection of All Persons from Enforced Disappearance;² and
- The Convention on the Rights of Persons with Disabilities.

Many of these treaties have widespread acceptance by States. Since the adoption of the Universal Declaration of Human Rights in 1948, all UN member States have ratified at least one core international human rights treaty, and 80% have ratified four or more.³

THE LANGUAGE OF INTERNATIONAL LEGAL INSTRUMENTS

1. **Adoption** refers to the formal act of establishing the language of the treaty. This is usually done by consent of the States that negotiated the treaty.
2. By providing its **signature**, a State expresses its intention to ratify, accept or approve the treaty in the future but it does not establish its consent to be bound. Once a State has signed a treaty it becomes obligated to refrain from acting in a manner that would defeat the object and purpose of the treaty.
3. **Ratification** is the process by which a State agrees to be bound by the obligations set forth in a treaty. States ratify treaties in different ways depending on their own legal systems. Ratification may be effectuated through the issuance of a decree, by amending existing laws to conform with treaty obligations or by introducing new legislation making the treaty part of State law.
4. When a State agrees to be bound by the obligations of a treaty but did not participate in its negotiation, the State is said to have **acceded** to the treaty rather than to have ratified it. Accession can be effectuated in the same manner as ratification.
5. A treaty is said to have **entered into force** when a specified number of States have ratified or acceded to it. The exact requirements for entry into force are often detailed in the treaty itself.
6. Each treaty has a committee of experts or 'treaty body' that is responsible for **monitoring** implementation of the treaty's provisions by States parties. Treaty bodies are also responsible for receiving and considering complaints and other communications with regard to the treaty they monitor.
7. A **reservation** is a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. For example, upon ratification of the OPSC, **Sweden** declared that it interpreted the term 'child pornography' to be restricted to visual representations.⁴

² This Convention has not yet entered into force.

³ Office of the High Commissioner for Human Rights (OHCHR). *United Nations Human Rights: Human Rights Bodies*. Accessed on 3 October 2008 from: <http://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx>.

⁴ UN Treaty Collection. *Multilateral Treaties Deposited with the Secretary-General*. Accessed on 7 October 2008 from <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=135&chapter=4&lang=en>.

The Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was the first binding international instrument to set out the civil, political, economic, social and cultural rights of children. It was the result of a decade of negotiations between governments and NGOs. It came into force in September 1990 and currently counts 193 States Parties. Every UN member State has ratified or acceded to the CRC with the exception of **Somalia**⁵ and the **United States**⁶.

The CRC establishes four core principles that must be followed by States with regard to the human rights of children. These principles are:

- **Non-discrimination:** all children have the rights set forth in the CRC and States must actively identify individual children and groups of children for whom the recognition and realisation of those rights demands special measures⁷
- **The best interests of the child** as a primary consideration in all actions concerning children⁸
- **The child's inherent right to life and States parties' obligation, to ensure to the maximum extent possible, the survival and development of the child**⁹
- **Children's participation rights:** children have the right to voice their opinion and to participate in the promotion, protection and monitoring of their rights¹⁰

⁵ At present, Somalia is without a functioning central government. However, parties within the Government structure have committed to signing and ratifying the CRC once the situation is rectified.

⁶ In the case of the United States, procedural and political barriers play an important role in its lack of ratification of treaties in general. It is the policy of the US to thoroughly evaluate the constitutionality and potential impact of a treaty prior to giving its consent for ratification. Lengthy review processes can delay treaty ratification by many years, and if the treaty is controversial, it can become politicised, further lengthening the ratification process.

⁷ Article 2 of the CRC provides: 1. "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". 2. "States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family member". Convention on the Rights of the Child, art. 2. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>; see also Committee on the Rights of the Child. *General Comment No 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, p. 4. UN Convention on the Rights of the Child. 27 November 2003. Accessed on 3 October 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En).

⁸ Article 3(1) of the CRC provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". (2) "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures". (3) "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision". Convention on the Rights of the Child, art. 3(1). Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

⁹ Article 6(1) of the CRC provides: "States Parties recognize that every child has the inherent right to life". (2) "States Parties shall ensure to the maximum extent possible the survival and development of the child". *Ibid.* art 6(1).

¹⁰ Article 12 of the CRC provides: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". (2) "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". *Ibid.* art. 12(1).

The CRC sets out child rights in its 54 articles and two optional protocols. It recognises that children have an inherent right to life and survival, to an identity, to a nationality, to be heard, to freedom of thought, conscience and religion, to health and to an education.

Articles 34 through 35 of the CRC directly obligate States to protect children from all forms of sexual exploitation, including child prostitution, child pornography and trafficking. These articles constitute the cornerstone of international legal protection of children against sexual abuse and exploitation.

Article 34 CRC

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”

Article 35 CRC

“States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

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

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC)¹¹ was the first of the CRC’s two optional protocols to enter into force. The OPSC was adopted in May 2000 and entered into force in January 2002. As of September 2008, it had been ratified by 129 UN member States.

¹¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The OPSC is a key instrument because it defines and prohibits the different forms of child sexual exploitation that are the sale of children, child prostitution and child pornography.¹² Accordingly, the OPSC requires that these offences to be treated as criminal acts by States Parties.¹³

The OPSC also requires the States parties to ensure that they have jurisdiction over the offences; to provide for the extradition of offenders; to encourage international cooperation between States in pursuing offenders; and to provide support to child survivors of commercial sexual exploitation including throughout the legal process.

Convention on the Rights of the Child and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography monitoring and reporting mechanism

The **Committee on the Rights of the Child** is the treaty body responsible for monitoring the implementation of the CRC and its two optional protocols. The Committee consists of 18 experts who periodically examine the progress made by States parties in meeting their obligations under the CRC.¹⁴

Within two years of the entry into force of the CRC and the OPSC, States parties are required to submit comprehensive initial reports to the Committee detailing their implementation of each of these instruments.¹⁵ Once they have submitted these initial reports, States must prepare reports on the implementation of the CRC and the OPSC every five years. After consideration of the State reports, the Committee publishes its recommendations in the form of concluding observations, which highlight positive aspects of implementation, as well as suggestions on how to improve the condition of children in their countries.

Periodic State reporting is important because it puts pressure on States to bring their legislation and policy into compliance with the CRC. NGOs can play an important role in this process by providing information and making recommendations in the monitoring process. **The CRC is the only international human rights treaty that expressly gives NGOs a role in monitoring its implementation.**

¹² *Ibid.* art. 2.

¹³ *Ibid.* art. 3.

¹⁴ Convention on the Rights of the Child, arts. 43(1) & 43(2). Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

¹⁵ *Ibid.* art. 44; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 12(1). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>. Unicef has published a handbook for the implementation of the CRC, providing a detailed reference for the implementation of law, policy and practice to promote and protect the rights of children. It examines each article in light of the Committee on the Rights of the Child's examination of State reports and Concluding Observations. Hodgkin, Rachel & Newell, Peter. *Implementation Handbook for the Convention on the Rights of the Child: Fully Revised Third Edition*. Unicef. September 2007. Accessed on 3 October 2008 from: http://www.UNICEF.org/publications/index_43110.html.

Over the past years NGOs have played an important role in the CRC reporting mechanism.¹⁶ While the OPSC does not contain a similar provision, it has become practice for the Committee to receive NGO alternative reports addressing the OPSC.¹⁷ ECPAT groups are and have been very active in the development and submission of alternative reports.¹⁸

Gaps Highlighted by the Committee on the Rights of the Child

By September 2008, the Committee had examined initial reports on the implementation of the OPSC in 26 States. No States were found to have adequate legal frameworks for addressing the sexual exploitation of children. Two of the most commonly observed gaps are:

- The **absence of adequate legislation** that defines and prohibits all forms of sexual exploitation of children. In particular, legislation on child prostitution, child trafficking for sexual purposes and child pornography is insufficient; and
- The **treatment of child victims as criminals**, in contravention of their right to protection.

Other gaps include the lack of a specific governmental body to coordinate monitoring and implementation of the OPSC; the absence of data collection and analysis mechanisms; and the lack of dissemination and training about the OPSC.

Unfortunately there are no mechanisms to enforce the Committee's recommendations and conclusions with regard to a State's non-compliance with the CRC and the OPSC. The CRC will soon be the only international human rights treaty with mandatory reporting that lacks a mechanism to challenge violations of its provisions.¹⁹ A campaign is currently underway to draft and adopt a protocol to establish such a mechanism. It would allow individuals, groups or their representatives, claiming that their rights have been violated by a State party, to bring a communication before a committee, provided that the State has recognised the competence of the committee to receive such complaints.²⁰ **ECPAT encourages States to support the campaign for the development of a complaints procedure under the CRC.**

¹⁶ For more on the reporting process, see ECPAT International. *An ECPAT Guide on Alternative Reporting to the Optional Protocol on the sale of children, child prostitution and child pornography*. 2007.

¹⁷ Theytaz-Bergman, Laura. *A Guide for Non-Governmental Organizations Reporting to the Committee on the Rights of the Child*, p. 15. NGO Group for the Convention on the Rights of the Child. Geneva. 2006. Accessed on 3 October 2008 from: http://www.crin.org/docs/Reporting_Guide_2006_English.pdf.

¹⁸ ECPAT Guidelines on the Development of Alternative Reports are available from the ECPAT International Secretariat.

¹⁹ Such a mechanism is currently being developed for the *International Covenant on Economic, Social and Cultural Rights*; all of the other instruments have one.

²⁰ Child Rights Information Network (CRIN). *Campaign for a complaints procedure under the CRC: Sign the petition!* Accessed on 3 October 2008 from: <http://www.crin.org/petitions/petition.asp?petID=1007>.

The OPSC in short:

- First international instrument to define and prohibit the sale of children, child prostitution and child pornography
- One hundred twenty nine ratifications as of September 2008
- States parties required to take measures in the areas of prohibition, criminal/penal procedure, prevention, protection and international cooperation
- Implementation monitored by the Committee on the Rights of the Child
- NGOs can participate in the reporting process
- To find out whether a State has ratified the OPSC:
http://www2.ohchr.org/english/bodies/ratification/11_c.htm
- To consult State reports and the Committee's examination schedule:
<http://www2.ohchr.org/english/bodies/crc/sessions.htm>
- To consult the NGO alternative reports:
<http://www.crin.org/docs/resources/treaties/crc.25/annex-vi-crin.asp>

OTHER RELEVANT INTERNATIONAL TREATIES

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)²¹ is a supplement to the UN Convention against Transnational Organized Crime, which is the main international instrument in this area. The Trafficking Protocol was adopted in November 2000, and entered into force in December 2003. As of April 2008, it has been ratified by 116 UN member States.

The Trafficking Protocol provided the first international definition for 'trafficking in persons'²² and outlines a comprehensive law enforcement regime.²³ The Protocol defines 'trafficking in children' as the recruitment, transportation, transfer, harbouring or receipt of a person under 18 years of age for the purpose of exploitation, such as, but not limited to, prostitution, forced labour or slavery.²⁴ The Trafficking Protocol obliges States

²¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime. Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

²² Article 3 of the Trafficking Protocol reads as follows: "Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons by means of 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 purposes of exploitation [...]" *Ibid.* art. 3.

²³ *Ibid.* pt III.
²⁴ *Ibid.* art. 3.

parties to establish criminal responsibility under national law for these acts.²⁵ It is meant to serve as a model for national legislation, detailing which kinds of conduct should be sanctioned, the appropriate severity of punishment and effective measures to be taken to combat and prevent trafficking.

Trafficking Protocol monitoring and reporting

Though the Trafficking Protocol creates common ground for counter-trafficking activities, it lacks an enforcement or monitoring mechanism. Nevertheless, the Committee on the Rights of the Child has indicated that the reports that States must submit on the implementation of the OPSC should also include information on trafficking in children. Thus the Committee is monitoring the implementation of the Trafficking Protocol to some extent.

The Trafficking Protocol in short:

- One hundred twenty three ratifications as of September 2008
- Seeks an international consensus around the definition of ‘trafficking in human beings’, with specific provisions applying to child victims
- Contains no enforcement or monitoring mechanism. However, the Committee on the Rights of the Child receives and reviews information on trafficking through its monitoring of the OPSC
- To find out whether a State has ratified the *Trafficking Protocol*:
<http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>.

International Labour Organization treaties: The Convention on the Worst Forms of Child Labour and the Minimum Age Convention

The International Labour Organization (ILO), which is the UN agency that brings together the governments, employers and workers of its member States to promote decent work conditions, has two ILO Conventions that are particularly relevant to child sexual exploitation.

ILO Convention No. 182 (Worst Forms of Child Labour) (ILO Convention 182)²⁶ was unanimously adopted by all 174 member States of the ILO in June 1999. It entered into force in November 2000. As of September 2008, it has been ratified by 169 of the signatory parties.²⁷

²⁵ *Ibid.* art. 5.

²⁶ ILO Convention 182 (Worst Forms of Child Labour). Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

²⁷ See ILO. *ILOLEX: Ratification by Convention*. Accessed on 3 October 2008 from: <http://www.ilo.org/ilolex/english/newratframeE.htm>.

The ILO Convention 182 defines those types of labour in which children below 18 years of age should not be involved. It defines the ‘worst forms of child labour’ to include all forms of slavery, trafficking, child prostitution, child pornography, the use of children for illicit activities (such as for the production and trafficking of drugs) and the use of children for any work that by its nature or the circumstances in which it is carried out is likely to harm the health, safety and morals of children.²⁸

The other relevant convention, **ILO Convention No. 138 (Minimum Age Convention)** (ILO Convention 138)²⁹ was adopted in June 1973 by the General Conference of the ILO and entered into force in June 1976. As of September 2008 it has been ratified by 150 of the ILO member States.³⁰ It expressly states that the minimum age for admission to any type of employment or work, which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young people, shall not be less than 18 years.³¹

International Labour Organization conventions monitoring and reporting

ILO Conventions 182 and 138 have two international supervisory processes: regular supervision and *ad hoc* procedures.

Regular supervision encompasses the State reports on measures they have taken to carry out the obligations of the Conventions. States Parties must submit those reports at regular intervals to the independent Committee of Experts on the Application of Conventions and Recommendations, which reviews the reports and other available information. If the Committee finds that the obligations under the Conventions are not fulfilled, the Committee may make a direct request for further information or publish an observation to that effect in its report.

In case of acute problems or persistent non-observance of a ratified Convention, the ILO Constitution sets forth ***ad hoc procedures*** to allow for the submission of allegations. Allegations are examined by designated bodies and result in recommendations. If these recommendations are persistently ignored, a country may be denied contact and assistance from the ILO, and possibly from the wider international community. This has occurred only once, in the case of Myanmar’s violations of its obligations under ILO Convention No. 29 (Forced Labour).

²⁸ ILO Convention 182 (Worst Forms of Child Labour), art. 3. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

²⁹ ILO Convention No. 138 (Minimum Age Convention). Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

³⁰ See ILO. *ILOLEX: Ratification by Convention*. Accessed on 3 October 2008 from: <http://www.ilo.org/ilolex/english/newraframeE.htm>.

³¹ ILO Convention No. 138 (Minimum Age Convention), art. 3. Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

ILO Conventions 138 and 182 in short:

- Define the ‘worst forms of child labour’ to include all forms of slavery, trafficking, child prostitution and child pornography
- Establishes 18 years as the minimum age for taking on employment likely to be harmful
- Some monitoring and reporting procedures in place
- To find out whether a State has ratified the conventions:
<http://www.ilo.org/ilolex/english/newratframeE.htm>

COMMITMENTS AND INITIATIVES AT THE INTERNATIONAL LEVEL

The Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment

In 1996, the ECPAT network, in collaboration with Unicef and the NGO Group for the Convention on the Rights of the Child, organised the First World Congress against the Commercial Sexual Exploitation of Children (CSEC) in Stockholm in Sweden. At the Congress, 122 countries adopted the Stockholm Declaration and Agenda for Action (Agenda for Action), which calls for States, all sectors of society and national, regional and international organisations to take action against CSEC. In particular, it calls on countries to develop National Plans of Action against CSEC and to implement the Agenda for Action in six areas: coordination, cooperation, prevention, protection, recovery and reintegration and child participation. The National Plans of Action provide governmental and child-care agencies with an opportunity to cooperate in devising national strategies to eliminate CSEC and promote child rights.³²

In December 2001, the Government of Japan hosted the Second World Congress against CSEC in Yokohama. At that Congress, 159 countries reaffirmed their commitment to the Agenda for Action by adopting the outcome document, the Yokohama Global Commitment. Participants recognised and welcomed the positive developments that had occurred since the First World Congress in 1996, including better implementation of the CRC and increased mobilisation of national governments and the international

³² Information on the Stockholm Declaration and Agenda for Action and the Yokohama Global Commitment can be obtained from ECPAT International’s website. ECPAT International. *Global Action: Declarations*. Accessed on 6 October 2008 from: http://www.ecpat.net/EI/Global_declarations.asp.

³³ *Ibid.*

community to adopt laws, regulations and programs to protect children from CSEC.³³ Although the Agenda for Action and the Yokohama Global Commitment represent strong governmental commitments that should be honoured, they are not legally binding. Part of ECPAT's mandate is precisely to monitor the implementation of the Agenda for Action, to identify areas of gaps and compliance, to make recommendations to governments and to develop appropriate strategies to implement the commitments. In 2006, ECPAT produced a compendium of reports entitled *Global Monitoring Report on the Status of Action against the Commercial Sexual Exploitation of Children*, consisting of more than 60 country reports analysing the measures that have been taken to counteract CSEC.³⁴

The Agenda for Action and the Yokohama Global Commitment in short:

- The first international instruments aimed at eradicating CSEC
- One hundred twenty two States committed in Stockholm; 159 committed in Yokohama
- Soft law instruments, which are not legally binding on participating States
- To consult ECPAT's global monitoring reports:
http://www.ecpat.net/A4A_2005/index.html

Special Rapporteur on the sale of children, child prostitution and child pornography

By 1990, international awareness of the problem had grown to such a level that the UN Commission on Human Rights created the position of Special Rapporteur on the sale of children, child prostitution and child pornography.

Since then, the appointment of the Special Rapporteur has been regularly renewed, most recently, in March 2008, for a three year period, by the UN Human Rights Council. The Human Rights Council is the body which replaced the Commission on Human Rights in 2005. It is a subsidiary organ of the UN General Assembly and is responsible for promoting human rights, addressing human rights violations and making recommendations to the General Assembly. It is also tasked with conducting a universal periodic review of the fulfilment by each State of its human rights obligations and commitments.

³⁴ These reports can be obtained from ECPAT International's website. ECPAT International. *ECPAT Global Monitoring Report on the Status of Action against the Commercial Sexual Exploitation of Children*. Accessed on 6 October 2008 from: http://www.ecpat.net/A4A_2005/index.html.

In its 2008 resolution, the Human Rights Council mandated that the Special Rapporteur, *inter alia*, analyse the root causes of the sale of children, child prostitution and child pornography; identify new patterns emerging from these issues; identify, exchange and promote best practices on measures to combat each problem; and make recommendations on the promotion and protection of the human rights of child victims of sale, prostitution and pornography and their rehabilitation. The Special Rapporteur is also competent to receive information on alleged violations of the OPSC from governments, NGO's and individuals.³⁵

Ms. Najat M'jid Maalla was appointed Special Rapporteur in May 2008. Previous mandate-holders are Mr. Vitit Muntarbhorn (1991-1994), Ms. Ofelia Calcetas-Santos (1994-2001) and Mr. Juan Miguel Petit (2001-2008).

Special Rapporteur on trafficking in persons, especially in women and children

In 2004, the UN Commission on Human Rights appointed, for a three year period, a Special Rapporteur on trafficking in persons, especially women and children. The Commission invited the Special Rapporteur to submit annual reports to the Commission, together with recommendations on measures required to uphold and protect the human rights of trafficking victims, to address violence against women and to take full account of the Commission's contributions to the issue. Ms. Joy Ngozi Ezeilo was appointed as Special Rapporteur in July 2008.

The Special Rapporteur is competent to receive complaints regarding violations against trafficked persons and situations in which there has been a failure to protect their human rights. Complaints can be transmitted to the Special Rapporteur electronically via the website of the UN High Commissioner for Human Rights.³⁶

A World Fit for Children: the declaration and action plan

In May 2002, a Special Session of the UN General Assembly addressing children took place in New York. This unprecedented meeting was dedicated to the children and adolescents of the world. It brought together government leaders and other heads of State, NGOs, children's advocates and young people and sought to realise the goals set at the World Summit for Children³⁷ in 1990, and to move children's rights up on the

³⁵ More information on this topic can be obtained from the website of the UN High Commissioner for Human Rights (UNHCHR). OHCHR. *Individual complaints and model questionnaire*. Accessed on 6 October 2008 from: <http://www2.ohchr.org/English/issues/children/rapporteur/model.htm>.

³⁶ OHCHR. *Special Rapporteur on trafficking in persons, especially in women and children: Individual complaints*. Accessed on 6 October 2008 from: <http://www2.ohchr.org/english/issues/trafficking/complaints.htm>.

³⁷ On 29 and 30 September 1990 the largest gathering of world leaders in history assembled at the UN to attend the World Summit for Children. Led by 71 heads of State and 88 other senior officials, mostly at the ministerial level, the World Summit adopted a *Declaration on the Survival, Protection and Development of Children* and a *Plan of Action* for implementing the Declaration in the 1990s.

world agenda. The session reviewed the progress that had been made since the World Summit and created a renewed commitment and pledge to take specific actions for children in the coming decade. The Special Session produced a global plan of action for children and young people called A World Fit for Children.³⁸ It set forth goals and an action plan to ensure the best possible start in life for children; a good-quality basic education for children; and the opportunity for all children, especially young people, to meaningfully participate in shaping their countries' policies.

With regards to sexual exploitation, the declaration commits leaders to protecting children from all forms of sexual exploitation and to taking "necessary action, at all levels, as appropriate, 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, 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 the primary consideration."³⁹

In December 2007, a commemorative high level plenary meeting of the General Assembly and roundtable discussions took place in New York, devoted to following-up on the outcome of the 2002 Special Session on Children. At this meeting, the UN Secretary General launched his report on progress towards the goals of A World Fit for Children. On the same occasion, more than 140 countries adopted a new declaration on children, in which they reaffirmed their "commitment to the full implementation of the Declaration and Plan of Action contained in the outcome document of the twenty-seventh special session of the General Assembly on children, entitled 'A world fit for children', recognising that their implementation and the fulfilment of obligations under the CRC, the Optional Protocols thereto and other relevant international instruments are mutually reinforcing in protecting the rights and promoting the well-being of all children. In all our actions, the best interests of the child shall be a primary consideration."⁴⁰

³⁸ UN General Assembly Resolution S-27/2 (A world fit for children). 10 May 2002. Accessed on 6 October 2008 from: <http://www.unicef.org/worldfitforchildren/files/A-RES-S27-2E.pdf>.

³⁹ *Ibid.* para.45.

⁴⁰ UN General Assembly Resolution 62/88 (Declaration of the commemorative high-level plenary meeting devoted to the follow-up to the outcome of the special session on children). 13 December 2007. Accessed on 6 October 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/62/88&Lang=E>.

Special Representative on Violence against Children

The UN Secretary-General's Study on Violence against Children⁴¹ was developed under the leadership of Professor Paulo Sérgio Pinheiro. The Study analyses the nature, extent and causes of violence against children, including sexual exploitation, and proposes recommendations on how to prevent and respond to it. The Study recommends "that the General Assembly request the Secretary-General to appoint a Special Representative on violence against children (SRSG) 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 [Study's] recommendations."⁴² In November 2007, the UN General Assembly requested the Secretary-General to appoint a SRSG for a period of three years, but as of September 2008, this appointment has not yet been made.

COMMITMENTS AND INITIATIVES AT THE REGIONAL LEVEL

In addition to the above described treaties and mechanisms, there are also mechanisms promoting and protecting human rights at the regional level. In the second half of the twentieth century, three regional human rights treaties were developed: the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms,⁴³ the American Convention on Human Rights⁴⁴ and the African Charter on Human and Peoples' Rights⁴⁵. These treaties set out basic human rights and establish monitoring bodies to which victims of alleged violations may seek recourse under special circumstances. The establishment of these three human rights bodies represents significant developments because they provide avenues for recourse against States that fail to meet their obligations under human rights treaties.⁴⁶

Within the broad framework of regional human rights instruments, regional conventions addressing child sexual abuse and exploitation have also been developed; mainly in Europe. In fact, the Council of Europe (CoE) has played a crucial role in negotiating and developing three key treaties: the Convention on the Protection of children against sexual exploitation and sexual abuse, the Convention on Action against Trafficking in Human Beings and the Convention on Cybercrime.

⁴¹ UN Secretary-General. *Violence Against Children: United Nations Secretary-General's Study*. Accessed on 7 October 2008 from: <http://www.unviolencestudy.org/>.

⁴² Pinheiro, Paulo S. *World Report on Violence against Children*. UN Secretary-General's Study on Violence against Children. Accessed on 6 October 2008 from: <http://www.violencestudy.org>.

⁴³ Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13. Accessed on 6 October 2008 from: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁴⁴ American Convention on Human Rights (Pact of San Jose, Costa Rica). Accessed on 6 October 2008 from: <http://www.oas.org/juridico/English/treaties/b-32.html>.

⁴⁵ African Charter on Human and Peoples' Rights. Accessed on 6 October 2008 from: http://www.achpr.org/english/info/charter_en.html.

⁴⁶ The International Criminal Court deals with crimes against humanity, war crimes and genocide. While there has been some discussion around the possibility of categorizing CSEC crimes as crimes against humanity, there is no such formal recognition to date.

Other regional forums have tackled the issue, albeit in an incomplete fashion, with some conventions addressing trafficking. For instance, the South Asia region has adopted the South Asian Association for Regional Cooperation (SAARC) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*;⁴⁷ the Organization of American States (OAS) has adopted the *Inter-American Convention on International Traffic in Minors*;⁴⁸ and the Organization of African Unity (OAU) has enacted the *African Charter on the Rights and Welfare of the Child*.⁴⁹

EUROPE

The main human rights instrument in Europe is the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms*, which was concluded in 1950 under the aegis of the CoE to protect human rights and freedoms.⁵⁰ The Convention established the **European Court of Human Rights (ECHR)** to monitor compliance of member States. All of the member States of the CoE are also signatories to the Convention.

The ECHR may receive applications from any person, NGO or group of individuals claiming to be the victim of a violation by a state party of the rights set forth in the Convention.⁵¹ It may also hear cases between States.⁵² In accordance with international law, the ECHR may only deal with a matter once all domestic remedies have been exhausted.⁵³

When the ECHR was first established, individuals did not have a direct access to the Court, but had to apply to the European Commission of Human Rights for redress. CoE Protocol 11, which entered into force in 1998, abolished the Commission and established individual access to the Court.

The ECHR is the largest international bench and has developed the most extensive jurisprudence on the protection of human rights.⁵⁴

⁴⁷ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Accessed on 6 October 2008 from: http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

⁴⁸ Inter-American Convention on International Traffic in Minors. Accessed on 6 October 2008 from: <http://www.oas.org/juridico/English/Treaties/b-57.html>.

⁴⁹ African Charter on the Rights and Welfare of the Child. Accessed on 6 October 2008 from: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

⁵⁰ Project on International Courts and Tribunals (PICT). ECHR: European Court of Human Rights. Accessed on 6 October 2008 from: <http://www.pict-cti.org/courts/ECHR.html>.

⁵¹ Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, with Protocol Nos. 1, 4, 6, 7, 12 and 13, art. 34. Accessed on 6 October 2008 from: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

⁵² *Ibid.* art. 33.

⁵³ *Ibid.* art. 35(1).

⁵⁴ PICT. *ECHR: European Court of Human Rights*. Accessed on 6 October 2008 from: <http://www.pict-cti.org/courts/ECHR.html>.

Basic rights and freedoms established under the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms

Article 1 – Obligation to respect human rights set out in the Convention

Article 2 – Right to life

Article 3 – Prohibition of torture

Article 4 – Prohibition of slavery and forced labour

Article 5 – Right to liberty and security

Article 6 – Right to a fair trial

Article 7 – No punishment without law

Article 8 – Right to respect for private and family life

Article 9 – Freedom of thought, conscience and religion

Article 10 – Freedom of expression

Article 11 – Freedom of assembly and association

Article 12 – Right to marry

Article 13 – Right to an effective remedy before a national authority

Article 14 – Prohibition of discrimination

The Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse

In July 2007, the Committee of Ministers of the CoE adopted the *Convention on the Protection of children against sexual exploitation and sexual abuse*.⁵⁵ In October 2008, it had been signed by 30 member States. The Convention will enter into force upon its ratification by five States, including at least three member States of the CoE.⁵⁶ The purposes of this Convention are to prevent and combat the sexual exploitation and abuse of children; to protect the rights of victims of sexual exploitation and sexual abuse; and to promote national and international cooperation against sexual exploitation and sexual abuse of children.⁵⁷ The Convention offers clear definitions of the terms ‘sexual abuse of children’ and ‘sexual exploitation of children’ and requires that their different manifestations be treated as criminal offences. The Convention also recognises the linkages between various forms of sexual crimes against children and groups them under a single umbrella.

⁵⁵ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

⁵⁶ State ratifications can be viewed at the CoE website. CoE. *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse CETS No.: 201*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=201&CM=8&DF=&CL=ENG>.

⁵⁷ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 1. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse represents significant progress in strengthening child protection standards for sexual abuse and exploitation. Many of its features will be explored throughout this publication and presented as examples that other countries may chose to follow. **This Convention is also open to ratification by countries outside of Europe and provided a good basis for harmonisation at international level.**

Monitoring and reporting mechanism

The Convention on the Protection of children against sexual exploitation and sexual abuse is to be monitored by the Committee of the Parties, which is composed of representatives of the parties to the Convention. The Committee is to be convened the first time by the Secretary General of the CoE, within a year of the entry into force of the Convention. The Committee will subsequently meet at the request of a third of the parties, or of the Secretary General of the CoE. The functions of the Committee will include making proposals to facilitate or improve the effective use and implementation of the Convention and playing a general advisory role by expressing an opinion on any question concerning its application.⁵⁸

The Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe Convention on Action against Trafficking in Human Beings⁵⁹ opened for signature in May 2005 and entered into force on 1 February 2008. As of October 2008, it had been ratified by 18 member States.⁶⁰ This comprehensive treaty focuses on the protection of victims of trafficking and the safeguard of their rights. It also aims to prevent trafficking and prosecute traffickers. It applies to all forms of trafficking; whether national or transnational, whether or not it is related to organised crime, whether the victim is a woman, man or child and whether the exploitation takes the form of sexual exploitation, forced labour or services or other practices.⁶¹

Monitoring and reporting mechanism

The Convention is to be monitored by the Group of Experts against Trafficking in Human Beings (GRETA) and the Committee of the Parties. GRETA will be a technical body of independent and highly qualified experts. The Committee of the Parties will be a political

⁵⁸ *Ibid.* art. 41.

⁵⁹ Council of Europe Convention on Action against Trafficking in Human Beings. Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

⁶⁰ State ratifications can be viewed at the CoE website. CoE. *Council of Europe Convention on Action against Trafficking in Human Beings CETS No.: 197*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=&CL=ENG>.

⁶¹ Council of Europe Convention on Action against Trafficking in Human Beings, art. 2, 4(a). Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

body, composed of the Committee of Ministers' representatives of the parties to the Convention. GRETA will have the task of adopting a report and conclusions on each party's implementation of the Convention. The Committee of the Parties will be able to adopt recommendations, on the basis of GRETA's report and conclusions, addressed to a party concerning the measures to be taken to follow-up on GRETA's conclusions.

This monitoring scheme is to be set up within one year of the Convention entering into force, which took place 1 February 2008. The CoE seems to be moving forward in establishing GRETA. On 11 June 2008, it adopted rules of procedure for the election of the members of GRETA.⁶²

The Council of Europe Convention on Cybercrime

The Council of Europe Convention on Cybercrime⁶³ (Convention on Cybercrime) is the only binding international instrument attempting to tackle the issue of cybercrime. It was adopted in Budapest in 2001 and entered into force in July 2004. As of October 2008 it had been ratified by 23 countries.⁶⁴ Developed by a group of CoE experts working together with the **United States, Canada, Japan** and other non-member countries, the Convention on Cybercrime represents a significant achievement in child protection from pornography, as it acknowledges a new form of sexual exploitation triggered by the ever-increasing use of the Internet as the primary instrument for trading child pornography-related material. The Convention on Cybercrime offers a comprehensive definition of child pornography, i.e. pornographic materials that visually depict, not only minors engaged in sexually explicit conduct, but also persons appearing to be minors, as well as realistic images representing minors.⁶⁵ It also modernises criminal provisions to more effectively circumscribe the use of computer systems in the commission of sexual offences against children.⁶⁶

Monitoring and reporting mechanism

Article 46 of the Convention on Cybercrime creates a framework for the parties to consult periodically to facilitate its use and implementation, and to exchange information on significant legal, policy or technological developments pertaining to the subject of

⁶² CoE. *Nomination of candidates for GRETA by the governments of states party*. Accessed on 6 October 2008 from: http://www.coe.int/t/dg2/trafficking/campaign/Docs/Monitoring/Nomination_en.asp.

⁶³ Council of Europe Convention on Cybercrime. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>. This Convention has been supplemented by an additional protocol making any publication of racist and xenophobic propaganda via computer networks a criminal offence.

⁶⁴ As with other CoE instruments, the Convention is not only open for ratification by members States of the CoE but also for those which participated in its elaboration. Among this last group of countries, only the US has ratified it. State ratifications can be viewed at the CoE website. CoE. *Convention on Cybercrime CETNS No.: 185*. 6 October 2008. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=&CL=ENG>.

⁶⁵ Council of Europe Convention on Cybercrime, art. 9(2). Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

⁶⁶ *Ibid.* art. 9.

computer or computer-related crime, the collection of evidence in electronic form and the possibility of supplementing or amending the instrument.⁶⁷ The European Committee on Crime Problems (CDPC) is to be kept periodically informed regarding the result of these consultations.⁶⁸ The procedure is flexible and it is left to the parties to decide how, when and whether to convene.

AFRICA

The main human rights instrument in Africa is the 1981 **African Charter on Human and Peoples' Rights** (Banjul Charter), concluded under the auspices of the Organization of African Unity (OAU), which has since been replaced by the African Union. The Charter establishes the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia.

In 1998, a protocol to the Banjul Charter was adopted to establish the **African Court on Human and Peoples' Rights (ACHPR)**. The ACHPR rules on African Union States' compliance with the Banjul Charter. The protocol establishing the ACHPR came into force in 2004. Prior to that, monitoring of the Banjul Charter rested with the African Commission on Human and Peoples' Rights; a quasi-judicial body with no binding powers. The ACHPR is in the process of being merged with the African Court of Justice following a decision by member States at the June 2004 African Union Summit and is located in Arusha, Tanzania. In January 2006, the Eighth Ordinary Session of the Executive Council of the African Union elected the first eleven judges of the ACHPR.

A promising aspect of the ACHPR is that actions may be brought before the Court on the basis of any instrument, including international human rights treaties which the State in question has ratified. In other words, the ACHPR could become the judicial arm of a panoply of human rights agreements.⁶⁹

The African Charter on the Rights and Welfare of the Child⁷⁰

The **African Charter on the Rights and Welfare of the Child (ACC)** was adopted by the OAU in 1990. The ACC is the first African regional treaty on children's rights. In many respects, the provisions of the ACC are modelled on the provisions of the CRC.

⁶⁷ Article 46 of the Convention on Cybercrime provides: "The Parties shall, as appropriate, consult periodically with a view to facilitating: (a) the effective use and implementation of this Convention, including the identification of any problems thereof, as well as the effects of any declaration or reservation made under this Convention; (b) the exchange of information on significant legal, policy or technological developments pertaining to cybercrime and the collection of evidence in electronic form; (c) consideration of possible supplementation or amendment of the Convention." *Ibid.* art. 46.

⁶⁸ *Ibid.* art. 46(2).

⁶⁹ PICT. *ACHPR: African Court of Human And Peoples' Rights*. Accessed on 6 October 2008 from: <http://www.pict-pecti.org/courts/ACHPR.html>.

⁷⁰ African Charter on the Rights and Welfare of the Child. Accessed on 6 October 2008 from: http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

The ACC calls for protection against abuse and maltreatment, negative social and cultural practices and all forms of exploitation or sexual abuse, including involvement of children in prostitution and pornography. It also aims to prevent the sale and trafficking of children, kidnapping of children and begging by children.

Monitoring and reporting mechanism

The ACC provides for the establishment of an African Committee of Experts on the Rights and Welfare of the Child (ACERWC) within the OAU to promote and protect the rights and welfare of the child. The Committee has the mandate to collect and document information; to give its views and make recommendations to governments; to formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa; and to monitor the implementation of the ACC and ensure protection of the rights enshrined in it.⁷¹ Within two years of entry into force of the ACC, States parties must submit reports to the Committee on the measures they have adopted to give effect to the provisions of the ACC and on the progress they have made in the enjoyment of these rights.⁷² Thereafter, reports must be made every three years.⁷³ At the pre-session of its 11th meeting held in May 2008 in Addis Ababa, Ethiopia, the ACERWC reviewed the reports submitted by **Egypt, Nigeria, Mauritania** and **Rwanda**.

AMERICAS

The main human rights instrument for the Americas is the 1969 **American Convention on Human Rights**, concluded under the auspices of the Organization of American States (OAS). The **Inter-American Court of Human Rights (IACHR)** was established to oversee compliance with the Convention, along with the **Inter-American Commission of Human Rights (Inter-American Commission)**.

Unlike the ECHR, individuals cannot directly access the IACHR to seek redress for the violation of their rights. They must first file a complaint with the Inter-American Commission, which in turn seeks redress from the IACHR. This narrower and conditional access explains why the IACHR has only been able to render one-tenth the number of the judgments as its European analogue per year.⁷⁴

⁷¹ *Ibid.* art. 42.

⁷² *Ibid.* art. 43.

⁷³ *Ibid.* art. 43.

⁷⁴ PICT. IACHR: *Inter-American Court of Human Rights*. Accessed on 6 October 2008 from: <http://www.pict-pcti.org/courts/IACHR.html>.

The American Convention on Human Rights is the only of the three core regional human rights conventions that specifically recognises the right of protection for children.

Article 19 of the Convention states that “every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.”

The Organization of American States Inter-American Convention on International Traffic in Minors

Adopted during the Fifth Inter-American Specialized Conference on Private International Law held on 18 March 1994, the *Inter-American Convention on International Traffic of Minors* entered into force in August 1997 and at the time of writing this manual has 11 States Parties and nine signatories.⁷⁵ The Convention defines international traffic in minors as the abduction, removal or retention, or attempted abduction, removal or retention, of a minor under the age of 18 years for unlawful purposes including prostitution and sexual exploitation. It stipulates the obligation of States parties to institute a system of mutual legal assistance dedicated to the prevention of international trafficking in minors, the punishment of its perpetrators and to ensuring the prompt return of child victims to the State of their habitual residence; all while bearing in mind the best interests of the minors.⁷⁶

Monitoring and reporting mechanism

The Convention does not provide for the establishment of a monitoring body, leaving the task of adjudicating instances of international trafficking to the member States’ national courts.⁷⁷ As such, it is not linked to any regional enforcement mechanism. This is problematic as impunity is common in many countries of the OAS. However, certain decisions of the IACHR do afford a basis for recourse to the Inter-American Commission and the IACHR in the case of a member State failing to afford the needed protection to its children.⁷⁸ Hence, victims of trafficking could petition the Commission and the Court to obtain reparation in a case where the government failed to take appropriate measures to ensure children are not being trafficked outside of or within its borders.⁷⁹

⁷⁵ Inter-American Convention on International Traffic in Minors. Accessed on 6 October 2008 from: <http://www.oas.org/juridico/english/signs/b-57.html>.

⁷⁶ *Ibid.*, art. 2.

⁷⁷ *Ibid.*, art. 9.

⁷⁸ *Villagran-Morales et al. v. Guatemala*. IACHR. 19 November 1999. Accessed on 6 October 2008 from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.doc; see also *Judicial condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003)*. University of Minnesota Human Rights Library. Accessed on 6 October 2008 from: http://www1.umn.edu/humanrts/iachr/series_A_OC-18.html.

⁷⁹ This would be done most likely under Articles 4 (right to life), 5 (right to physical integrity), 7 (right to liberty) and 19 (rights of the child). See *Villagran-Morales et al. v. Guatemala*, paras. 178-191. IACHR. 19 November 1999. Accessed on 6 October 2008 from: http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.doc. In essence, the Court rules that a child deprived of the protection usually afforded by his/her family is entitled to protection from the State.

SOUTH ASIA

There is no human rights mechanism in the South Asia region. However, the South Asian Association for Regional Cooperation (SAARC) has adopted a [Convention on regional arrangements for the promotion of child welfare in South Asia](#). In 2002, it also adopted the [SAARC Regional Convention on Preventing and Combating Trafficking of Women and Children for Prostitution \(SAARC Convention\)](#),⁸⁰ which entered into force in November 2005.

The SAARC Convention was created as a response to the increasing incidence of human trafficking throughout the South Asia region. It recognises the transnational nature of trafficking and the necessity of cooperation in the prevention, protection and punishment of trafficking offences. Despite some positive features, such as the simplification of repatriation procedures for trafficking victims, this convention has been harshly criticised for a number of reasons, including a narrow definition of trafficking, which limits it to trafficking for the purpose of prostitution; the lack of provisions for victim compensation; and for its criminalisation of prostitution.⁸¹

Monitoring and reporting mechanism

The SAARC Convention has been criticised for its inadequate monitoring mechanism.⁸² In the absence of an established body with the power to monitor and report on implementation by the individual States, regional coordination is threatened. Thus it is important that an independent treaty body be created to ensure consistent and effective implementation.⁸³

SOUTHEAST ASIA

While there are four national human rights institutions in Southeast Asia (the **Philippines, Indonesia, Malaysia** and **Thailand**), the region is one of the last without an intergovernmental human rights mechanism. Although ASEAN – the Association of Southeast Asian Nations – has long been perceived as a promising avenue for regional monitoring and promotion of children’s rights, it appears as though human rights are not yet a priority on ASEAN’s agenda.

⁸⁰ SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Accessed on 6 October 2008 from: http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

⁸¹ Forum for Women, Law and Development (FWLD). Prevalence of the Problem. Kathmandu. Information retrieved on 20 March 2007 from: <http://www.fwld.org.np/advsaarc.pdf>.

⁸² *Ibid.*

⁸³ *Ibid.*

At the 13th ASEAN summit in November 2007, in Singapore, ASEAN's officials signed the regional body's charter but failed to agree on the establishment of a human rights body,⁸⁴ leaving this issue to be discussed at a future Foreign Ministers gathering.⁸⁵ Unfortunately, the protection of children and the enforcement of their rights under the auspices of ASEAN are achievements which remain quite remote, although some progress has been made since the idea of a human rights mechanism was first introduced in 1993.

CONCLUSION

The protection and promotion of the human rights of children, as set out in the numerous treaties and other existing instruments, lies primarily with the State. By signing and ratifying international and regional treaties, States commit themselves to making children's rights to protection from all forms of sexual abuse and exploitation a reality. This commitment includes the development of strong legal frameworks that define and prohibit these violations – an element that, unfortunately, is still missing 18 years after the entry into force of the CRC. With this in mind, the remainder of this publication will examine the development of protective frameworks.

⁸⁴ ASEAN signs landmark charter. *Associated Press*, 21 November 2007. Accessed on 6 October 2008 from: <http://edition.cnn.com/2007/WORLD/asiapcf/11/21/asean.myanmar.ap/>.

⁸⁵ Charter of the Association of Southeast Asian Nations, art. 14. Accessed on 6 October 2008 from: <http://www.aseansec.org/ASEAN-Charter.pdf>.

LEGAL REFORM CHECKLIST

International Level

- ✓ Government has signed and ratified:
 - ✓ The CRC
 - ✓ The OPSC
 - ✓ The Trafficking Protocol
 - ✓ ILO Conventions 182 and 138

- ✓ Government has submitted its CRC, OPSC and ILO reports

Regional Level

- ✓ Government has signed and ratified the relevant regional instruments (see p. 36 for a more complete list), in particular:

Europe

- ✓ The Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse
- ✓ The Council of Europe Convention on Action against Trafficking in Human Beings
- ✓ The Convention on Cybercrime

Africa

- ✓ The ACC

Americas

- ✓ The Inter-American Convention on International Traffic in Minors

South Asia

- ✓ The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

- ✓ Government has complied with its reporting obligations under the relevant regional instruments

- ✓ Reservations that restrict the scope of child rights treaties are removed

LIST OF INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS RELEVANT TO THE SEXUAL ABUSE AND EXPLOITATION OF CHILDREN

International Instruments

International Convention for the Protection of All Persons from Enforced Disappearance. Not yet entered into force. http://untreaty.un.org/English/notpubl/IV_16_english.pdf.

Convention on the Rights of Persons with Disabilities. Entered into force 12 May 2008. <http://www.un.org/disabilities/convention/conventionfull.shtml>.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Entered into force 1 July 2003. http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm.

Rome Statute of the International Criminal Court. Entered into force 1 July 2002. <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Entered into force 18 January 2002. <http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>.

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Entered into force 1 January 2002. http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=70.

ILO Convention No. 182 (Worst Forms of Child Labour Convention). Entered into force 19 November 2000. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Entered into force 1 May 1995. http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

Convention on the Rights of the Child. Entered into force 2 September 1990. <http://www.unhchr.ch/html/menu3/b/k2crc.htm>.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Entered into force 26 June 1987. http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

Convention on the Elimination of All Forms of Discrimination against Women. Entered into force 3 September 1981. <http://www.un.org/womenwatch/daw/cedaw/>.

Convention on the Civil Aspects of International Child Abduction. Entered into force 1 December 1983. http://www.hcch.net/index_en.php?act=conventions.text&cid=24.

ILO Convention No. 138 (Minimum Age Convention). Entered into force 19 June 1976. <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

International Covenant on Civil and Political Rights. Entered into force 23 March 1976. <http://www1.umn.edu/humanrts/instree/b3ccpr.htm>.

International Covenant on Economic, Social and Cultural Rights. Entered into force 3 January 1976. http://www.unhchr.ch/html/menu3/b/a_cescr.htm.

International Convention on the Elimination of All Forms of Racial Discrimination. Entered into force 4 January 1969. http://www.unhchr.ch/html/menu3/b/d_icerd.htm.

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. Entered into force 25 July 1951. <http://www.unhchr.ch/html/menu3/b/33.htm>.

Geneva Convention relative to the Protection of Civilian Persons in Time of War. Entered into force 21 October 1950. <http://www.unhchr.ch/html/menu3/b/92.htm>.

Regional Instruments

Africa

African Charter on the Rights and Welfare of the Child. Entered into force 29 November 1999. http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

African Charter on Human and Peoples' Rights. Entered into force 21 October 1986. http://www.achpr.org/english/info/charter_en.html.

Americas

Inter-American Convention on International Traffic in Minors. Entered into force 15 August 1997. <http://www.oas.org/juridico/english/sigs/b-57.html>.

American Convention on Human Rights. Entered into force 18 July 1978.
<http://www.oas.org/juridico/English/treaties/b-32.html>.

Asia

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution. Entered into force November 2005. http://www.humantrafficking.org/uploads/publications/SAARC_Convention_on_Trafficking_Prostitution.pdf.

SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia. Signed 5 January 2002. http://www.slmfa.gov.lk/saarc/images/agreements/saarc_child_welfare_2002.pdf.

Europe

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. Not yet entered into force.
<http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

Council of Europe Convention on Action against Trafficking in Human Beings. Entered into force 1 February 2008. http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/CETS197_en.asp#TopOfPage.

Council of Europe Convention on Cybercrime. Entered into force 1 July 2004.
<http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

Convention for the Protection of Human Rights and Fundamental Freedoms. Entered into force as amended 1 November 1998. <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>.

SECTION 2

DEFINITIONS THAT REFLECT A COMMON UNDERSTANDING

Objectives:

- To identify the differences and linkages between child sexual abuse and child sexual exploitation
- To underscore the importance of national legal provisions that clearly define and prohibit the different forms of child sexual abuse, child sexual exploitation and child trafficking for sexual purposes
- To better understand the CRC definition of a child and its implications for child protection from sexual abuse and exploitation

Key Provisions:

- Articles 1, 34 and 35 of the CRC
- Article 3(d) of the Trafficking Protocol
- Article 2 of the ILO Convention 182
- Paragraph 5 of the Stockholm Agenda for Action
- Preamble and Articles 3(b), 18 and 22 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

Over the years, States have sought to address the emergence and identification of new sexual crimes against children through their national laws as well as through ratifying and implementing internationally agreed conventions. Child trafficking issues, for instance, have been addressed within the context of a convention on transnational organised crime (see Section 1 above). The first international instrument addressing child pornography was a European convention targeting cybercrime. As a result, States' obligations to protect children from different forms of sexual abuse and exploitation can be found in several legal instruments, some of which are redundant or have insufficient application to cover the full array of sexual crimes against children.

While this publication focuses on criminal legislation as an essential element of broader child protection frameworks, States are encouraged to review all relevant laws affecting children to ensure that provisions defining and prohibiting child sexual abuse and exploitation are consistent with international standards and that they reflect a common understanding among different countries.

WHAT IS COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN? DISTINGUISHING ABUSE FROM EXPLOITATION

The commercial sexual exploitation of children (CSEC) is a violation of children’s rights and consists of criminal practices that demean and threaten the physical and psychosocial integrity of children. The Stockholm Agenda for Action defines it as:

“A fundamental violation of children’s rights. It comprises sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual object and as a commercial object. The commercial sexual exploitation of children constitutes a form of coercion and violence against children, and amounts to forced labour and a contemporary form of slavery.”

The primary, interrelated, forms of CSEC constituting the focus of this guide are the prostitution of children, child pornography, trafficking of children for sexual purposes and child sex tourism.

It is important to include in-kind transactions in the definition of CSEC, as there is a tendency to view such transactions as demonstrating consent on the child’s part. Where sexual exploitation occurs in exchange for protection, a place to sleep, access to higher school grades or promotion, the child does not ‘consent’ to the transaction, but is the victim of manipulation and abuse of a position of power and responsibility by another person.

CSEC exists because there is a demand for it. However, there is a complex matrix of factors which make children vulnerable and shape the forces and circumstances that allow for commercial sexual exploitation. These factors include, but are not limited to, societal tolerance, poverty, domestic abuse and neglect, and children living and working on the streets.⁸⁶

Child sexual abuse (CSA) can be defined as contacts or interactions between a child and an older or more knowledgeable child or adult, such as a stranger, a neighbour or a relative, where the child is being used as an object of gratification for the abuser’s sexual needs. The abuser may use force, threats, bribes, trickery or pressure. Abusers also use a process called ‘grooming’, whereby they will befriend a child in order to lower the child’s inhibitions and prepare him/her for abuse. In recent years increased attention has been devoted to Internet ‘grooming’, whereby an adult deliberately sets out, using Internet chat rooms or ‘Social Networking’ websites to prepare or ‘groom’ a child

⁸⁶ For more information on the factors that make children vulnerable, consult *Questions & Answers about Commercial Sexual Exploitation of Children*. ECPAT International. 2001. Accessed from: <http://www.ecpat.net>.

for a subsequent physical or virtual meeting with the intent or result of sexually abusing the child. The Internet has also made organised CSA more widespread, providing opportunities for individuals to form networks for the purpose of exchanging child abuse images and gaining access to victims.⁸⁷ Wherever trading of images or information occurs, the abuse can be categorised as sexual exploitation of children.

Sexually abusive activities do not necessarily involve bodily contact between abuser and child. Abusive activities could include exhibitionism or voyeurism, such as an adult watching a child undress, or encouraging or forcing children to engage in sexual activities with one another while the abuser observes or films such activities. It could also include making sexual comments to a child, exposing intimate body parts, having a sexual fixation on a child's or youth's clothing or body parts, luring, making sex-related phone calls, etc. **It is therefore important that the criminal law addresses all such conduct.**

Abusers are often people who know their victim and have a responsibility, in some capacity, for the child's safety and well-being. Thus any abuse of the child is both a breach of trust and a misuse of a position of power.

ADDRESSING CHILD SEX ABUSE AND COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN UNDER NATIONAL LAW: INTERNATIONAL STANDARD-SETTING

CSEC and CSA are distinct forms of sexual violence against children, requiring different interventions for their elimination. However they also overlap.

The remuneration factor distinguishes CSEC from CSA, as commercial or in-kind gain is absent from the latter, although sexual exploitation is also abusive. Through CSEC a child becomes not only a sexual object but also a commodity. CSEC is the use of a child for sexual purposes in exchange for cash, goods or in-kind favours between the exploiter, intermediary or agent, and others who profit from the sexual exploitation of the child.

There are situations which are difficult to categorise strictly as either CSA or CSEC. For example, child domestic labourers, among whom girl children are disproportionately represented, are particularly vulnerable to sexual abuse and are often victims of such abuse. It is difficult to categorise such situations as either CSA or CSEC, as there can be an implicit expectation by the employer that the child's duties include providing 'sexual services' as part of the employment. Another example of the difficulties in categorisation relates to child pornography. For example, child abuse images can be created for non-commercial use or exchange. Nevertheless, child pornography initially made for non-commercial purposes may subsequently be commercially traded or exchanged.⁸⁸

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse acknowledges the linkages between child sexual abuse and exploitation and includes a broad range of offences such as engaging in sexual activities with a child who has not reached the age of consent, child prostitution, child pornography and causing children to witness sexual abuse or sexual activities. The Convention also addresses the issue of child abuse and exploitation in a fairly holistic way, requiring prevention activities, assistance and protective measure to be undertaken as well as treatment for victims. There is an accompanying Explanatory Report to the CoE Convention which is useful for interpreting its objectives and helping States to implement them at the national level.⁸⁹ Under the Convention States are explicitly allowed to reserve their right to criminalise certain conduct, which limits the uniformity of its application across the States that ratify it.⁹⁰

The table below lists examples of offences that States should consider including in

Child Sexual Abuse Offences ⁹¹	Child Sexual Exploitation Offences
<ul style="list-style-type: none"> • Engaging in sexual activities with a child under the age of sexual consent • Engaging in sexual activities with a child using force, coercion or threats • Engaging in sexual activities with a child by abusing a position of trust, authority or influence over the child, including within the family • Engaging in sexual activities with a child by abusing the vulnerable situation of the child, such as a mental or physical disability or a situation of dependence • Making a child watch sexual acts • Soliciting a child for sexual purposes 	<ul style="list-style-type: none"> • Child prostitution: recruiting or coercing a child to participate in prostitution or having recourse to a prostituted child • Child pornography: producing, offering, distributing, possessing, procuring or accessing child pornography • Pornographic performances/sexual posing: promoting, recruiting or exploiting the participation of a child in pornographic performances/sexual posing⁹²
<p>Aiding, or abetting the commission of such offences should also attract criminal liability in any legal system.</p>	

⁸⁹ CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 143. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

⁹⁰ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, arts. 20(3) & (4), 21(2), 24(3), 25(3). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

⁹¹ *Ibid.* arts. 18 & 22.

⁹² In April 2005 the Swedish *Penal Code* was amended to include a new offence termed 'exploitation of a child for sexual posing'. The Code makes it an offence for anyone to promote or exploit the performance or participation in sexual posing by a child under fifteen years of age in return for compensation. This provision also applies to such an act against a child who has attained 15 years of age, but not 18, if the posing is, by its nature, likely to damage the child's health or development. This crime refers to sexual posing that occurs in sex clubs, private circles or for the production of pornographic pictures. Sexual posing in this context means to participate in or perform a sexual act or to openly expose the body to one or more people or in front of a camera. Similarly, Article 21 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse exploitation includes offences "concerning the participation of a child in pornographic performances".

criminal legislation.

TRAFFICKING AS A PROCESS LEADING TO EXPLOITATION

There are several international agreements that address child trafficking. Article 35 of the CRC stipulates that “States parties shall take all appropriate national, bilateral, and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” However, the key international legal instrument on trafficking is

the Trafficking Protocol,⁹³ and offers the definition below.

Article 3 Trafficking Protocol

“For the purposes of this Protocol:

- (a) ‘Trafficking in persons’ shall mean 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. Exploitation shall include, at 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;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age”.⁹⁴

⁹³ The CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not address child trafficking, as the CoE has another convention on this issue.

⁹⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

According to the above definition, trafficking is:

- A process (recruitment, transportation, etc)
- Involving deceptive/coercive/fraudulent means – **except when the victim is a child**
- Where the purpose is exploitation

The main characteristics of the international definition under the Trafficking Protocol are presented below.

First, the Trafficking Protocol expressly mentions a range of activities in the chain of trafficking that must be made criminal under national law where the ultimate purpose is exploitation. These activities are recruitment, transportation, transfer, harbouring and receipt of adults or children. The table below illustrates how the different elements of the trafficking offence would apply to children.

Trafficking Protocol Act	Interpretation
Recruitment	Relates to the search for and physical conscription of one or more children with the sole objective of trafficking for exploitation.
Transportation	Relates to the means by which children are moved from one place to another.
Transfer	Refers to the process of moving children from one place to another. It does not necessarily require the use of transportation vehicles.
Harbouring	Relates to the process of keeping child victims of trafficking hidden (usually in the short term) by a person or persons until arrangements are made for their transfer or transportation by someone else.
Receipt	Refers to the act by which a person comes to be in possession of a trafficked child.

National legal provisions must criminalise each of the above acts so that any action in the chain of the movement of a child qualifies as an act of trafficking when the ultimate intent is exploitation. Unfortunately, there are many countries which have not yet legislated to cover the spectrum of activities contained in the Trafficking Protocol.

Second, the definition of trafficking in the Trafficking Protocol, which illustrates the process leading to exploitation, is central (even if the ultimate

intended exploitation does not actually take place). It will be necessary to prove at least intent of exploitation for a prosecution for human trafficking to succeed. Therefore legislation drafted to comply with the requirements of the Trafficking Protocol should allow for flexibility in establishing intent. Then, even if no actual exploitation can be established, all persons in the chain of trafficking will be included as accessories to the crime.

It is important that the definition of ‘exploitation’ include, at a minimum, sexual exploitation. Once children are trafficked, they may be subjected to many forms of exploitation, including child labour, debt bondage, domestic work, begging, involvement in illicit activities (such as drug trafficking), illegal adoptions, marriage and trafficking in organs. The forms of exploitation tend to reflect changes in demand and in opportunities. Laws should therefore take into account the different forms of exploitation that victims may be subjected to, including sexual exploitation.

Harmonisation of child trafficking law in Australia

Before the Trafficking Protocol was agreed to, **Australian** law addressed trafficking through its laws on slavery⁹⁵ which were subsequently amended to deal with the growing international trade in persons for the purpose of sexual exploitation. Following the entry into force of the Trafficking Protocol, the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* created a specific offence of international trafficking in children, which complies with the international standard definition and provides that a person commits an offence of trafficking in children if he or she organises or facilitates the entry, receipt or exit from Australia of a child under the age of 18 years, for the purpose of providing sexual services or any other form of exploitation after that entry, receipt or exit.⁹⁶ ‘Sexual services’ is at the same time broadly defined as the use or display of the body of the person providing the service for the sexual gratification of others.

Third, the Trafficking Protocol considers children to be victims of trafficking from the moment they are recruited, transported, transferred, harboured or received for the purposes of exploitation. Whereas in the case of an adult, the international definition of trafficking requires the use of coercion or deceit, this does not apply when the victim is a child under the age of 18 years. That is, the consent of a child, or the means used to obtain such consent, is irrelevant, as long as the overall objective of the operation is the exploitation of the child. Unfortunately, few countries’ national laws reflect this principle; but there are encouraging developments.

⁹⁵ Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999. Australia.

⁹⁶ Criminal Code Amendment (Trafficking in Persons Offences) Act 2005, art. 271.4. Australia

Ghana has expressly laid down in its *Trafficking Act of 2004* that where children are trafficked, the consent of the child, parents or guardian of the child cannot be used as a defence in a prosecution.⁹⁷ In contrast, **South Korea, Belarus and Bolivia**, among others, have legal provisions requiring a 'deceptive scheme' to be established, which appears to be quite an onerous burden of proof. An example worthy of emulation is **Norway**, whose *Penal Code* specifically provides that any person who commits any of the punishable acts against a person who is under 18 years of age shall be liable to imprisonment independent of any use of force or threats, misuse of a person's vulnerability or other improper conduct.

Fourth, although the Trafficking Protocol does not expressly make this point clear, it must be understood that both international and internal trafficking fall within the scope of the treaty. The Trafficking Protocol has been interpreted as requiring the offence to be transnational and committed by an international criminal network. The most direct consequence of this narrow interpretation is that internal trafficking is not always considered as falling within its scope.⁹⁸ ECPAT would urge all countries to ensure that their anti-trafficking laws cover both internal and cross-border trafficking.

Fifth, the definition in the Trafficking Protocol clarifies the distinction between trafficking and migrant smuggling, the latter being the subject of a separate protocol to the Convention. For adults, trafficking involves elements of coercion, deception, violence and physical and/or psychological force against persons who never consented or, if they initially consented, that consent was obtained by deception. Smuggling, on the other hand, involves migrants who have consented to be transported into another country. The distinction is that whereas smuggling is a migration issue, trafficking is a human rights issue. Nevertheless, the vulnerability of children who are smuggled often results in them being trafficked: once smuggled across the border, they may find themselves abducted into a trafficking network, unable to escape and without access to legal advice or protection.

“Smuggling of migrants refers to the procurement, in order to obtain, directly or indirectly, a financial or other benefit, of the illegal entry of a person into a State [...] While smuggling does not inherently involve exploitation, smuggled persons are often at risk of injury or death. Trafficking, on the other hand, specifically targets the trafficked person as an object of exploitation and inherently involves a violation of human rights.”⁹⁹

⁹⁷ Human Trafficking Act of 2004. Ghana.

⁹⁸ Scarpa, Silvia. Child Trafficking: the worst face of the world. *Global Migration Perspectives, No. 40*, September 2005. Global Commission on International Migration. Geneva, Switzerland. Accessed on 26 September 2008 from: <http://www.gcim.org/attachements/GMP%20No%2040.pdf>.

⁹⁹ Stefánsson, Gudmundur Árni. *The Fight Against Children Trafficking*. Committee Report, Sub-Committee on Democratic Governance. NATO Parliamentary Assembly. November 2004. Accessed on 26 September 2008 from: <http://www.nato-pa.int/Default.asp?SHORTCUT=501>.

The above statement is based on the definition of smuggling of migrants provided in Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air¹⁰⁰ of 2000, which supplements the UN Convention against Transnational Organized Crime, and provides ratifying States with a tool to combat and prevent the smuggling of human cargo.

WHO IS RESPONSIBLE FOR CHILDREN? OBLIGATIONS OF PARENTS AND LEGAL GUARDIANS

As mentioned above, child sex offenders are often people who know their victim and have some responsibility towards the child. As parents and legal guardians have primary responsibility for the upbringing and development of children in their care,¹⁰¹ it is important that national laws clearly define parents' and guardians' obligations to protect children under their care from all forms of sexual abuse and exploitation.

In some jurisdictions, a parent who knows that another person is abusing his/her child and takes no action to stop the abuse is liable to criminal prosecution. The law may also require individuals in certain occupations to report suspected child abuse. These occupations may include teachers, doctors and social service workers. At any rate, the involvement of parents and guardians in the commission or facilitation of child sexual abuse and child sexual exploitation should always attract punishment under national law.

WHO IS A CHILD? THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE IMPORTANCE OF CONSISTENT DEFINITIONS WITHIN AND ACROSS LEGAL SYSTEMS

The CRC sets out the numerous rights of children but leaves it up to States to decide who is a child. More precisely, it defines a child as any person below the age of 18 years while at the same time allowing States to determine an earlier age of majority. Majority is generally understood as a legal concept defining the age at which a person becomes a full adult.¹⁰²

Under the CRC, a child is thus defined as *"every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"*.¹⁰³

¹⁰⁰Entered into force the 28 January 2004, in accordance with Article 22. The Protocol was adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the UN.

¹⁰¹Convention on the Rights of the Child, art. 18. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹⁰²Definition of 'majority' from the *Compact Oxford English Dictionary* available at AskOxford.com. Accessed on 26 September 2008 from: http://www.askoxford.com/concise_oed/majority?view=uk.

¹⁰³Convention on the Rights of the Child, art. 1. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

In practical terms, a person who has attained the age of majority is considered able to do certain things such as marry, without the consent of others, as well as vote or enter into a legally binding contract. National laws provide for different ages of majority and there are significant variations within and across jurisdictions.

When a State establishes a low age of majority - for example, 14 years – one of the most direct consequences is that persons aged between 14 and 18 years may be excluded from the scope of the CRC’s protection because they will not be considered as ‘children’ in their national jurisdictions. The issue has been raised by the Committee on the Rights of the Child, which has repeatedly stated that the provisions of the CRC should benefit all children up to the age of 18 years, as illustrated by the example below.

“The Committee reiterates its deep concern that the age of majority is set at pre-defined ages of puberty for boys at 15 and for girls at 9, because it implies that boys from 15 to 18 years and girls from 9 to 18 years are not covered by the provisions and principles of the Convention.”¹⁰⁴

In its Concluding Observations, the Committee urged the Government of Iran to review its legislation so that the age of majority is set at 18 years of age.¹⁰⁵

In harmonising their laws with international standards to better protect children from sexual abuse and exploitation, States should seek consistency across all their laws containing age references so as to reduce children’s vulnerability to sexual exploitation and abuse. This would include a review of the following:

The age of sexual consent

The age of sexual consent refers to the time at which a person is considered able to legally engage in and consent to sexual activity (which may range from kissing to sexual intercourse) with another person. The age of sexual consent in a given country can often be inferred from looking at its legal provisions on sexual offences.

In practice, the age of sexual consent may vary according to the context. For example, in many countries the age of sexual consent varies depending on the sex of both partners.

¹⁰⁴Committee on the Rights of the Child. *Concluding observations: The Islamic Republic of Iran*, para. 22. UN Convention on the Rights of the Child. 31 March 2005. Accessed on 26 September 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/816601ca7398c9b3c1257021004d0583/\\$FILE/G0540872.DOC](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/816601ca7398c9b3c1257021004d0583/$FILE/G0540872.DOC).

¹⁰⁵*Ibid.* para. 23.

In other jurisdictions, so-called ‘close in age’ exemptions may apply, whereby a child who is younger than the age of consent may nonetheless engage in sexual activity with another person who is of a similar age.¹⁰⁶ For example in some **United States** states a lower age applies when the age gap between partners is minimal, or when the older partner is below a certain age (usually 18 or 21 years). On the other hand, laws on the age of consent may not apply if the partners are married to one another.

As illustrated by the table below there is no consensus as to what constitutes an ‘appropriate’ age of sexual consent. The question has generated much debate worldwide; on occasion exposing the inconsistencies between the age of majority applicable in different situations (for e.g. voting, getting married and driving a car) and the age of consent to sexual activity.

AGE OF SEXUAL CONSENT ¹⁰⁷	
Algeria ¹⁰⁸	16 years
Angola ¹⁰⁹	14 years
Canada ¹¹⁰	16 / 18 years
Colombia ¹¹¹	14 years
El Salvador ¹¹²	18 years
Egypt ¹¹³	18 years
Fiji ¹¹⁴	16 years
Japan ¹¹⁵	13 years
Spain ¹¹⁶	13 years

¹⁰⁶It is the case for Finland and Norway.

¹⁰⁷Compilation of ages of consent worldwide available from Interpol website. Interpol. *Legislation of INTERPOL member states on sexual offences against children*. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/>.

¹⁰⁸Crimes et Delits et Leurs Sanctions [Penal Code], art. 334. Algeria. Accessed on 26 September 2008 from: http://www.lexinter.net/DZ/crimes_et_delits_et_leurs_sanctions.htm.

¹⁰⁹Código Penal [Penal Code], art. 179. Angola. Accessed on 26 September 2008 from: <http://www.angola-portal.ao/PortalDoGovern0/LegislacaoD.aspx?Codigo=76>.

¹¹⁰Criminal Code, art. 151. Canada. Accessed on 26 September 2008 from: http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_V//en#anchorbo-ga:l_V. The age of sexual consent was raised to 16 years in 2008, However the Code extends protection to children up to the age of 18 years in cases of sexual exploitation.

¹¹¹Ley 599 de 2000 (julio 24) por la cual se expide el Código Penal [Penal Code], arts. 208-209. Colombia. Accessed on 26 September 2008 from: http://www.ramajudicial.gov.co/csj_portal/Min/15992000.htm.

¹¹²Interpol. *Legislation of Interpol member states on sexual offences against children: El Salvador*. Updated Spring 2006. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaElSalvador.pdf>.

¹¹³Interpol. *Legislation of Interpol member states on sexual offences against children: Egypt*. Updated Spring 2006. Accessed on 26 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csaEgypt.pdf>.

¹¹⁴Penal Code, arts. 155-156. Fiji. Accessed on 26 September 2008 from: http://www.itc.gov.fj/lawnet/fiji_act/penal_code.html.

¹¹⁵Penal Code (Act No. 45 of 1907), art. 177. Unofficial English translation. Japan. Accessed on 26 September 2008 from: <http://www.cas.go.jp/ip/seisaku/hourei/data/PC.pdf>. We are, however, told that this is the federal age of consent and that the latter is higher in the prefectures (Japan’s territorial divisions).

¹¹⁶Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 181(2). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l218.html#c2.

In countries where the age of sexual consent is low, children who have reached that age are particularly vulnerable to abuse and exploitation, especially when there are no legal provisions that define and prohibit the different manifestations of child sexual exploitation.

In reviewing their laws, States should thus take into account the distinction between: (1) sexual activity taking place in the context of a child's sexual development and in the course of which consent is most relevant; and (2) sexual activity which is exploitative in its very nature.

In this regard **Canada** has enacted two different ages of consent: 18 years is the threshold where the sexual activity involves exploitative activity, such as prostitution, pornography or where there is a relationship of trust, authority or dependency; while for other sexual activity, in 2008 the age of consent was raised from 14 to 16 years.¹¹⁷ The Committee on the Rights of the Child expressed its concern to the Government of **Iceland**, noting that:

“The rather low age of sexual consent” of 14 years old may not “provide adequate protection for children older than 14 years old against sexual exploitation”.¹¹⁸

The principle that children up to the age of 18 years should be protected from sexual exploitation not only stems from the provisions of the CRC but is also clearly reflected in other international instruments such as the Trafficking Protocol, which extends special protection to all children up to the age of 18 years¹¹⁹ and ILO Convention 182, pursuant to which all those aged below 18 years are to be regarded as children, without exception¹²⁰.

Marriageable age

Where a child has been given in marriage in exchange for cash, goods or benefits in kind, the transaction could be considered a form of CSEC. It happens when parents or family members having authority over a child marry the child into another family in order to get some benefit or support for the child's family.¹²¹

¹¹⁷Criminal Code, art. 153(2). Canada. Accessed on 26 September 2008 from:

http://laws.justice.gc.ca/en/showdoc/cs/C-46/bo-ga:l_v//en#anchorbo-ga:l_v:

¹¹⁸Committee on the Rights of the Child. *Concluding observations: Iceland*, para. 13. UN Convention on the Rights of the Child. 21 June 2006. Accessed on 26 September 2008 from: http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.ISL.CO.1_En.pdf.

¹¹⁹Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(d). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_20traff_eng.pdf.

¹²⁰ILO Convention No. 138 (Minimum Age Convention), art. 2. Entered into force 19 June 1976. Accessed on 26 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138>.

¹²¹Subgroup Against the Sexual Exploitation of Children, NGO Group for the Convention on the Rights of the Child. *Semantics or Substance? Towards a shared understanding of terminology referring to the sexual abuse and exploitation of children*, p. 22. January 2005. Accessed on 26 September 2008 from: http://www.crin.org/docs/resources/publications/Subgroup_Sexual_Exploitation_Semantics.pdf.

In some countries, the age at which individuals are allowed to marry is very low. Sometimes the age of marriage is different from the age of sexual consent. This is the case in **Tanzania**, where the age permitted for marriage is actually lower than the age of sexual consent.¹²² It may also be the case that the laws on the age of capacity to marry are overridden by customary laws and traditions.¹²³

The definition of a child may therefore require a review of the ages set for capacity to marry.

Age of criminal responsibility

Around the world children are often treated as criminals as a result of their involvement in activities such as prostitution. This problem is exacerbated when the age of criminal responsibility is low; in such cases children are at risk of being treated as offenders by law enforcement when in fact they are victims in need of care and protection.¹²⁴

Minimum age for employment

Children may also be commercially sexually exploited through domestic servitude or bonded labour. A child may be contracted to work as a household servant, but the employer assumes that the child can also be used for sexual purposes. In countries with a very low threshold for employment, children are especially vulnerable. All countries should observe the ILO standards for the minimum age of employment.

Definitions based on sex, gender or ethnicity

In spite of the CRC's fundamental principle of non-discrimination, in several countries children are treated differently on the basis of sex, gender or ethnicity. In some cases, laws only recognise the rape, sexual exploitation or prostitution of females, leaving boys with no legal protection. Some legislations criminalise underage sex 'with members of the opposite sex', which means that where the act is performed with children of the same sex as the perpetrator, the child is not protected.

¹²²The African Child Policy Forum. *In the best interests of the child: Harmonising laws in Eastern and Southern Africa*, p. 4. Accessed on 29 September 2008 from [http://www.africanchild.info/documents/Report%20\(Harmonising%20Laws\).pdf](http://www.africanchild.info/documents/Report%20(Harmonising%20Laws).pdf).

¹²³*Ibid.* p. 75.

¹²⁴The Committee on the Rights of the Child has often expressed concern in this regard. See for example *Concluding Observations of the Committee on the Rights of the Child, Lithuania, U.N. Doc. CRC/C/15/Add.146 (2001)*. Reprint of document available from the University of Minnesota Human Rights Library. University of Minnesota Human Rights Library. Accessed on 5 March 2007 from: <http://www1.umn.edu/humanrts/crc/lithuania2001.html>.

Misperceptions that boys cannot fall victim to prostitution are sometimes reflected in national laws that afford different protections to boys and girls. In **Bangladesh**, not only do laws fall short of the minimum requirements set by international law, but the margin of protection for boys is reduced.¹²⁵ ECPAT research has also revealed that the prostitution of boys is on the rise in many countries and the need to address such legal gaps in their protection must be addressed as a matter of urgency.

While the **Indian Penal Code** prohibits importing a foreign girl for purposes of illicit sex, this provision offers no protection to girls from India or boys from any country. Thus, the *Penal Code* provisions on child trafficking need review so as to protect Indian girls - instead of only foreign girls - and boys - who do not enjoy any protection whatsoever.

Birth registration

Article 7 of the CRC provides that every child has the right to have his/her birth registered immediately after birth. The lack of a birth certificate may prevent a child from receiving health care, nutritional supplements and social assistance, and from being enrolled in school. Later in childhood, identity documents also help protect children from child labour, premature enlistment in the armed forces and, if accused of a crime, prosecution as an adult.

Without birth registration systems in place, children are also generally more vulnerable to sexual abuse and exploitation as they cannot prove their age. Without proof of age, girl children may fall victim to forced marriage before they are legally eligible;¹²⁶ a tactic frequently used to traffic and prostitute children. Girls exploited in prostitution may also be claimed by pimps to be over 18 years of age.¹²⁷

¹²⁵The only provisions that apply to the prostitution of boys are the *Penal Code* sections on transferring or possessing a person under 18 years of age for the purpose of prostitution or any unlawful or immoral purpose (Penal Code, Sections 372 and 373) and the *Women and Child Repression Prevention Act's (WCRPA)* child trafficking section (Act No. VIII of 2000. The *WCRPA* was enacted in 2000 and amended in 2003).

¹²⁶Unicef. *Childinfo.org: Statistics by Area – Birth Registration*. Accessed on 26 September 2008 from: <http://www.childinfo.org/areas/birthregistration/>.

¹²⁷IRIN, UN Office for the Coordination of Humanitarian Affairs. *Bangladesh: Moving towards universal birth registration*. 15 July 2008. Accessed on 26 September 2008 from: <http://www.irinnews.org/report.aspx?ReportId=79258>.

CONCLUSION

As a final observation, we emphasise the importance of consistent definitions for the offences of child sexual abuse and exploitation:

- First, definitions that have been internationally agreed upon will reflect a shared understanding of a given issue;
- Second, the scope of an offence revolves around how it is defined. Definitions that are clear and consistent are more conducive to efficient law enforcement;
- Third, given the transnational nature of many sexual exploitation crimes, common definitions will facilitate collaboration and cooperation in fighting these crimes, for instance through extradition and the provision of mutual assistance. In many countries, extradition for a given offence is conditional upon the act being considered criminal in both jurisdictions;
- Finally, common definitions can help curb 'forum shopping', that is the choosing of a jurisdiction because the prevailing legal rules are more advantageous to a particular claim or defence. Harmonisation of States' domestic laws is a way to thwart criminals seeking out jurisdictions with more lenient rules, which seems to be a trend as far as sexual tourism is concerned.

The mere presence of clear and consistent definitions is not necessarily an indicator of good child protection schemes in any country. There may be gaps between the written law and its actual enforcement. However, ECPAT believes that common definitions provide a solid foundation for a better understanding of sexual crimes against children and for more adequate responses. **ECPAT urges governments to enact laws that define and prohibit the sexual abuse of children, the sexual exploitation of children and their various manifestations.**

LEGAL REFORM CHECKLIST

- √ National law establishes offences and penalties relating to the sexual abuse of children
- √ Sexual abuse includes:
 - (1) sexual activities with a child who has not yet reached the age of sexual consent
 - (2) sexual activities with a child up to the age of 18 years where use is made of coercion, force or threats, or when the offender abuses a position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child
- √ National law addresses the conduct of making a child watch sexual acts or performing such acts in the presence of children, which could result in harm to the psychological health of the victim
- √ National law establishes offences and penalties for the sexual exploitation of children
- √ Sexual exploitation includes:
 - (1) child prostitution
 - (2) child pornography
 - (3) coercing/recruiting children to participate in pornographic performances/sexual posing
- √ National law criminalises aiding or abetting and attempts to commit the above offences
- √ National law establishes offences of child trafficking for sexual purposes including the process leading to sexual exploitation, in accordance with the Trafficking Protocol
- √ States should conduct a comprehensive review of existing legislation to ensure that:
 - (1) The law provides for a nationally consistent definition of a child as anyone up to the age of 18 years
 - (2) Laws on the sexual exploitation of children protect children up to the age of 18 years, irrespective of the age of sexual consent

- (3) The law establishes a clear age of sexual consent for the purpose of legal certainty. States with low ages of sexual consent, should amend the laws to raise that age
 - (4) In order to avoid punishing consensual sexual activity between peers, States should consider providing a 'close in age' exemption in the law
 - (5) Laws establish the responsibilities of parents and legal guardians to protect children under their care from abuse and exploitation. Reporting of suspected sexual abuse/exploitation should be mandatory for persons in positions of responsibility
- √ States should review the minimum ages established for:
- (1) Marriage
 - (2) Criminal responsibility
 - (3) Employment
- and if necessary increase them in line with international standards
- √ States should establish mandatory birth registration systems

SECTION 3

THE PROSTITUTION OF CHILDREN

Objectives:

- To define child prostitution with reference to international standards and map out elements for an enhanced definition
- To clarify 'who and what' should be subject to criminal law

Key Provisions:

- Article 34 of the CRC and OPSC
- Article 2(b) of the ILO Convention 182
- Article 19 of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

CHILD PROSTITUTION AND THE NEED FOR A TARGETED LEGAL RESPONSE

Child prostitution occurs when someone benefits from a commercial transaction in which a child is made available for sexual purposes. Children may be controlled by an intermediary who manages or oversees the transaction, or by an exploiter who negotiates directly with a child.

Children are also involved in prostitution when they engage in sex in return for basic needs such as food, shelter or safety, or for favours such as higher grades at school or extra pocket money to purchase consumer goods. The sex acts may occur in many different locations such as brothels, bars, clubs, homes, hotels or on the street. Sometimes child prostitution is not an organised activity, but usually it is; either on a small scale through individual pimps or on a large scale through criminal networks.

The Committee on the Rights of the Child has found that many countries do not yet have adequate legal provisions to define and criminalise child prostitution in accordance with the definition in the OPSC.

The prostitution of children vs. adult prostitution: the need for separate offences

When the term ‘child prostitute’ or ‘child sex worker’ is used, the implication is that a child has somehow chosen to make prostitution a profession. This line of thinking masks the reality that it is adults who create a demand for children as sexual objects, and are prepared to misuse their power and their desire for profit. Any State that has ratified the CRC, must consider that such children are the victims of criminal sexual exploitation.

This distinction must be reflected in national laws. In countries where prostitution is legalised or decriminalised, national law must contain distinct provisions prohibiting child prostitution and imposing penalties upon those who exploit children.

Child prostitution in a jurisdiction where adult prostitution has been decriminalised – New Zealand

Although the *Prostitution Reform Act* 2003 decriminalised adult prostitution, it prohibits child prostitution as required under international standards. Under the Act, “commercial sexual services” include a person’s physical participation in sexual acts with and for another person’s gratification, for payment or other reward to the person providing sexual services or a third party.¹²⁸ Regarding criminalised activities, the Act makes it illegal to “cause, assist, facilitate, encourage, contract for or arrange” the prostitution of a person under 18 years of age.¹²⁹ Nor may any person receive a payment or other reward that she or he reasonably should know is directly or indirectly a result of commercial sexual services provided by a person under the age of 18 years.¹³⁰ It is also illegal to receive commercial sexual services from a person below the age of 18 years.¹³¹

¹²⁸Prostitution Reform Act 2003, s. 4(1). New Zealand. Accessed on 29 September 2008 from: <http://www.legislation.govt.nz/act/public/2003/0028/latest/DLM197815.html>.

¹²⁹*Ibid.* ss. 20 & 22(1).

¹³⁰*Ibid.* s. 21.

¹³¹*Ibid.* s. 22(2).

Regrettably, this legislation is poorly enforced. In the first two years following the enactment of the *Prostitution Reform Act 2003*, there were 48 charges laid for the use in prostitution of persons under the age of 18 years and only five people convicted, with sentences ranging from two years in prison to a fine and community service. The first conviction of a perpetrator of underage prostitution occurred in 2005. The police force has been criticised by NGOs, such as ECPAT New Zealand and the STOP Demand Foundation, for the low level of prosecutions of people who pay for sex with children under the Act.¹³²

In June 2006, the *Crimes Act* was amended to include provisions on child sexual exploitation, including child prostitution. Under the *Crimes Act*, anyone who sells, buys, transfers, barter, rents, hires or in any other way enters into a dealing involving a person under the age of 18 years for the purpose of sexual exploitation is liable to a maximum of 14 years' imprisonment.¹³³ The first charges under this provision of the *Crimes Act* were brought in July 2008 when a Christchurch brothel madam was charged for exploiting two girls aged 16 and 17 years.¹³⁴

Child prostitution, pornography and trafficking: three intertwined phenomena

Child prostitution and child trafficking are closely linked. Children may end up being prostituted as the outcome of the trafficking process if they are transported within or across borders for the purpose of sexual exploitation. Child prostitution may also be the objective of a trafficking process.

Children exploited in prostitution may also be used in the production of pornographic materials, or further exploited by being used in pornographic performances.

¹³²ECPAT International. *Global Monitoring Report on the status of action against commercial sexual exploitation of children: New Zealand*, p. 17. 2006. Accessed on 29 September 2008 from: http://www.ecpat.net/A4A_2005/PDF/EAP/Global_Monitoring_Report-NEWZEALAND.pdf.

¹³³Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, art. 90AA(1)(a)(i). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act. Section 98AA was inserted by section 6 of the *Crimes Amendment Act 2005*. Crimes Amendment Act 2005 No 41 (as at 26 June 2008), Public Act. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/2005/0041/latest/DLM346172.html?search=ts_act_Crimes+Act#DLM346172.

¹³⁴Steward, Ian & Calcott, Dean. Brothel madam on sex-slavery charges. *The Press*, 29 July 2008. Accessed on 29 September 2008 from: <http://www.stuff.co.nz/stuff/4634499a12855.html>.

THE INTERNATIONAL LEGAL RESPONSE TO THE PROSTITUTION OF CHILDREN

International legal framework

There is extensive international human rights law prohibiting child prostitution. The CRC requires States parties to protect children from exploitation in prostitution¹³⁵, but does not provide a definition of child prostitution (see page 15).

Other international standards are in ILO Convention 182, which includes prostitution as one of the worst forms of child labour and calls upon States parties to prioritise its elimination. The Convention requires States parties to condemn child prostitution and adopt penal sanctions to eliminate it.¹³⁶ Similarly, the Trafficking Protocol calls for the elimination of the exploitation of the prostitution of others and other forms of sexual exploitation.¹³⁷

The OPSC offers the first international definition of child prostitution as follows:

“Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration.”¹³⁸

In addition, it requires States parties to prohibit and criminalise child prostitution¹³⁹ and to ensure that as a minimum, the following acts are fully covered under their criminal or penal laws:

“Offering, obtaining, procuring or providing a child for child prostitution”

In the next part of this section, the different elements of the above mentioned OPSC provisions are broken down and their different components explained. Suggestions are also made on how to strengthen existing legislation towards better child protection.

¹³⁵Convention on the Rights of the Child, art. 34. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹³⁶ILO Convention 182 (Worst Forms of Child Labour), art. 7. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

¹³⁷Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, art. 3(a). Entered into force 25 December 2003. Accessed on 26 September 2008 from: http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf.

¹³⁸*Ibid.* art. 2.

¹³⁹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The constitutive elements of the international offence of child prostitution, examples of national laws and issues of concern

The irrelevance of consent

As mentioned in Section 2 above, under the CRC, a child means any person up to the age of 18 years. However, in some countries, children who have reached the age of sexual consent are also considered capable of entering into exploitative sexual activities such as prostitution. This leads to a situation in which law enforcement officers may be reluctant to take action against clients/exploiters if a child is older than the age of consent, but younger than 18 years of age.¹⁴⁰ Consequently, there needs to be some differentiation in law between the capacity to enter into consensual sexual activity, and involvement in sexual activities that are exploitative by their very nature. **Protection from exploitation in prostitution must be extended to all children up to the age of 18 years, and consent in such circumstances should be an irrelevant consideration.**

'Sexual activities' as contemplated by the OPSC

In the context of child prostitution, 'sexual activities' should be understood broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Sexual intercourse should be included, but also sexual touching and masturbation, without discrimination in relation to the sex of the parties. ECPAT would also urge States to consider the inclusion of other non-contact acts, such as sexual posing, in order to better protect children from exploitation.

In **Bangladesh** for instance, the *Suppression of Immoral Traffic Act (SITA) of 1933*, defines prostitution as "promiscuous sexual intercourse for hire, whether in payment or in kind"¹⁴¹ a definition which does not reflect the breadth of the OPSC definition. Although the *SITA* includes the element of remuneration, its limited definition restricts its application from situations where children are sexually exploited by acts that are sexual, but do not amount to sexual intercourse, such as oral sex, sexual touching and fondling, posing and acts relating to the making of child pornography.

¹⁴⁰Muntarbhorn, Vitiit. International Perspectives and Child Prostitution in Asia, p. 10. In *Forced Labor: The Prostitution of Children* (p. 9). US Department of Labor, Bureau of International Labor Affairs. 1996. Accessed on 29 September 2008 from: http://departments.bloomu.edu/crimjust/pages/articles/Child_Labor.pdf.

¹⁴¹Suppression of Immoral Trafficking Act of 1933, s. 3(3). Bangladesh.

Remuneration or consideration: the commercial element of exploitation

As indicated above, children are sometimes involved in prostitution in return for basic needs or favours; therefore 'remuneration or other form of consideration' should include any form of reward whether promised or given to the child or to a third party. The 'consideration' needs to be able to include food, shelter, drugs, drinks, consumer goods, etc. The inclusion of such 'indirect' forms of remuneration is crucial, as many children originally become involved in prostitution because they are homeless, runaways or experiencing substance abuse problems. They become subject to exploitation in order to satisfy their basic needs (food, shelter, belonging to a group of people).¹⁴² States should therefore adopt a broad definition of 'remuneration and consideration' in order to capture all forms of exploitation.

Offences covered under the OPSC

The OPSC delineates activities that each State party is required to fully cover under its criminal or penal law, whether the offences are committed "domestically or transnationally, or on an individual or organized basis".¹⁴³ These are the "offering, delivering or accepting, by whatever means" of a child for the purpose of sexual exploitation¹⁴⁴ and with specific regards to child prostitution, all acts of "offering, obtaining, procuring or providing a child for child prostitution".¹⁴⁵

Interpretation of these terms varies among different countries and there are different understandings and concepts of the issue. Unfortunately, not many countries have provisions dealing with the prostitution of children which are broad enough to encompass the full range of acts contemplated by the OPSC.

Below is an attempt to explain these acts by giving concrete examples of what they may include.

¹⁴²Hickey, Eric W. *Sex Crimes and Paraphilia*, p. 42. Pearson Education. 2006. It should be noted that it is precisely the incapacity to fulfil these needs independently that makes it so hard for children to get out of their situation of exploitation.

¹⁴³Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(1). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

¹⁴⁴*Ibid.* art. 3(1)(a).

¹⁴⁵*Ibid.* art. 2(b).

OPSC Act	Interpretation
Offering	To ask someone if they would like a child for sex; to advertise the availability of children as sexual partners. An offer may occur in a range of ways, including verbally or via newspapers, internet, mobile phone or any other form of communication.
Obtaining	The prohibition on obtaining a child for prostitution targets the client of a prostituted child. It refers to the transaction by which a person acquires the sexual services of a child.
Procuring	To arrange for a child victim to be made available to a customer, for example by 'buying' a child for someone, or arranging for a child to be brought to a particular place for them. This activity is commonly referred to as 'pimping'.
Providing	To make a child available to someone who so requests. This can be illustrated by a parent or a relative who sells a child for the purposes of prostitution or to a brothel owner who provides a customer with access to a child.

Addressing demand and supply: criminalising clients, recruiters, managers of premises and other intermediaries

The client/exploiter: counteracting demand

Child prostitution can never be eradicated without tackling the demand for it. In several countries, national laws on prostitution criminalise the prostitute and the intermediary but leave out those purchasing sexual services. In some instances, laws apply to those who force a child into prostitution or live off the prostitution of others, but fail to make the client subject to criminal liability. For example, in **Brazil**, "subjugating" and/or "obliging" a child to practice prostitution is a crime but neither the *Estatuto da Criança e do Adolescente (ECA)*¹⁴⁶ nor the Brazilian *Penal Code* of 1940¹⁴⁷ criminalise the acts of 'clients'.

It is important to criminalise the 'client' of prostituted children and the purchase of sexual services from children, and this matter must be addressed independently of the question of decriminalising adult prostitution. **The purchase of sexual services from children should always be considered as a crime.**

¹⁴⁶Estatuto da Criança e do Adolescente, Lei N° 8.089, de 13 de julho de 1990, art. 244-A. Brazil. Accessed on 29 September 2008 from: <http://www.planalto.gov.br/ccivil/LEIS/L8069.htm>.

¹⁴⁷Código Penal [Penal Code], art. 218. Brazil. Accessed on 29 September 2008 from: http://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm.

On an encouraging note, a few countries in Latin America are beginning to reform their laws in this direction. Promising practices may be found in the codes of **Chile**¹⁴⁸ and **Costa Rica**¹⁴⁹. In Europe, some countries have specific provisions targeting the ‘client/exploiter’. For example, the penal code of **Norway** provides that any person who, for payment, engages in sexual activity or commits a sexual act with a person under the age of 18 is liable to fines or to two years’ imprisonment.¹⁵⁰

The mere fact of engaging the sexual services of a minor should trigger criminal responsibility, meaning the offering of money with intent to involve a minor in sexual activities, and not just the actual performance of the sexual activities. A new **South African** law is very much on point:

Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007

“17. (1) A person (“A”) who unlawfully and intentionally engages the services of a child complainant (“B”), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person (“C”)—

- (a) for the purpose of engaging in a sexual act with B, **irrespective of whether the sexual act is committed or not;** or
- (b) by committing a sexual act with B,

is, in addition to any other offence which he or she may be convicted of, guilty of the **sexual exploitation of a child.**¹⁵¹
[emphasis added]

¹⁴⁸Chile’s *Penal Code* now directly criminalises the client. Note however that this article illustrates the discrepancies of the protection offered to children who have attained the age of the consent and those below the age of consent: “Artículo 367 ter.- El que, a cambio de dinero o otras prestaciones de cualquier naturaleza, obtuviere servicios sexuales por parte de personas mayores de catorce pero menores de dieciocho años de edad, sin que medien las circunstancias de los delitos de violación o estupro, será castigado con presidio menor en su grado máximo.” Código Penal [Penal Code], art. 367 ter. Chile. Accessed on 29 September 2008 from: <http://www.bcn.cl/leyes/pdf/actualizado/1984.pdf>.

¹⁴⁹Código Penal [Penal Code], art. 160. Costa Rica. Accessed on 29 September 2008 from: http://www.oas.org/juridico/MLA/sp/cri/sp_cri-int-text-cpenal.pdf.

“Artículo 160 – Quien pague a una persona menor de edad de cualquier sexo o prometa pagarle o darle a cambio una ventaja económica o de otra naturaleza, para que ejecute actos sexuales o eróticos, será sancionado (...)”

¹⁵⁰Penal Code, section 19. Norway. Accessed on 19 September from:

<http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws/csanorway.pdf>.

¹⁵¹Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, ch. 3, pt. 2. South Africa. Accessed on 29 September 2008 from: <http://www.info.gov.za/gazette/acts/2007/a32-07.pdf>.

Finally, the 'client/exploiter' must be subject to severe penalties. One must remember that clients are the ones who fuel the demand for children and hence should be liable on conviction to exemplary prison sentences.

Recruiters/suppliers

Recruiters prey on vulnerable children by taking advantage of their distress. Recruiters may induce or coerce children into prostitution; they may make children available to others by offering them for sale or bringing them to a particular place; or they may hand a child over to another exploiter. They may also facilitate child prostitution, for example by providing someone with information on where to find children available for prostitution. Laws must be broad enough to enable the prosecution of persons involved in any such scenarios.

Owners, occupiers, managers of premises used for prostitution of children

The owners of bars, brothels, hotels and other places where children are prostituted must also be amenable to prosecution. Again, while in some countries prostitution is legal and the law allows for the keeping or letting of premises for prostitution, this should never exempt their owners or managers from criminal liability if children are involved. Accordingly, every owner, occupier or manager of premises, or any other person who has control of premises or assists in the management or control of premises, who knowingly permits a person under the age of 18 years to engage in prostitution or to be on the premises for the purpose of engaging in child prostitution must be liable to severe criminal sanctions.¹⁵²

Moreover, States should impose a legal duty on owners and occupiers to report such activities as soon as they become aware of the sexual exploitation of children.¹⁵³

AVOIDING THE CRIMINALISATION OF CHILDREN INVOLVED IN PROSTITUTION

Children involved in prostitution or other forms of sexual exploitation may end up in a justice system designed for adults where they are treated as criminals rather than victims. What is even worse, if illegally in another country, children may be subjected to arrest, detention and deportation.¹⁵⁴ Criminalising young people engaged in prostitution

¹⁵²Criminal Code, s. 171. Canada. Accessed on 29 September 2008 from: <http://www.canlii.org/eliisa/highlight.do?text=171&language=en&searchTitle=R.S.C.+1985%2C+c.+C-46&path=/ca/sta/c-46/sec171.html>. This section provides for such liability on the owner.

¹⁵³South Africa's *Child Care Act, 1983*, s. 50A(2), provides: "(...) Any person who is an owner, lessor, manager, tenant or occupier of the property on which the commercial sexual exploitation of a child occurs and who, within a reasonable time of gaining information of such occurrence fails to report such occurrence at a police station, shall be guilty of an offence (...)." Interpol. *Legislation of Interpol member states on sexual offences against children: South Africa*. Updated Spring 2006. Accessed on 29 September 2008 from: <http://www.interpol.int/Public/Children/SexualAbuse/NationalLaws//csaSouthAfrica.pdf>.

¹⁵⁴Skinnider, Eileen. *Violence against children: International criminal justice norms and strategies*. International Centre for Criminal Law Reform and Criminal Justice Policy. Accessed on 29 September 2008 from: <http://137.82.153.100/Publications/Reports/VACChildren.pdf>.

provides their exploiter with the opportunity to use the threat of prosecution to coerce the child. In addition, children who risk prosecution are unlikely to report the crime of their exploitation to law enforcement agents.¹⁵⁵

It is sometimes argued that arresting or detaining prostituted children helps them to leave prostitution and escape their pimps. However, this is usually only a temporary measure, and children return to the exploitative situation on release.

Children are sometimes arrested under public order laws. A child found begging or 'loitering', may be the victim of exploitation in prostitution and should never be considered as being in conflict with the law. A national law that criminalises children for such acts is not in compliance with international human rights standards.¹⁵⁶

The *Model Guidelines for the Effective Prosecution of Crimes Against Children* state that "[c]hildren who engage in criminal activities through coercion by others who profit by their acts should be considered victims of exploitation rather than perpetrators of crime."¹⁵⁷ This same principle is expressed in other instruments such as the UN's *Resolution on the Instrumental Use of Children in Criminal Activities*.¹⁵⁸ The outcome document of the Second World Congress against CSEC in Yokohama also stated that action to criminalise CSEC in all its forms should not criminalise or penalise child victims.¹⁵⁹

New Zealand has expressly recognised this principle. Its *Prostitution Reform Act* 2003 protects persons under the age of 18 years from prosecution as a party to any of the prostitution related offences. Section 23(3) of the Act reads "[n]o person under 18 years of age may be charged as a party to an offence committed on or with that person against this section."

The OPSC does not expressly call for the non-criminalisation of children victims of sexual exploitation. This legal loophole carries important consequences for child protection, with one observer noting that "by not exempting them from criminal liability for offences relating to prostitution, the law considers them complicit with their own exploitation."¹⁶⁰ In jurisdictions where the age of criminal liability is low, children are even more vulnerable.

¹⁵⁵Gillespie, Alisdair A. Diverting Children Involved in Prostitution. *Web Journal of Current Legal Issues*, 2007. Accessed on 21 May 2007 from: <http://webjcli.ncl.ac.uk/2007/issue2/gillespie2.html>.

¹⁵⁶ECPAT International. *Combating the Trafficking in Children for Sexual Purposes. Questions and Answers*. 2006.

¹⁵⁷The International Centre for Criminal Law Reform and Criminal Justice Policy. *Model Guidelines for the Effective Prosecution of Crimes against Children*, p. 15. August 2001. Accessed on 29 September 2008 from: <http://www.icclr.law.ubc.ca/Publications/Reports/modelguidelines-2001.pdf>.

¹⁵⁸UN General Assembly Resolution 45/115 (Resolution on the Instrumental Use of Children in Criminal Activities). 3 April 1991.

¹⁵⁹The Yokohama Global Commitment 2001. Outcome document of the 2002 World Congress against CSEC. Accessed on 1 October 2008 from: <http://www.csecworldcongress.org/en/yokohama/Outcome/index.htm>.

¹⁶⁰Gillespie, Alisdair A. Diverting Children Involved in Prostitution. *Web Journal of Current Legal Issues*, 2007. Accessed on 21 May 2007 from: <http://webjcli.ncl.ac.uk/2007/issue2/gillespie2.html>.

In its Concluding Observations on **Lithuania's** periodic State report on the implementation of the CRC,¹⁶¹ the Committee on the Rights of the Child expressed concern about the fact that some legal provisions resulted in the punishment of victims. The Committee encouraged the State party to abolish every legal provision resulting in administrative or other punishment of the victims of sexual abuse and exploitation and to prevent other forms of stigmatisation of the victims.¹⁶²

In its Concluding Observations on the report of the Government of **Morocco**, the Committee on the Rights of the Child stated “the Committee is further concerned at the status of child victims of sexual exploitation who may be treated as offenders”.¹⁶³

Mr. Juan Miguel Petit, former Special Rapporteur on the sale of children, child prostitution and child pornography, observes:

“Where children fear being arrested, they are unlikely to seek medical attention, and given the high risk amongst prostitutes of contracting sexually transmitted diseases, being raped, or suffering other forms of violence, this can have very serious consequences. The same fear often also prevents such children from reaching out for assistance from relevant organisations or individuals who may be able to help them. When the child is considered to be a criminal, the chances of the real perpetrator of the offence namely the child’s client or trafficker – being apprehended are minimal. In receiving countries for victims of trafficking, children are regularly rounded up from brothels and from the streets, locked in detention cells which may also hold adults, and then deported back to the very place from which they were sold. The whole process involving the same child often repeats itself.”¹⁶⁴

The criminalisation of children involved in prostitution or other forms of sexual exploitation raises serious concern and ECPAT would urge governments to review criminal and administrative measures applying to such children.

¹⁶¹Reprint of document available from the University of Minnesota Human Rights Library. *Concluding Observations of the Committee on the Rights of the Child, Lithuania, U.N. Doc. CRC/C/15/Add.146 (2001)*. University of Minnesota Human Rights Library. Accessed on 5 March 2007 from: <http://www1.umn.edu/humanrts/crc/lithuania2001.html>.

¹⁶²See *Ibid.* paras. 53 & 54.

¹⁶³Reprint of document available from the University of Minnesota Human Rights Library. *Concluding Observations of the Committee on the Rights of the Child, Morocco, U.N. Doc. CRC/C/15/Add.211 (2003)*. University of Minnesota Human Rights Library. Accessed on 1 October 2007 from: <http://www1.umn.edu/humanrts/crc/morocco2003.html>.

¹⁶⁴Petit, Juan Miguel, Special Rapporteur on the sale of children, child prostitution and child pornography. *Rights of the Child*. Report submitted to the UN Economic and Social Council Commission on Human Rights. 6 January 2003. Accessed on 2 October 2008 from: <http://www.unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/217511d4440fc9d6c1256cda003c3a00?Opendocument>.

Promising Practice in the UK?

The UK Department of Health and the Home Office issued guidelines in 2000 entitled *Safeguarding Children Involved in Prostitution (SCIP)*,¹⁶⁵ which fundamentally altered previous policy and practice with regard to young people in prostitution. Instead of being arrested and punished for prostitution-related offences, those under 18 years of age are to be considered as children 'in need' and offered welfare-based interventions.¹⁶⁶

SCIP is welcome, as it constitutes an official recognition of the fact that children in prostitution are crime victims rather than criminals and should be treated as such and afforded protection. The UK Government, however, provided for a significant exception to the general rule, and expressly states that:

"[...] it would be wrong to say that a boy or girl under 18 never (sic) freely chooses to continue to solicit, loiter or importune in a public place for the purposes of prostitution, and does not knowingly and willingly break the law. In such cases the police should only start to consider whether criminal justice action is required[...] The criminal justice process should only be considered if the child persistently and voluntarily continues to solicit, loiter or importune in a public place for the purposes of prostitution".¹⁶⁷

¹⁶⁵Department of Health, Home Office, Department of Education and Employment, National Assembly for Wales. *Safeguarding Children Involved in Prostitution*. Crown. May 2000. Accessed on 21 May 2007 from: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4057858.pdf.

¹⁶⁶*Ibid.*

¹⁶⁷*Ibid.* pp. 27-28.

LEGAL REFORM CHECKLIST

- ✓ National legislation has adopted a clear definition of 'child prostitution'
- ✓ The use of children in prostitution is defined as an offence distinct from adult prostitution (if adult prostitution has not been legalised or decriminalised), and the penalties are more stringent to reflect the gravity and impact of this crime on the lives of child victims
- ✓ If adult prostitution has been decriminalised or legalised, the use of children in prostitution remains a criminal offence
- ✓ Children are protected from exploitation until the age of 18 years
- ✓ In the context of child prostitution, 'sexual activities' are defined broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Activities covered include not only sexual intercourse, but also sexual touching, masturbation and sexual posing, without distinction for the sex of the victim or perpetrator
- ✓ The element of consideration is construed broadly so as to include any form of compensation
- ✓ The law criminalises all acts of offering, obtaining, procuring and providing a child for prostitution so as to capture the whole spectrum of child exploiters
- ✓ The client/exploiter is subject to the criminal law; any form of compensation to obtain sexual services from a minor is a criminal transaction
- ✓ Recruiters and those who own, lease or manage premises where prostitution of children occurs are criminalised; there is a duty to report the use of premises for child prostitution
- ✓ Criminal/administrative measures applicable to a child found in prostitution are reviewed. Administrative/criminal codes addressing 'delinquency' or 'anti-social behaviour' on the part of children are reviewed. Legal provisions that result in administrative or other punishment of the victims are abolished
- ✓ Guidelines/rules are available to the police and judicial authorities to deal with children found in prostitution

SECTION 4

CHILD PORNOGRAPHY AND OTHER CHILD ABUSE MATERIALS

Objectives:

- To emphasise the importance of eradicating child pornography as one of the most abhorrent violations of children's rights
- To analyse the international definition of child pornography and map out elements for an enhanced definition
- To provide guidance for the drafting of an efficient definition of child pornography and related offences under national law
- To highlight the need for reporting obligations for designated individuals and the private sector, including ISPs and financial companies

Key Provisions:

- Article 34(c) of the CRC
- Article 2(c) of the OPSC
- Article 3(b) of ILO Convention 182
- Article 9(2) of the Convention on Cybercrime
- Article 20(2) of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse

CHILD PORNOGRAPHY: VISUAL, AUDIO AND WRITTEN MATERIALS DEPICTING CHILD ABUSE

Child pornography in the broader context of commercial sexual exploitation of children

Child pornography, including child sexual abuse imagery is a severe violation of children's rights. It involves sexual abuse and the exploitation of children and is linked to the prostitution of children, child sex tourism and the trafficking of children for sexual purposes. Its most obvious use is sexual arousal and gratification. However, it is also used to validate that the behaviours and beliefs of child abusers are normal, establish trust among those interested in abusing children, gain entrance to private clubs and to make a profit. At a societal level, child pornography - whether it involves real or simulated images of children - continues to cultivate a demand that involves the sexual abuse and exploitation of children.

Child pornography exploits children in many ways:

- Children may be tricked or coerced into engaging in sexual acts for the production of pornography or images may be made in the process of sexually exploiting a child without the child's knowledge. These images are then sold, traded or otherwise distributed.
- Secondly, the demand for images of children maintains the incentive to produce such materials. Thus, those who 'consume' and/or possess pornographic depictions of children continue to exploit these children.
- Thirdly, pornographic materials are frequently used by child abusers to diminish a child's inhibitions and to convey the impression that sex between adults and children is normal, acceptable and enjoyable. This is part of the 'grooming' process.
- Fourthly, the makers of pornography commonly use their 'products' to coerce, intimidate or blackmail the children used in the making of such material.

In those rare cases where investigators are able to identify the children depicted in pornography, the abuser is commonly found to be a member or associate of the child's family or to be providing care or guardianship. However, children who are especially vulnerable, such as children living or spending time on the streets, as well as those already forced into prostitution or those who have been trafficked, are also at risk of being used in the production of pornography.

The link between the use of child pornography and the commission of offences against the child

The causal link between the consumption of child pornography and the commission of sexual offences against the child remains an issue of controversy among mental health professionals. Among the many obstacles to proving a relationship are the lack of empirical data (many studies fail to make a distinction between child pornography – which amounts to a criminal offence in many jurisdictions – and adult pornography) and the predominance of anecdotal evidence from convicted offenders, which is generally not representative of the profile of the average child pornography consumer.¹⁶⁸

Moreover, the reliability of self-reporting data may be questioned as it is difficult to determine whether offenders are truthful about their habits. Studies have shown that sex offenders tend to minimise the full extent of their sexually aberrant behaviour.¹⁶⁹ This is even more likely in a law enforcement setting, as offenders may fear the consequences of admitting behaviour that would amount to an additional offence.¹⁷⁰

¹⁶⁸Rettinger, L. Jill. *The Relationship between Child Pornography and the Commission of Sexual Offences Against Children: A review of the Literature*, p. 3/18. Canada Department of Justice. March 2000. Accessed on 7 October 2008 from: http://www.justice.gc.ca/eng/pi/rs/rep-rap/2000/rr00_5.html.

¹⁶⁹*Ibid.* p. 8/18.

¹⁷⁰*Ibid.*

Child pornography is also seldom used in a single way by child sex offenders. Hence, even if it may be claimed to be used as a way to ease the tension and avoid offending, it may also be used as stimuli to establish relationships with a child or to diminish a child's resistance (as part of the 'grooming' process).¹⁷¹

Even if a direct causal link between the consumption of child pornography and the commission of offences against the child remains to be unequivocally established (in fact absolute statistics may be impossible to draw on that issue), research has clearly demonstrated that "exposure to pornography is one important factor which contributes directly to the development of sexually dysfunctional attitudes and behaviours", in part because viewers of pornography may believe that the representation is a normal and appropriate portrayal of reality.¹⁷² **ECPAT believes that child pornography serves as a way to legitimise behaviours that victimise vulnerable children.**

The impact of information technology on the use and dissemination of child pornography

It is common knowledge that child pornography is often produced and distributed using information and communication technologies (ICT) and the Internet. New technologies and the growth of the Internet are creating more commercial opportunities for child exploiters and child pornography users, facilitating the development and extending the reach of distribution networks. The use of ICT also facilitates organised sexual abuse and violence against children by networks of commercial buyers, sex tourists, paedophiles and traffickers, as well as various forms of prostitution of children and young people. Children who use ICT in their daily lives are at risk of sexual exploitation.

ICT and the Internet are used by child sex exploiters to gain access to both child pornography and children directly. Child pornographers use file sharing networks, newsgroups, peer2peer systems and other technologies to share and sell child pornography and child sex exploiters use mobile phones, chat rooms and other online social spaces to lure and 'groom' children with the intent of abusing and exploiting them.

The global distribution of child abuse images over the Internet without uniform laws to protect children makes it difficult for national law enforcement authorities to prosecute offenders locally. As the Internet is not confined to national boundaries, specific provisions taking ICT into account, harmonised legislation, international police cooperation and industry responsibility are required to effectively tackle the problem.

¹⁷¹*Ibid.* p. 9/18.

¹⁷²Paolucci, Eliabeth Oddone, Genuis, Mark, & Violato, Claudio. *A Meta-Analysis of the Published Research on the Effects of Pornography*, p. 3. National Foundation for Family Research and Education, University of Calgary, Alberta. 2000. Accessed on 7 October 2008 from: <http://www.ccoso.org/library%20articles/Meta-analysis.pdf>.

THE INTERNATIONAL LEGAL RESPONSE TO CHILD PORNOGRAPHY

International legal framework

While individual and community understandings of child pornography may vary within and between societies, Article 34 of the CRC commits signatories to act to prevent “the exploitative use of children in pornographic performances and materials.”

Article 34 CRC

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.”¹⁷³

ILO Convention 182 provides that “the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performance” constitutes one of the “worst forms of child labour”.¹⁷⁴ Article 7(1) obliges governments to apply “all necessary measures... including the provision and application of penal sanctions” to enforce the Convention, in order to eliminate child pornography.¹⁷⁵

The OPSC expands on this to offer a general description of child pornography, as illustrated below.

¹⁷³Convention on the Rights of the Child, art. 34. Entered into force 2 September 1990. Accessed on 26 September 2008 from: <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

¹⁷⁴ILO Convention 182 (Worst Forms of Child Labour), art. 3. Entered into force 19 November 2000. Accessed on 29 September 2008 from: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182>.

¹⁷⁵*Ibid.*

Article 2(c) OPSC

“[...] 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 sexual purposes”¹⁷⁶

The OPSC definition and the constitutive elements of the international offence of child pornography

Understanding the OPSC definition: 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 sexual purposes

“[A]ny representations by whatever means”

There are many different kinds of child pornography materials, made available through a variety of media, but essentially they all involve depictions of a child or children in a manner that is intended to aid sexual arousal and gratification. The variety of materials was taken into consideration by the drafters of the OPSC when including the expression ‘by whatever means’, which clearly indicates that child pornography may be embodied not only in visual materials such as photographs and images but also in audio representations and writings which can then be distributed through magazines, books, drawings, movies, videotapes, mobile phones and computer disks or files. The broad scope of prohibited materials must be kept in mind by national law-makers when enacting criminal legislation aimed at combating and eradicating child pornography. To date, there exist significant variations in national laws, which are symptomatic of different understandings of the issue and which result in insufficient legal protections for children.

¹⁷⁶Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 2(c). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

“[E]ngaged in real or simulated explicit sexual activities” – the limiting effect of the word “explicit”

Generally speaking, there are two categories of pornography: pornography which is not sexually explicit but involves naked and seductive images of children and pornography which presents images of children engaged in explicit sexual activity. One of the shortcomings of international law is that it does not directly prohibit the former, restricting itself to representations of “explicit sexual activity”.

ECPAT urges States to adopt a broad interpretation of the term “explicit sexual activities” such as the one established under the CoE Convention. This term should encompass at least the following real or simulated acts: a) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, between children or between an adult and a child, of the same or opposite sex; b) bestiality; c) masturbation; d) sadistic or masochistic abuse in a sexual context; and e) lascivious exhibition of the genitals or the pubic area of a child. It is not relevant whether the conduct depicted is real or simulated.¹⁷⁷

“[O]r any representation of the sexual parts of a child for sexual purposes”

Representations of the sexual parts of the child fall within the international definition when they have a “sexual purpose”. This means that, for example, a photo of the sexual parts of a child would not necessarily be considered child pornography unless it was produced for sexual purposes as opposed to, for example, so-called scientific purposes.

Offences covered by the OPSC

The OPSC requires States Parties to criminalise and penalise a number of activities in relation to child pornography, as illustrated in the table below. It is up to countries to define these terms within their laws but harmonisation should be sought.

Below is an attempt to explain these acts by giving concrete examples of what they may include.

¹⁷⁷CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 143. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

OPSC Offence	Interpretation
Production	Producing child pornography refers to its creation or making, by whatever means. This may include taking photographs of a child, morphing ¹⁷⁸ images, organising and/or directing films or audio recordings, sexual posing, etc.
Offering	This may be done through a range of different means whether verbally or via newspapers, the Internet (for example through a website), mobile phones or other forms of ICT. It does not matter whether a subsequent transaction actually take place. The CoE Convention on the Protection of children against sexual exploitation and sexual abuse establishes an offence of making available child pornography ¹⁷⁹ to cover, for instance, the creation of child pornography websites and the creation or compilation of hyperlinks to child pornography websites. ¹⁸⁰
Distribution and dissemination	This refers to the act of delivering, giving, selling or sending of child pornography materials, including through computer systems (for e.g. file sharing programmes, popular online chat mediums or webpages). This would include the import/export of child pornography.
Possessing	Having child pornography under someone's control or owning the materials. In order to be considered a criminal act, the OPSC requires that possession be coupled with the intent to distribute the materials, or to commit any of the other above acts.

TOWARDS A PROTECTION-BASED DEFINITION OF CHILD PORNOGRAPHY AND THE CRIMINALISATION OF ALL CONDUCTS FROM PRODUCTION TO POSSESSION

ECPAT strongly believes that – as the CoE stressed in its Explanatory Report to its most recent Convention – an effective way to curtail the consumption of child pornography is to attach a criminal consequence to the conduct of each participant in the chain, from production to possession of child pornography. Considerable time and attention should be given to legislative drafting to ensure that all conduct violating the rights of the child fall within the purview of the law.¹⁸¹ Furthermore, in their definitions, States should pay attention to what constitutes child pornography in order to encompass all materials that pose a threat to the appropriate protection of the rights of the child.

¹⁷⁸'Morphed' images refers to digitally created, blended images of adults and children.

¹⁷⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 20(1)(b). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

¹⁸⁰CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 136. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

¹⁸¹*Ibid.* para. 139.

Drafting an efficient definition of child pornography¹⁸²

ECPAT believes that a carefully drafted definition of child pornography plays a crucial role in the protection of children. Hence, law-makers should focus on two particular aspects when undertaking to define the term ‘child pornography’: (1) the materials that should be criminalised; and (2) the type of depicted activities that should be criminalised. We will consider these in turn.

Material support

A child-safe definition should include visual representations embodied in photographs, films, video cassettes, DVDs, drawings, paintings, sculptures, as well as tapes, computer disks and other devices on which visual representations can be recorded. Documents should also be covered and should include books, pamphlets, periodicals, and any tape or computer disk on which data capable of conversion is stored. Audio representations should also be covered.

Activities depicted

As we have seen above, the OPSC does not provide much guidance on the specific child pornography materials that should fall within the scope of national criminal legislation. Thus, for greater clarity, vague legal provisions limiting themselves to the prohibition of “indecent” or “obscene” materials could be replaced with provisions describing the specific materials that are the object of criminal consequences.

A child-safe definition of child pornography should ideally include any material:

- Which shows or relates to a person who is a child, or is being depicted as a child, **engaged, or depicted as being engaged, in sexual activity;**
- Which shows a person who is a child, or is being depicted as a **child, witnessing any such activity** by any person(s);
- Which has as a **dominant characteristic the depiction**, for sexual purposes, of the **breasts, genitals or anus of a child, or of a person being depicted as a child;**
- Which is a visual or audio representation that **advocates, encourages or counsels any sexual** activity with children that is an offence under any enactment, or
- Which is any visual representation or description of, or information relating to, a child that indicates or **implies that the child is available for sexual purposes.**

¹⁸²We have based our analysis on Section 2 of Ireland’s *Child Trafficking and Pornography Act, 1998*. Child Trafficking and Pornography Act, 1998. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

These last two elements would encompass what is known as ‘child erotica’, that is sexually suggestive images of children, which remains excluded from the ambit of criminal law in many jurisdictions.¹⁸³

New Zealand has some of the most inclusive child pornography laws in the world.¹⁸⁴ The *Films, Videos, and Publications Classification Amendment Act 2005* considerably broadened offences related to child pornography.¹⁸⁵ It outlines offences related to the creation, possession and distribution of ‘objectionable publications’.

‘Objectionable’ materials include publications that describe, depict, express or otherwise relate to sex. More specifically, a publication deals with sex where it contains one or more visual images of one or more children or young persons who are nude or partially nude and these images, alone or together, can reasonably be regarded as sexual in nature.¹⁸⁶

Other factors that determine if a publication is ‘objectionable’ include:

- Whether it promotes, supports or tends to promote or support the exploitation of children or young persons for sexual purposes;¹⁸⁷
- Describes, depicts or otherwise deals with sexual conduct by children or young persons;¹⁸⁸
- Exploits the nudity of children or young persons.¹⁸⁹

¹⁸³The term ‘Corporate Paedophilia’ has been used to describe the sexualisation of children and its harmful consequences. See for example Rush, Emma & La Nauze, Andrea. *Corporate Paedophilia: Sexualisation of children in Australia*. The Australia Institute. October 2006. Accessed on 7 October 2008 from: <http://www.tai.org.au/documents/downloads/DP90.pdf>. While sexualised images of children do not strictly fall under the OPSC definition, governments are encouraged to consider the harm caused to children through their production and dissemination. Sexualised images of children send the wrong message that children are available and ready for sexual activity with adults. It serves to validate paedophiles’ cognitive distortions that children are interested in sex. It is also well known to law enforcement that paedophiles are often found in possession of collections of images including more ‘innocent’ images of children. Of course, addressing this problem calls for a broad range of measures, including media regulation, in order to curb the sexualisation pressure exerted by advertisers and marketers. When enacting legislation targeting ‘child pornography’ governments are urged to consider a definition that is broader and counteracts one of the root causes of this form of abuse: distorted perceptions that children are sexual commodities.

¹⁸⁴See also Child Trafficking and Pornography Act, 1998, s. 2. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

¹⁸⁵Films, Videos, and Publications Classification Amendment Act 2005. New Zealand. The main body of legislation is the *Films, Videos, and Publication Classification Act 1993*. Films, Videos, and Publications Classification Act 1993. New Zealand. Accessed on 7 October 2008 from: http://www.legislation.govt.nz/act/public/1993/0094/latest/DLM312895.html?search=qs_act_films&sr=1.

¹⁸⁶*Ibid.* s. 3(1A).

¹⁸⁷*Ibid.* s. 3(2)(a).

¹⁸⁸*Ibid.* s. 3(3)(a)(iv).

¹⁸⁹*Ibid.* s. 3(3)(b).

'Publications' include: printed matter, film, sound recordings, photographs, negatives, plates or slides; or anything, including a disk or electronic or computer file, on which information is recorded or stored and (using a computer or other device) can be reproduced or shown as one or more images, representations, signs, statements or words.¹⁹⁰ This broad interpretation of child pornography allows for a wide range of materials to fall within the scope of the Act.

The criminalisation of materials promoting and supporting the sexual exploitation of children is also a laudable feature of **New Zealand** law, and one that should be found much more often in national laws.

The 'real child' requirement and the issue of 'virtual' child pornography

It is disappointing to observe that the international community is still divided on the question of whether the use of a 'real' child victim is required before any material can be considered prohibited. When a real child has been used in making the materials (e.g. in a picture), it is generally agreed that its possession amounts to an offence and, therefore, prosecution must ensue. There is no consensus however, around the urgency to criminalise virtual images, or 'virtual pornography'.¹⁹¹ These are cartoons, computer generated images (CGIs), created through the process of morphing for instance or drawings that graphically depict children in a sexually abusive way and which are generally found alongside photographs of actual children. One of the most cited examples of such materials is the Japanese *Manga*.

ECPAT's position concerning cartoons, drawings, CGIs and other virtual representations is that, although they may not harm real children in the same way as taking a photograph of the abuse of a child, the related risks bear very real outcomes. Such images fuel the abuse of real children by reinforcing abusers' inappropriate feelings towards children. Moreover, there is a genuine risk that these materials, taking the form of cartoon or fantasy-style format, are used in the 'grooming' process.¹⁹² These risks bear very tangible consequences and do not depend in any way on the use of a 'real' child. Again, when considering the implication of these materials a protection-based approach is needed in order to curb demand and break the cycle of exploitation.

¹⁹⁰*Ibid.* s. 2, "Publication".

¹⁹¹When talking about pseudo-child pornography, however, 'pseudo' should be used warily because its synonymic link to 'false' could have the effect of downplaying the exploitative significance of such imagery and its power to normalize images of CSA under the pretext of it not being 'real', as well as to incite sexual exploitation of children. It is with reference to these kind of images that the *Convention on Cybercrime's* definition is worthy of emulation.

¹⁹²*Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*, p. 6. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

Fortunately, some jurisdictions have adopted powerful legislation in order to deal with virtual pornography. For instance, **Canada**¹⁹³ and **Ireland**¹⁹⁴ have adopted definitions of child pornography that clearly seek to include such 'virtual child pornography'. In the case of Irish law, this is done by putting aside the requirement that an actual child be used in the material.

Section 2(2) *Child Trafficking and Pornography Act* 1998 (Ireland)

"The reference in paragraph (a) of the definition of child pornography to a person shall be construed as including a reference to a figure resembling a person that has been generated or modified by computer-graphics or otherwise, and in such a case the fact, if it is a fact, that some of the principal characteristics shown are those of an adult shall be disregarded if the predominant impression conveyed is that the figure shown is a child."¹⁹⁵

Italy's Penal Code also criminalises pornographic images representing simulated children or only parts of real children created and/or modified using morphing software.¹⁹⁶ **Spain's Penal Code**,¹⁹⁷ criminalises pornographic materials in which the voices of children, or their modified images are utilised for pornographic purposes. Therefore, the direct participation of children in pornography is not required for the act to amount to a crime.

The **United Kingdom (UK)** is now contemplating the possibility of criminalising the possession of cartoons, CGIs, or drawings that graphically depict children in a sexually abusive way. In its recent *Consultation on the Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*,¹⁹⁸ the Home Office of the Government of the UK sought to address this issue. It is interesting to note that the Consultation paper addresses

¹⁹³Criminal Code, s. 163.1. Canada. Accessed on 7 October 2008 from: <http://www.canlii.org/ca/sta/c-46/sec163.1.html>.

¹⁹⁴Child Trafficking and Pornography Act, 1998. Ireland. Accessed on 7 October 2008: <http://www.irishstatutebook.ie/1998/en/act/pub/0022/print.html>.

¹⁹⁵*Ibid.* s. 2(2).

¹⁹⁶Codice Penale, art. 600-quarter. Italy. Accessed on 7 October 2008: <http://www.altalex.com/index.php?idnot=36774>.

¹⁹⁷Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 189(7). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995.l218.html#c5.

¹⁹⁸*Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse*. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

the issue of whether virtual pornography should be integrated in the current definition of child pornography or whether a distinct offence should be created. The paper concludes that a stand alone offence should be created for which the threshold for conviction would be higher than indecency, which is typically used for depictions of actual children. ECPAT agrees that this adequately reflects the gravity of the offence compared to that of possession of images of abuse of actual children.¹⁹⁹

In some countries, the criminalisation of virtual child pornography has been challenged as a violation of a constitutional guarantee of freedom of expression. One oft-cited example is the **United States (US)** landmark case of *Ashcroft v. Free Speech Coalition*²⁰⁰ in which the US Supreme Court addressed the question of whether a law prohibiting virtual child pornography – sexually explicit material that appears to depict children but was produced without the use of children – was a violation of the freedom of speech. The Court concluded that the law was overbroad, extending its prohibition to non-obscene material that might have serious redeeming value and that is, therefore, protected by the First Amendment of the US Constitution. The US Congress has since enacted new legislation which has survived constitutional scrutiny to date.²⁰¹

The *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act)* allows federal prosecutors to pursue cases involving visual depictions of minors engaging in sexually explicit conduct, provided that the depiction is obscene.²⁰² The *PROTECT Act's* prohibition encompasses visual depictions not involving real children.²⁰³ Dwight Whorley was the first person sentenced under the *PROTECT Act*.²⁰⁴ Following the rejection of Whorley's motions to dismiss by the US District Court for the Eastern District of Virginia, he was convicted "on twenty counts of knowingly receiving obscene visual depictions of the sexual abuse of children... based on his accessing [...] obscene Japanese anime cartoons via the Internet."²⁰⁵ For these and related crimes, Whorley was sentenced to 240 months' imprisonment.²⁰⁶ The November 2006 US Attorneys' Bulletin, published by the Department of Justice, suggests that prosecutors should use provisions of the *PROTECT Act* not only in cases involving cartoons, but also in cases where it is difficult to establish that the children depicted in sexually explicit images are real.²⁰⁷

¹⁹⁹ *Ibid.*, p. 7.

²⁰⁰ *Ashcroft v. Free Speech Coalition*. United States Supreme Court. 16 April 2002. Accessed on 7 October 2008 from: <http://supct.law.cornell.edu/supct/html/00-795.ZS.html>.

²⁰¹ See for example *United States v. Williams*. United States Supreme Court. 2008.

²⁰² Amendments brought by the *PROTECT Act* have been incorporated to US Law. US Code, Title 18, s. 1466A. United States. Accessed on 7 October 2008 from: http://supct.law.cornell.edu/uscode/html/uscode18/usc_sec_18_00001466---A000-.html; see also Flannery, Sara E. & King, Damon A. Prosecuting Obscene Representations of the Sexual Abuse of Children. *United States Attorney's Bulletin on Internet Pornography and Child Exploitation*, 54(7), November 2006, 49. Accessed on 7 October 2008 from: http://justice.gov/usao/eousa/foia_reading_room/usab5407.pdf.

²⁰³ *Ibid.*

²⁰⁴ *United States v. Whorley*. US District Court for the Eastern District of Virginia. 23 March 2005.

²⁰⁵ Flannery, Sara E. & King, Damon A. Prosecuting Obscene Representations of the Sexual Abuse of Children. *United States Attorney's Bulletin on Internet Pornography and Child Exploitation*, 54(7), November 2006, 49. Accessed on 7 October 2008 from: http://justice.gov/usao/eousa/foia_reading_room/usab5407.pdf.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

Finally, the Convention on Cybercrime should be used as a model when reforming child pornography legislation on this particular aspect. This Convention provides a comprehensive definition of child pornography encompassing CGIs. It defines child pornography as pornographic materials which visually depict, not only minors engaged in sexually explicit conduct, but also persons appearing to be minors, as well as realistic images representing minors. It obliges all parties to criminalise, not only the production, offering or making available, distributing or transmitting and procuring of child pornography through computer systems, but also the possession of child pornography in computer systems.²⁰⁸

Criminalised conduct

Simple possession of child pornography

The OPSC identifies the possession of child pornography-related material as a punishable act only when the material is intended to be distributed. However, bearing in mind that every representation of child pornography encourages the further growth of this industry (fuelling demand and victimising the child depicted), it is important that national law also cover its mere possession for private use. Furthermore, in practical terms, the outlawing of simple possession allows law enforcement to seize the images, thereby taking materials depicting child abuse out of circulation to the clear benefit of the victims.²⁰⁹

In keeping with the Stockholm Agenda for Action, ECPAT therefore urges States to adopt higher protection standards by making sure that mere possession is treated as a criminal act, regardless of whether the material is destined for private use or distribution.²¹⁰

As discussed in the beginning of this section, child pornography produces a number of harms and, thus, there are many reasons for criminalising possession: it promotes the notion that sexual activities with children are acceptable; it victimises the child subjects; it fuels the demand for child exploitation; and the images are used to 'groom' children for sexual exploitation.

²⁰⁸Council of Europe Convention on Cybercrime, art. 2. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

²⁰⁹Consultation on Possession of Non-Photographic Visual Depictions of Child Sexual Abuse, p. 7. UK Home Office. 2 April 2007. Accessed on 7 October 2008 from: <http://www.homeoffice.gov.uk/documents/cons-2007-depiction-sex-abuse?view=Binary>.

²¹⁰The protection section of the *Stockholm Agenda for Action* reads in its Paragraph b as follows: "develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, child pornography, including possession of child pornography, and other unlawful sexual activity".

In the **Canadian** case of *R. v. Steadman*, Justice Gallant, from Alberta's Queen's Bench court, made the following commentary which very well sums up the above:

“Child pornography promotes cognitive distortions. It fuels fantasies that incite offenders to offend. It is used for grooming and seducing victims. Children are abused in the production of child pornography. Child pornography is inherently harmful to children and society. That type of pornography by its very existence violates the dignity and rights of children. Harmful attitudes are reinforced by such pornography. Possession of child pornography reinforces the erroneous belief that sexual activity with children is acceptable. It fuels pedophiles fantasies which constitutes the motivating force behind their sexually deviant behaviour.”²¹¹

Following this line of thinking some countries have created offences of mere possession of child pornography. This is the case in **Italy**,²¹² the **United States**,²¹³ **Australia**,²¹⁴ **New Zealand**,²¹⁵ **Spain**,²¹⁶ **Austria**,²¹⁷ **Canada**²¹⁸ and, very recently, the **Czech Republic**.²¹⁹ It is hoped that other countries worldwide will follow the same path.

Pornographic images produced and retained by consenting children

How to deal with a situation of a couple below the age of 18 years taking and possessing pornographic photos of themselves? If the children have reached the age of consent, then legally they can enter into sexual activity which may include the production of images of a pornographic nature and their retention. However, under the law these images may constitute child pornography.

²¹¹ *R. v. Steadman*, para. 2. The Court of Queen's Bench of Alberta. 2001.

²¹² Codice Penale, s. 600-4. Italy. Accessed on 7 October 2008: <http://www.altalex.com/index.php?idnot=36774>.

²¹³ US Code, Title 18, s. 2252. Accessed on 7 October 2008 from:

http://www4.law.cornell.edu/uscode/18/usc_sec_18_00002252----000-.html.

²¹⁴ Criminal Code Act 1995, s. 474.20. Australia. Accessed on 8 October 2008 from: <http://law.ato.gov.au/atolaw/print.htm?DocID=PAC%2F19950012%2F5ch-Ch10-Pt10.6-Div474-SDivC-474.20&PiT=99991231235958>.

²¹⁵ Films, Videos, and Publications Classification Act 1993, s. 131. New Zealand. Accessed on 7 October 2008 from: http://www.legislation.govt.nz/act/public/1993/0094/latest/DLM312895.html?search=qs_act_films&sr=1.

²¹⁶ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal [Penal Code], art. 189(2). Spain. Accessed on 26 September 2008 from: http://noticias.juridicas.com/base_datos/Penal/lo10-1995_1218.html#c5.

²¹⁷ Strafgesetzbuch (StGB) [Penal Code], art. 207(a)(3). Austria. Accessed on 29 September 2008 from: http://www.sbg.ac.at/ssk/docs/stgb/stgb_index.htm.

²¹⁸ Criminal Code, s. 163.1(4). Canada. Accessed on 8 October 2008 from: <http://laws.justice.gc.ca/en/C-46/>.

²¹⁹ Parliament's lower house has recently outvoted the Senate's veto against the amendment to the Czech Republic's *Criminal Code* in order to criminalise mere possession of child pornography. The amendment took effect 1 December 2007. Veling, Jan. Lower house overrules senate, making possession of child porn a criminal offence. *Radio Praha*, 26 September 2007. Accessed on 8 October 2008 from: <http://www.radio.cz/en/news/95880#9>.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse has created an exemption to the possession offence for such cases. States parties to the Convention may reserve their right not to criminalise the possession of images involving children who have reached the age of consent, where the images are produced and possessed by them, with their consent and solely for their own use. This exception should however be strictly interpreted: if the images are subsequently distributed in any way, this should constitute a criminal offence.

Possession in the context of ICT – the issue of downloading child pornography

The fact that child pornography is often produced and transmitted using ICT calls for specific measures to criminalise related conduct. The Council of Europe’s Convention on Cybercrime²²⁰ and its new Convention on the Protection of children against sexual exploitation and sexual abuse²²¹ specifically address the possession of child pornography in computers. Some countries have followed this trend and enacted related provisions; however the debates around the definition of what constitutes possession in the context of computer materials and the need to create distinct offences for **accessing, viewing and downloading** child pornography, have raised new issues.

In the 2004 **United States** case of *State v. Jack P. Lindgren*, the Court had to determine whether the evidence at hand was sufficient to sustain a conviction for possessing child pornography, in light of the defence expert’s testimony that “no evidence of any child pornography had been saved on Lindgren’s computer.”²²²

The Wisconsin Court upheld the conviction on appeal, adopting the reasoning of the 2003 federal case of *United States v. Tucker*. In that case, the defendant had unsuccessfully argued that because the images were only temporarily displayed on his computer screen, he did not intend to save them on his hard drive, and therefore was not guilty of possession. Tucker also argued that the automatic computer process of saving thumbnail pictures to a temporary Internet cache file could not be held

²²⁰Article 9 of the *Convention on Cybercrime* requires States to “adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct... (e) possessing child pornography in a computer system or on a computer storage medium”. Council of Europe Convention on Cybercrime, art. 9. Accessed on 6 October 2008 from: <http://conventions.coe.int/Treaty/EN/Treaties/HTML/185.htm>.

²²¹Article 19 provides for the criminalisation of accessing child pornography through ICT, albeit with one significant exception: States parties may reserve their right to apply this provision or not. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, arts. 19. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²²²*State v. Jack P. Lindgren*, para. 23. Court of Appeals of Wisconsin (US). 21 July 2004. Accessed on 7 October 2008 from: <http://www.wicourts.gov/html/ca/03/03-1869.htm>.

against a computer user. In its ruling, the Court nevertheless found that the accused did have control over the files present in his web browser cache file, and that was enough to constitute possession. It relied on the Government's computer-expert testimony that an image in a cache file could be attached to an e-mail, posted to a newsgroup, placed on a web site or printed to a hard copy. The Court expressly held the following :

“Tucker ... intentionally sought out and viewed child pornography knowing that the images would be saved on his computer. Tucker may have wished that his Web browser did not automatically cache viewed images on his computer's hard drive, but he concedes he knew the Web browser was doing so. Tucker continued to view child pornography knowing that the pornography was being saved, if only temporarily, on his computer. In such circumstances, his possession was voluntary. Since he knew his browser cached the image files, each time he intentionally sought out and viewed child pornography with his Web browser he knowingly acquired and possessed the images.”²²³

The same line of reasoning was applied by the Court in the *Lindgren* case. The Court concluded that there was sufficient evidence on file to demonstrate that the defendant knowingly possessed child pornography images on his computer, because the images could only be saved if the defendant actually manipulated the images, by clicking on and enlarging the thumbnail images.²²⁴

Nonetheless, the judicial recognition that temporary files suffice to constitute possession did not attract consensus among US courts. For example, in the 2006 case of *Commonwealth of Pennsylvania vs. Anthoni Diodoro*, the Court annulled a conviction on a count of possession of child pornography because it found that the prosecutor had not proven that the accused consciously possessed the material in his computer because the images were automatically stored in the temporary files.²²⁵ The Court determined that in order to amount to possession, active downloading to the hard disk was required.

²²³ *United States v. Tucker*, s. IV. US Court of Appeals for the Tenth Circuit. 16 September 2002. Accessed on 7 October 2008 from: <http://wings.buffalo.edu/law/bclc/web/apptuckerposs.html>.

²²⁴ *State v. Jack P. Lindgren*, para. 27. Court of Appeals of Wisconsin (US). 21 July 2004. Accessed on 7 October 2008 from: <http://www.wicourts.gov/html/ca/03/03-1869.htm>.

²²⁵ *Commonwealth of Pennsylvania v. Anthoni Diodoro*, para. 1. Superior Court of Pennsylvania (US). 2 November 2006. Accessed on 7 October 2008 from: http://www.superior.court.state.pa.us/opinions/a23036_06.PDF. Note that in this case charges were pressed on the basis of the Pennsylvania state law.

The above debates on the constitutive elements of the possession offence reflect the difficulties in reaching a compromise between punishing ill-intentioned offenders, and protecting those individuals who ‘accidentally’ access child pornography. For example, those who accidentally browse a website and immediately cancel the navigation. In such a case, images could still be saved in a computer’s temporary folders, albeit in the absence of a *mens rea* or ‘guilty mind’, which is a necessary element of the crime.

Courts have, on occasion, displayed judicial creativity in an effort to circumvent the possession loopholes. In a key **United Kingdom** ruling on Internet pornography in *R. v. Bowden*, the Court ruled that the downloading and/or printing out of computer data of indecent images of children from the Internet could amount to an offence under Section 1(1)(a) of the *Protection of Children Act* of 1978, which provides that “it is an offence for a person to take, or permit to be taken or to make, any indecent photograph or pseudo-photograph of a child”. Three judges ruled that the acts of downloading and printing amounted to the “making” of an indecent photograph or pseudo-photograph of a child, even though the material created was for private use, and therefore constituted an offence under the Act. It is interesting to note the Court’s policy rationale in making the decision:

“The Act is not only concerned with the original creation of images, but also their proliferation. Photographs or pseudo-photographs found on the Internet may have originated from outside the United Kingdom; to download or print within the jurisdiction is to create new material which hitherto may not have existed therein.”

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Such judicial interpretation certainly emphasises the importance of clear and concise criminal law. Legal provisions should spell out all prohibited activities related to child pornography, giving law enforcement a clear indication of what activities amount to a criminal offence.

According to the Committee on the Rights of the Child, while the use of children in pornography may be prohibited under children’s acts, States should nevertheless specifically criminalise the production, distribution, dissemination, importation, exportation, offer, sale and possession of child pornography as it is defined in the OPSC.²²⁷

²²⁶*R. v. Jonathan Bowden*. 1 Cr. App. R. 438 (UK). 2000. Accessed on 7 October 2008 from: http://www.geocities.com/pca_1978/reference/bowden2000.html.

²²⁷Committee on the Rights of the Child. *Concluding observations: Sudan*, para. 23(b). UN Convention on the Rights of the Child. 8 June 2007.

Accessing and viewing offences– solving the problem of possession without the downloading requirement

As stated above, the offence of possession has given rise to debate when applied to the act of obtaining child pornography via computer; most notably on the question of whether the actual downloading of images onto a computer hard drive is required to establish possession. As a way to circumvent potential evidentiary problems, ECPAT believes that States should include a separate offence of “viewing and accessing” child pornography in their national body of laws.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse establishes a new offence of **“knowingly obtaining access, through information and communication technology, to child pornography”**, which is intended to catch those who access child pornography websites without downloading. The act must be intentional, meaning that it would not cover those who come across child pornography websites inadvertently.²²⁸ The foregoing is subject to an important caveat: States may reserve their right not to criminalise this conduct.²²⁹

Canadian Parliament amended its *Criminal Code* by the adoption in 2001 of *Bill C-15A: An Act to Amend the Criminal Code*, which created an offence of accessing child pornography punishable by up to 5 years’ imprisonment.²³⁰ In contrast to the offence of possession, which, in the context of the Internet, arguably requires that the accused download the material to a computer hard drive, disk or printer, the offence of accessing covers the mere viewing of the material through an Internet browser. However, the accessing must be intentional. In other words, the accused must know before viewing the material, or causing its transmission to himself or herself, that it contains child pornography.²³¹

Canadian legislation thus not only takes into consideration the difference between downloading and viewing an image from the Internet but, it also makes criminal both acts as separate and distinct offences. While this will hopefully shed some light on the interpretation of the possession of child pornography material in the context of computer

²²⁸CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 140. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²²⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 2(4). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²³⁰This amendment is now embodied in Section 163.1(4.1) of Canada’s Criminal Code.

²³¹Parliament of Canada. *LEGISinfo: 37th Parliament – 1st Session (Jan. 29, 2001-Sept. 16, 2002): Legislative Summary: Bill C-15A: An Act to Amend the Criminal Code and to Amend Other Acts.*, Accessed on 7 October 2008 from: <http://www.parl.gc.ca/LEGISINFO/index.asp?Language=E&query=2979&Session=9&List=ls>.

systems, further debates on the notions of ‘accessing’ and ‘viewing’ are to be expected.

Procuring child pornography

National laws should also include an offence of procuring child pornography for oneself or for another person, meaning actively seeking such material. Because child pornography is a crime, the process of actively seeking such material should also be considered a crime. In practical terms, this should cover the downloading of computer data as well as the purchase of child pornographic material online.²³²

Defences available to the accused in child pornography cases

ECPAT is increasingly concerned that, despite the adoption of appropriate child pornography legislation by some States, some accused may avail themselves of statutory defences to exonerate themselves from criminal liability for acts that violate the rights of the child. ECPAT is particularly concerned with the defence of ‘artistic merit’ (as opposed to defences of ‘scientific’ or ‘medical’ merit, which are harder to satisfy). In the 2002 **Canadian Sharpe** case, the accused used the defence of ‘artistic merit’ to escape criminal liability for materials written by the accused describing man-boy and boy-boy sexual encounters. The Court held that the writings did have artistic merit; a finding supported by literature professors.²³³ It is necessary to recall that at the time *Sharpe* was decided, Canadian law provided that any objectively established artistic value, however small, could support such a defence.²³⁴

Fortunately, Canada amended its *Criminal Code* and adopted a protection-based defence to charges of child pornography. A defence is now only available where an act in relation to child pornography satisfies a two-step harm-based test: the act in question must have a legitimate purpose related to the administration of justice, or to science, medicine, education or art; and the act must not pose an undue risk of harm to children.²³⁵

ECPAT welcomes this new approach which builds in a child protection component, but remains concerned with the future interpretation of these provisions that may be given by Canadian courts; especially in light of their very broad interpretation, just a few years

²³²CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 138. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²³³*R. v. Sharpe*. Supreme Court of British Columbia (Canada). 2002.

²³⁴*Ibid.* para. 121.

²³⁵Criminal Code, s. 163.1(6), online: <http://laws.justice.gc.ca/en/C-46/>

²³⁶*R. v. Sharpe*. Supreme Court of Canada. 2001.

ago, of the defence of artistic merit.²³⁶ In fact, the terms 'legitimate purpose' and 'undue risk of harm to children' have yet to be defined.

The defence of artistic merit still prevails in many common law jurisdictions, for instance in many states of **Australia**.²³⁷ Bills have also been introduced to create the defence of 'artistic merit' in child pornography cases in some countries of civil law traditions, such as **Mexico**²³⁸ and **Peru**.²³⁹ These bills have not, however, been adopted.

REPORTING CHILD PORNOGRAPHY: A UNIVERSAL DUTY

Who should be subject to reporting obligations?

In Section 2 the notion of reporting obligations was briefly introduced. The obligation to report a suspicion of child sexual abuse or exploitation stems from the duty of care that different stakeholders owe to children and serves to illustrate that all segments of society share the responsibility to protect children. In many jurisdictions, the law imposes reporting obligations upon different categories of individuals. Failure to report by such individuals may lead to prosecution and conviction.

In some jurisdictions the parents and legal guardians of children are legally obliged to report suspicions of child sexual abuse. Similarly, several jurisdictions impose reporting obligations on different categories of professionals such as physicians, social workers, health-care workers, professors and law-enforcement officers. Many jurisdictions have adopted laws imposing the obligation to report abuse on individuals such as professors and nurses, including **Australia**,²⁴⁰ the **United**

²³⁷In fact the state of New South Wales provides a very broad defense of artistic merit. See Crimes Act 1900, s. 91H(4)(c). Australia. Accessed on 7 October 2008 from: http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol_act/ca190082/s91h.html?query=child%20pornography; see also Sections 70(2)(b) and 70(3) of Victoria state's *Crimes Act, 1958*, in which the defense of artistic merit cannot be relied on if prosecution proves that the person depicted was in fact a minor. Crimes Act 1958, ss. 70(2)(b) & 70(3). Australia. Accessed on 7 October 2008 from: [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/B9CFD00D1D50542BCA2573B70022E3D1/\\$FILE/58-6231a195.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/B9CFD00D1D50542BCA2573B70022E3D1/$FILE/58-6231a195.pdf). Finally, it is interesting to note that Australian Federal law – Section 474.21(2)(d) of the *Criminal Code Act, 1995*, provides a defense of 'public benefit' that includes scientific, medical or educational research but does not mention the artistic merit.

²³⁸Secretaría de Servicios Parlamentarios. *Con proyecto de decreto por el que se reforma y adiciona el artículo 201 Bis del Código Penal Federal, en material de pornografía infantil en Internet*. Diputada Laura Pavón Jaramillo (PRI). Accessed on 7 October 2008 from: <http://www.cddhcu.gob.mx/servicios/datorele/cmprtvs/1po2/oct/201biscodpenalfed.htm>.

²³⁹Delitosinformaticos.com. *Legislación Sobre Delitos Informáticos Perú: Proyecto de Ley de Delitos Informáticos (Perú)*. Accessed on 7 October 2008 from: <http://www.delitosinformaticos.com/legislacion/peru.shtml>.

²⁴⁰See the fact sheet published by the Australian Institute of Family Studies, an agency of the federal government. Higgins, Daryl, Bromfield, Leah and Richardson, Nick. *Mandatory reporting of child abuse*. Resource Sheet Number 3 August 2007. Australian Institute of Family Studies. Accessed on 7 October 2008 from: <http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.html>.

²⁴¹See the very useful compilation by the Child Welfare Information Gateway, an agency of the US Department of Health and Human Services, of the existing law in the US states and territories. Child Welfare Information Gateway. *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws*. January 2008. Accessed on 7 October 2008 from: http://www.childwelfare.gov/systemwide/laws_policies/statutes/mandaall.pdf.

²⁴²Proposed legislation in Manitoba would also impose such an obligation on all citizens, including IT technicians. Canada: First mandatory reporting law for child pornography. *Globe and Mail*, 28 November 2007. Accessed on 7 October 2008 from: <http://www.crin.org/resources/infoDetail.asp?ID=15687>.

States²⁴¹ and **Canada**²⁴². As these are federal States, legislation significantly varies between federal units (that is province or state), and hence offers different levels of child protection.

The obligation to report child pornography is usually subsumed under the obligation to report child abuse, and that obligation is, in some jurisdictions, imposed on each and every citizen, whatever their connection to the child.

In addition to “individuals who in their every day professional capacity come into contact with children and owe a certain duty of care to those children”, the International Centre for Missing and Exploited Children (ICMEC) has identified two categories of physical or legal persons²⁴³ which should also be subject to reporting obligations that are specific to child pornography.²⁴⁴ These categories will be used to exemplify how national jurisdiction can foster good child protection practices.

As a general comment, the CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not by itself impose reporting obligations. Neither does it suggest categories of professionals that should bear such obligations, nor specify which competent authorities should handle reports and how they should be handled.

Individuals who, in their professional capacity, do not come into contact with children, but may be exposed to child pornography as a result of their job responsibilities

This category includes any person, from photo developers to IT technicians, who might come across child pornography images in the course of their activities. An obligation to report any suspicion of child abuse is often imposed upon such individuals as part of a comprehensive reporting obligation.

²⁴³Legal persons' refers to the legal construct which permits entities, such as corporations, to be treated in the same manner as real person. In this, case, for example, a tour company might be subject to prosecution for promoting child sex tourism in the same manner that an individual could be subject to prosecution for such activities.

²⁴⁴International Center for Missing and Exploited Children. *Child Pornography: Model Legislation and Global Review*, p. 4. 2006.

Interestingly, in a recent decision a New Jersey (**United States**) court imposed on an employer a duty to monitor and investigate employee activity when the employer knows or has reason to know that the employee is using a workplace computer to access child pornography.

Monitoring employees in the workplace?

In *Doe v. XYZ Corporation*,²⁴⁵ an individual, who had been reprimanded by his employer a number of times over a period of three years for accessing pornography websites, was arrested on child pornography charges. Following his arrest, his computer was searched and many images and child pornography oriented emails were discovered. The individual admitted to downloading over 1,000 images at his workplace and to storing nude photos of his stepdaughter on his office computer. The mother of the stepdaughter brought suit against the employer, claiming that her daughter had suffered severe and permanent harm because the employer failed to report the employee's unlawful conduct to the police.

The Court found that the company knew or at least had reason to know that the employee was downloading child pornography and held that an employer who is on

notice that one of their employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties.

This decision is important as it emphasises the very privileged position of employers when it comes to tackling the problem of using computers to access child pornography. Employers may monitor the activities of their employee and easily identify child pornography viewers, which is not usually the case when material is accessed from home or some other 'anonymous' location.²⁴⁶ The Court noted in the above ruling that there is no reasonable expectation of privacy for the use of a computer in the workplace, and therefore an employer should not fear any prosecution arising from the denunciation of an employee.²⁴⁷

Organisations or corporations whose services are being used to proliferate child pornography Internet providers and financial companies

²⁴⁵ *Doe v. XYZ Corporation*. Superior Court of New Jersey (US). 27 December 2005. Accessed on 7 October 2008 from: <http://lawlibrary.rutgers.edu/courts/wordperfect/appellate/A2909-04.DOC>.

²⁴⁶ *Ibid.* pp. 7-8.

²⁴⁷ *Ibid.* pp. 17-21.

Internet Service Providers (ISPs), Internet content hosts (ICHS), financial companies and institutions do access a great deal of information regarding consumers of child pornography and may facilitate the commission of crimes by providing channels for the exchange of illegal material. These actors should also be subject to reporting obligations. ECPAT has long sought to collaborate with the private sector on different matters relating to child sexual exploitation, and this collaboration has proven successful in many respects.²⁴⁸ Unfortunately, in the case of reporting child pornography, it is impossible to establish partnerships with every single actor (some of which are very small in size), and national law-makers are encouraged to address the problem.

The CoE Convention on the Protection of children against sexual exploitation and sexual abuse only minimally contemplates the responsibility of the private sector at its Article 9(2), pursuant to which States should “encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation.”²⁴⁹

In this section, an overview of legislation imposing reporting obligation on different stakeholders pertaining to the private sector will be provided and, where no legislation exists, recommendations on how legal reform could be conducted in that respect will be made.

Overview of legislation imposing reporting obligations on Internet providers and financial companies

ISPs and ICHs²⁵⁰

Legislation in place

When it comes to regulating the legality of the content displayed on Internet, different approaches may be taken by law-makers, each of them placing a more or less heavy burden on both Internet providers and government. These approaches range from

²⁴⁸In the fight against child sex tourism, ECPAT has teamed up with various companies from the hospitality sector (see www.thecode.org). Note that the implication of this industry on the issue of sexual exploitation of children will be dealt with in the chapter on child sexual tourism.

²⁴⁹Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 9(2). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

²⁵⁰Collectively referred to as ‘Internet providers’.

imposing a ‘notice and take down requirement’, to the imposition on Internet providers of an obligation to report child pornography, to the more intense and proactive obligation to monitor content displayed on their pages.

The ‘notice and take down’ procedure typically involves a denunciation of illegal content on a given webpage, to a tip line or directly to law enforcement authorities. Law enforcement authorities then communicate with the hosting Internet provider and require it to either block access to the site or remove the offending content. This procedure has been adopted in the **United Kingdom**, under the

supervision of the Internet Watch Foundation (to which the public may report illegal content). A similar mechanism exists in **Canada** (users can report offending material to a national tip line: www.cybertip.ca).

The imposition of a monitoring obligation that would require ISPs to monitor the content of sites under their control on a continuous basis sounds ideal at first glance. This solution has, however, proven to be problematic in terms of resources and in terms of the availability of the technology to undertake such monitoring.²⁵¹

To date, only a few countries have adopted legislation specifically requiring Internet providers to report child pornography and child abuse material. These countries are **Australia**,²⁵² **Colombia**,²⁵³ **France**,²⁵⁴ **South Africa**²⁵⁵ and the **United States**.²⁵⁶ Among these jurisdictions, only **South African** law imposes an obligation to “take all

²⁵¹It should be noted, however, that Sweden has enacted in 1998 the *Bulletin Board System (BBS) Liability Act*, which aims to prevent the spread of child pornography by obligating BBS providers to supervise BBS content. BBS providers are obligated to remove or in some ways prevent the dissemination of messages with criminal content, including those with child pornography. International Centre for Missing & Exploited Children. *Child Pornography: Model Legislation & Global Review*, p. 25. 2006. Accessed on 7 October 2008 from: http://www.icmec.org/en_X1/pdf/ModelLegislationFINAL.pdf.

²⁵²Criminal Code Act 1995, s. 474.25. Australia. Accessed 7 October 2008 from:

<http://law.ato.gov.au/atoLaw/view.htm?docid=PAC/19950012/Sch-Ch10-Pt10.6-Div474-SDivC-474.25>.

²⁵³Ley 679 de 2001 por medio de la cual se expide un estatuto para prevenir y contrarrestar la explotación, la pornografía y el turismo sexual con menores, en desarrollo del artículo 44 de la Constitución, art. 8. Columbia.

²⁵⁴Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, art. 6(1)(7). France. Accessed on 7 October 2008 from: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005789847&dateTexte=20080212>.

²⁵⁵Act No. 18 of 2004: Films and Publications Amendment Act, 2004, s. 27A. South Africa. Accessed on 7 October 2008 from: <http://www.info.gov.za/gazette/acts/2004/a18-04.pdf>.

²⁵⁶US Code, Title 42, s. 13032. United States. Accessed on 7 October 2008 from:

http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00013032----000-.html. It is interesting to note that the provision specifically mentions that it cannot be construed as requiring the provider to monitor the content of communication.

²⁵⁷Act No. 18 of 2004: Films and Publications Amendment Act, 2004, s. 27A(2)(c). South Africa. Accessed on 7 October 2008 from: <http://www.info.gov.za/gazette/acts/2004/a18-04.pdf>.

reasonable steps to preserve evidence of crime for purposes of investigation or prosecution by the relevant authorities".²⁵⁷ Other jurisdictions have struggled to impose a retention obligation as it sometimes collides with the enforcement of privacy laws.

Panama has enacted a reporting obligation that requires anyone who has knowledge of the use of minors in pornography or sexual activities to report such abuse to the authorities.²⁵⁸ The obligation is not specific to internet providers and exists without regard to whether the knowledge was obtained in the course of an individual's duty, functions, business or employment, or through any other means.²⁵⁹ Failure to report may result in the imposition of a prison sentence of 6 months to 2 years.²⁶⁰

In summary, very few jurisdictions impose obligations on ISPs and ICHs. Although this is problematic, some private sector initiatives are encouraging.

Private, public sector and NGO initiatives

Fortunately enough, some private sector stakeholders have been very proactive in combating the dissemination of child pornography. Efficient initiatives include the blocking by Internet providers of websites that have been previously blacklisted by the authorities or any agencies responsible for monitoring illegal activities on the web. Typically, a customer trying to access a blocked site would get an error message from their web browser, as if the page had failed to load. In the **United Kingdom**, British Telecom has implemented the Cleanfeed system and blocked websites flagged by the Internet Watch Foundation. This initiative has proven successful in cracking down on online child abuse.²⁶¹ Similar initiatives have been set up in **Spain**,²⁶² **Canada**²⁶³ and **New Zealand**.²⁶⁴

Although such initiatives from the private sector are commendable, ECPAT is concerned that the 'voluntary' approach of self-regulation leaves cracking down on child pornography wholly dependant on the good will of the Internet providers. Although some companies have efficiently implemented blocking procedures, some smaller players remain free to collaborate or not with the authorities. **ECPAT believes that**

²⁵⁸Código Penal [Penal Code], art. 231-I. Panama. Accessed on 7 October 2008 from: <http://www.iin.oea.org/iin/versi%C3%B3n%20final/Panama%20vf.htm>.

²⁵⁹*Ibid.*

²⁶⁰*Ibid.*

²⁶¹See Bright, Martin. BT puts block on child porn sites. *The Observer*, 6 June 2004. Accessed on 7 October 2008 from: <http://www.guardian.co.uk/technology/2004/jun/06/childrenservices.childprotection>; see also BT sounds child web porn warning. *BBC News*, 7 February 2006. Accessed on 7 October 2008 from: <http://news.bbc.co.uk/1/hi/uk/4687904.stm>.

²⁶²See Proveedores de servicios y contenidos de Internet se unen para defender los derechos de los menores en la Red. *Consumer Eroski*, 8 February 2005. Accessed on 7 October 2008 from: <http://www.consumer.es/web/es/tecnologia/2005/02/08/116485.php>.

²⁶³Canada has also implemented the Cleanfeed project. See Cybertip.ca. *Cleanfeed Canada*. Accessed on 7 October 2008 from: <http://www.cybertip.ca/app/en/cleanfeed>.

²⁶⁴See Society for the Promotion of Community Standards. Society Applauds ISP blocks on Child Porn. *Scoop*, 13 November 2007. Accessed on 7 October 2008 from: <http://www.scoop.co.nz/stories/PO0711/S00223.htm>.

²⁶⁵This possibility has been advocated by the ECPAT group in Canada, Beyond Borders. See Toughen ISP rules on child porn, advocate says. *CBC News*, 18 January 2008 from: <http://www.cbc.ca/canada/manitoba/story/2008/01/18/isp-disclose.html?ref=rss>.

legislation should address this issue by creating an offence for the failure to report child abuse material. Moreover, Internet providers should have the obligation to retain information about customers in order to facilitate investigations.²⁶⁵

Financial companies facilitating the distribution of child pornography

Legislation in place

So far, the banking and finance sectors seem to have escaped legal scrutiny when it comes to their role in the dissemination and commercial production of child pornography. In fact, while these actors have the possibility of disrupting the functioning of financial mechanisms supporting child pornography websites, very few legal instruments explicitly refer to a bank's or a credit card company's obligation to report suspicious transactions. Although **United States** law, as mentioned above, has imposed a duty to report on Internet providers, a similar obligation remains to be imposed on financial institutions.²⁶⁶

As previously mentioned, Article 9(2) of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse only cautiously contemplates potential reporting obligations for the finance and banking sectors.

Private, public sector and NGOs initiatives

Beyond the law making arena, some interesting initiatives have resulted from the collaboration of NGOs, governmental agencies and the private sector. These initiatives illustrate how financial institutions can be very powerful allies of law enforcement officials in the fight against child pornography. In fact, banks, credit card institutions (Visa, AmEx, Mastercard) and payment gateways (Pay Pal, Pro Pay) often possess key information to identify users and track funds related to the buying and selling of online child pornography. This was demonstrated in the *Regpay* case, in which federal prosecutors cracked down on a child pornography ring in **Belarus** in collaboration with Visa, MasterCard and Morgan Chase.²⁶⁷

In July 2005, the Financial Coalition Against Child Pornography was created, following an initiative of ICMEC and its sister organisation, the National Center for Missing and Exploited Children (NCMEC). Officially launched in March 2006, the coalition aimed at drafting a protocol or statement of principles for adoption and implementation by every nation, in order to establish a proactive system to enable the

²⁶⁶US Code, Title 42, s. 13032. United States. Accessed on 7 October 2008 from: http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00013032----000-.html.

²⁶⁷See Scherer, Ron. A siege on the child-porn market. *The Christian Science Monitor*, 16 March 2006. Accessed on 7 October 2008 from: <http://www.csmonitor.com/2006/0316/p01s03-ussc.html>.

financial industry to deal more effectively with illegal uses of its systems to disseminate child pornography, to create a system for reporting suspected child pornography, to develop a process for performing test transactions to identify parties involved in child pornography, to ensure that current processes in place to identify money laundering and report unusual circumstances are used to identify illegal child pornography and to implement monitoring and due diligence checks. The coalition has since published the *Internet Merchant Acquisition and Monitoring Best Practices for the Prevention and Detection of Commercial Child Pornography (Best Practices)*.²⁶⁸ While the coalition targets the organisations or individuals distributing child pornography for money, it does not target individual customers.²⁶⁹

One impressive feature of this initiative is how the coalition has managed to gather key players of the financial world, some of which are otherwise ferocious competitors, to unite forces, share knowledge and eventually cooperate with law enforcement.²⁷⁰ A strong collaboration with law enforcement is critical as it is typically illegal for anyone other than law enforcement officers to view child pornography, thus making it difficult for companies to proceed with their internal controls.²⁷¹ Visa has a program for eradicating child pornography, which includes monitoring the Internet to identify child pornography sites and working with law enforcement.²⁷²

It should also be highlighted that the coalition has managed to disseminate its *Best Practices* through national institutions such as the Federal Deposit Insurance Corporation (FDIC) and the Office of the Comptroller of the Currency (OCC); institutions which regulate different aspects of all US chartered and foreign banks located in the US.²⁷³ The coalition has also recently extended its reach beyond US borders by rallying the Association of Banks in **Singapore**²⁷⁴ and the European Banking Federation.²⁷⁵

²⁶⁸ See International Centre for Missing & Exploited Children. *Financial Coalition Against Child Pornography*. Accessed on 7 October 2008 from: http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PagelId=3064.

²⁶⁹ See Child Focus. *Le blocage des paiements via les canaux bancaires habituels soutient la lutte contre la pornographie enfantine sur l'Internet* Child Focus se réjouit de la réaction positive des banques européennes. 4 May 2006. Accessed on 7 October 2008 from: <http://www.childfocus-net-alert.be/fr/BlocagePaiements.pdf>.

²⁷⁰ The list of coalition members can be found on ICMC's website. International Centre for Missing & Exploited Children. *Financial Coalition Against Child Pornography*. Accessed on 7 October 2008 from: http://www.icmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_X1&PagelId=3064.

²⁷¹ See Scherer, Ron. A siege on the child-porn market. *The Christian Science Monitor*, 16 March 2006. Accessed on 7 October 2008 from: <http://www.csmonitor.com/2006/0316/p01s03-ussc.html>.

²⁷² Visa has demonstrated numerous elements of good practice. See Visa. *Fighting Internet Child Pornography*. Accessed on 7 October 2008 from: <http://www.visa-asia.com/ap/sea/cardholders/society/acp.shtml>.

²⁷³ See Comptroller Distributes Booklet to Help Banks Fight Child Pornography. *Comptroller of the Currency Administrator of National Banks*, 9 August 2007. Accessed on 7 October 2008 from: <http://www.occ.treas.gov/ftp/release/2007-81.htm>; see also *Preventing and Detecting Child Pornography: Best Practices from the Financial Coalition Against Child Pornography*. Federal Deposit Insurance Corporation Financial Institution Letter. 24 August 2007. Accessed on 7 October 2008 from: <http://www.fdic.gov/news/news/financial/2007/fil07072.html>.

²⁷⁴ See Association of Banks in Singapore. Singapore Banks Join Global Battle Against Child Pornography. *National Center for Missing and Exploited Children*. 17 January 2007. Accessed on 7 October 2008 from: http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PagelId=3041.

²⁷⁵ See Child Focus. *Le blocage des paiements via les canaux bancaires habituels soutient la lutte contre la pornographie enfantine sur l'Internet* Child Focus se réjouit de la réaction positive des banques européennes. 4 May 2006. Accessed on 7 October 2008 from: <http://www.childfocus-net-alert.be/fr/BlocagePaiements.pdf>.

The issue of non-traditional payment methods

Although these initiatives take us one step further in the fight against child pornography, they fall short of reaching all those involved in processing payments for child pornography. The voluntary nature of the coalition leaves out many novel forms of electronic payment, such as the popular 'digital currencies'. The peculiarity of this method of payment resides in the very anonymous way in which units are traded and materials acquired. In fact, only a few clicks of a mouse allows the user to open an account, many times with a bogus name, and to convert actual money to units which can thereafter be freely traded in absolute anonymity. As a result, even if the initial purchase of units can be tracked down through a credit card number or a bank account wire number, further transactions in the digital units are virtually untraceable.²⁷⁶ It has been noted that some sites featuring child pornography are dropping Visa and MasterCard in favour of more 'anonymous' methods of payment.²⁷⁷

Digital currencies came under public and law enforcement scrutiny recently when a US Grand Jury indicted the company E-Gold and its founders on charges of conspiracy to engage in monetary transactions derived from child exploitation. The indictment contends that officers of the company knew of the illicit nature of the transfers but nevertheless refused to denounce the actions to the authorities. The future will tell us how the case will be handled.²⁷⁸

In summary, strong laws are needed to curtail the operations of such companies, including laws that impose strong reporting obligations on those providing a platform of exchange for online merchants and stronger obligations on merchants to collect reliable data so that no crime of sexual exploitation of children remains unpunished.

²⁷⁶See Gold Rush: Online payment systems like e-gold Ltd. are becoming the currency of choice for cybercrooks. *Business Week*, 9 January 2006. Accessed on 7 October 2008 from: http://www.businessweek.com/print/magazine/content/06_02/b3966094.htm?chan=gl.

²⁷⁷*Ibid.*

²⁷⁸The indictment can be viewed at the website of the US Department of Justice. *United States v. E-Gold, Ltd. et al.* Indictment. US District Court for the District of Columbia. 24 April 2007. Accessed on 7 October 2008 from: www.usdoj.gov/criminal/ceos/Press%20Releases/DC%20egold%20indictment.pdf.

LEGAL REFORM CHECKLIST

- √ National legislation has adopted a clear definition of 'Child Pornography', excluding vague terms such as 'obscene' or 'indecent'
- √ The definition encompasses a broad spectrum of depictions, whether fixed in visual, audio or electronic support
- √ National legislation includes 'virtual child pornography' and there is no requirement to prove that a 'real' child has been used
- √ National legislation criminalises a broad range of activities including simple possession, procuring, accessing and viewing, producing and making, distributing, disseminating, importing, exporting and offering
- √ Reporting of suspected sexual abuse/exploitation is mandatory for persons in positions of responsibility (see section 2, pages 47 and 55)
- √ Individuals and professionals who may be exposed to child pornography because of the nature of their work are subject to reporting obligations
- √ Internet providers and financial companies are subject to reporting obligations

SECTION 5

CHILD SEX TOURISM

Objectives:

- To offer an overview of the phenomenon of child sex tourism and legal responses
- To discuss extraterritorial legislation as a tool in the fight against child sex tourism; to explain some of the difficulties associated with its implementation
- To suggest how extraterritorial laws can be strengthened
- To discuss tourism industry liability and how to bring tour operators and travel agents to account
- To emphasise the importance of the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism and related legal responses

Key Provisions:

- Preamble and Articles 3(2), 4 and 10(1)(3) of the OPSC
- Explanatory Report of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse²⁷⁹
- The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism²⁸⁰

This section examines the phenomenon of child sex tourism and offers an assessment of some of the legal responses generated by the international community and their implementation at country level. It also discusses some of the roles of the tourism sector as a key ally in the fight against child sex tourism and the need to impose corporate liability in order to strengthen existing legal frameworks.

CHILD SEX TOURISM: AN OVERVIEW²⁸¹

The problem of child sex tourism was first brought to the world's attention in the early 90's, largely as a result of the work of ECPAT and other NGOs. The international community's recognition of and concern for "the widespread and continuing practice of sex tourism, to which children are especially vulnerable, as it directly promotes the sale

²⁷⁹Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

²⁸⁰The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism. Accessed on 1 October 2008 from: <http://www.thecode.org/>.

²⁸¹For a more detailed overview of child sex tourism see ECPAT International. *Combating Child Sex Tourism: Questions & Answers*. 2008.

of the children, child prostitution and child pornography” was also clearly stated in the OPSC preamble.²⁸² While in past years measures to counter these crimes have been delineated and made binding upon States parties, little progress has been achieved to effectively halt the problem.

A definition of child sex tourism

ECPAT defines child sex tourism as the sexual exploitation of children by a person or persons who travel from their home district, home geographical region or home country in order to have sexual contact with children. Despite what the term suggests, child sex tourists can be domestic travellers or they can be international tourists. Offenders often travel from a richer country (‘sending countries’) to one that is less developed (‘destination countries’), but they may also be travellers within their own countries or regions.

Child sex tourism often involves the use of accommodation, transportation and other tourism-related services that facilitate contact with children and enable the perpetrator to remain fairly inconspicuous in the surrounding population and environment.

In spite of some progress in enacting measures to counter child sex tourism in recent years, the problem persists. In fact child sex tourism is a growing phenomenon which seriously harms countless children around the world; often with irreparable consequences.

No destination immune: from the US to Canada

Lynn Winslow, a US Army retiree, was arrested in 2005 as he attempted to board a plane to Australia. He believed that he was travelling there to have sexual relations with a six year old girl, which had in fact been arranged for him by an undercover Australian policeman.²⁸³ In another case, a 31 year old American named Elisha Pasdeck was indicted in Springfield, IL, for allegedly travelling to Saskatchewan, Canada, in July 2002 and engaging in sexual conduct with a 12 year old.²⁸⁴ Also, Saudi Arabian citizen Nabil Al Rowais was arrested and charged for travelling to the US with the alleged intent to molest a two and a half year old girl.²⁸⁵

²⁸²Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 1. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

²⁸³Scarcella, Michael A. Sex Offender’s Trip Cut Short at Airport. *Herald Tribune*, 9 August 2005.

²⁸⁴Montgomery County man pleads guilty to international child sex exploitation, transporting child pornography. *US Immigration and Customs Enforcement News Releases*, 16 April 2006, available at: <http://www.ice.gov/pi/news/newsreleases/articles/060417illinois.htm?searchstring=Montgomery%20AND%20child%20AND%20exploitation>.

²⁸⁵Molestation Sting Nets Saudi Tourist, *The Associated Press*, 28 April 2006. Accessed on 29 September 2008 from available at <http://www.msnbc.msn.com/id/12538200/>.

Underlying factors and driving forces

Poverty is often cited as the main driving force behind the different manifestations of CSEC. Other factors such as social inaction, living and working on the streets, domestic abuse of children and neglect also play a significant role in increasing children's vulnerability to sexual exploitation.

Destinations tend to shift from one country or region to another with the opening up of transportation routes and markets, unregulated mass tourism development and accentuated wealth discrepancies. As protection and prevention strategies increase in certain countries, child sex tourists easily adapt and change destinations. Long affected destinations include **Brazil, Mexico, the Philippines and Thailand**. Emerging destinations include **Argentina, Cambodia, Colombia, Czech Republic, India, Kenya, Laos, Mongolia, Peru, South Africa and Vietnam**.

Weak legal frameworks are one of the factors that increase children's vulnerability and encourage demand. In fact, child sex offenders tend to choose destinations known for their lenient laws. In this context, the importance of severe laws coupled with strict penalties that reflect the gravity of the offences committed and also act as efficient deterrents cannot be overemphasised.

Tourism is not the cause of child sexual exploitation, but through their use of the numerous tourism services that have increasingly opened up travel destinations around the world (for example budget accommodation, local travel agencies, online booking services and low-cost carriers) tourists can easily gain access to destinations and locations where they are able to have direct contact with vulnerable children. The tourism industry is therefore an important player and a valuable ally in the protection of children from sexual exploitation in tourism. Many national travel and tourism organisations have recognised this danger to children and are working together to take action against people who sexually exploit children in tourism.

Who are the child sex tourists? A classification of child sex offenders in the context of child sex tourism

Child sex tourists come from all walks of life: they may be married or single, male or female, wealthy tourists or budget travellers, national or international travellers.

Preferential offenders and **paedophiles** target children specifically, but most child sex tourists are **situational offenders**, individuals who do not usually have a sexual preference for children but take advantage of a situation in which a child is made available to them.

Child sex tourists often justify their behaviour by claiming that children freely chose this type of 'employment' for themselves. Offenders may also try to rationalise their actions by claiming that sex with a child is culturally acceptable at a destination and may also display well-rooted racist views which regard 'less developed cultures' as inferior and, therefore, do not consider any stigma or moral reprehension as attached to it.²⁸⁶

Another common misperception among sex tourists is that through the provision of money or the exchange of gifts for sexual access to a child, they are benefiting the victims and their families by helping them out of poverty.

Not all child sex tourists fall neatly into the above described categories. However, some cases display features which help illustrate the classifications described above.

a) The situational child sex tourist/offender

Situational offenders abuse children by way of experimentation or through the anonymity and impunity afforded to them by being in a foreign destination. They do not have an exclusive sexual inclination for children. Often the situational offender is an indiscriminate sex tourist who is presented with the opportunity to interact sexually with a person under 18 years of age and takes it. Contrary to popular belief, the majority of child sex tourists are situational offenders, which calls for legal responses that target not only the more organised forms of child sex tourism but also the many instances of more spontaneous, opportunistic abuse.

Very few situational child sex tourists are arrested, tried and sentenced. This may be because they do not necessarily produce imagery of the abuse carried out nor do they go to extreme means to harm children such as contacting paedophile networks or exchanging pornography. As they are often more involved in the sexual exploitation of adolescents rather than young children, they may benefit from a social tolerance in both sending and destination countries around sexual exploitation of minors, which is seen as less of a crime (sometimes not seen as a crime at all) than abusing children.

Arrested following an investigation into a child pornography ring, French national Amnon Chemouil was tried in 2001 for having sexually abused an 11 year old girl in Pattaya, Thailand when he was presented with the opportunity to do so.²⁸⁷ The abuse

²⁸⁶The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced International Studies. *International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*. January 2007.

²⁸⁷Tiberghien, Nathalie. Un Touriste Sexuel aux Assises. *L'Express*, 19 October 2000. Accessed on 30 September 2008 from: <http://www.lexpress.fr/info/societe/dossier/pedophilie/dossier.asp?id=418775>.

had been filmed by one of two Swiss men who were with Chemouil. During the trial, Chemouil presented his acts as a moment of weakness, apologizing for “stealing [the girl’s] childhood.”²⁸⁸ He also placed all responsibility on himself, in contrast with statements from preferential child sex offenders and paedophiles, who often place the blame on the victim for having seduced the offender. Experts present at the trial did not classify Chemouil as a paedophile. It was the first case in France to be tried under extraterritorial legislation aimed at prosecuting offenders who carry out abuse in a foreign country.

b) The preferential child sex tourist/offender

Preferential offenders have an active sexual preference for children. They are fewer in numbers than situational offenders, but can potentially abuse larger numbers of children as this is their desire and intention. Preferential child sex tourists will generally actively search for pubescent or adolescent children. This category of child sex offender represents a minority of the overall total. It is important to distinguish the preferential child sex tourist from the paedophile described below.

In April 2005, in Thailand, Singaporean national Darwis Rianto Lim, 31, a teacher at Temasek Polytechnic School of Applied Science, was arrested by Thai police in a hotel room for allegedly trying to buy sex with underage boys over the Internet.²⁸⁹

Following tip-offs from US Immigration and Custom Enforcement special agents and Australian Interpol officers who had monitored the teacher’s attempts to buy sex with Thai boys over the Internet, undercover police officers from Thailand’s Central Investigation Bureau posed as sex agents to entrap the teacher.

Shortly after arriving in Bangkok, Lim allegedly posted messages on the Internet offering US\$200 for sex with a boy aged between 12 and 16 years.²⁹⁰ After being told about three boys, he allegedly picked a 16 year old and was arrested while paying the undercover police 8,000 Thai Baht.²⁹¹

²⁸⁸ *Ibid.*

²⁸⁹ Nu-Wen, Seto. Special US Police Unit Spies on Suspected Paedophiles. *The Electronic New Paper*, 21 August 2005.

²⁹⁰ Wee, Eugene. Thai Child Sex Case: Arrested Man Poly Lecturer. *The Electronic New Paper*, 30 April 2005.

²⁹¹ *Ibid.*

While in some situations the boundaries between the categorisations of preferential and situational abusers are blurred, in this case Lim actively sought sexual contact with adolescent minors (but not with pre-pubescent children), most likely placing him in the preferential child sex offender category.

c) The paedophile

The paedophile manifests an exclusive sexual inclination for pre-pubescent children. Usually considered as someone suffering from a clinical disorder, the paedophile may not necessarily show any preference for the gender of children and may not view sexual contact with children as harmful. Paedophiles and preferential abusers constitute a minority of child sex tourists.²⁹²

Therefore, in spite of the extensive media coverage around so-called paedophile child sex tourists, it is not necessarily accurate to call a person who sexually exploits or abuses a child as such. The term 'child sex offender' is preferred as it includes, but is not limited to paedophiles.

EXTRATERRITORIAL LEGISLATION : A TOOL TO FIGHT CHILD SEX TOURISM

From a legal perspective, the alarmingly high incidence of child sex tourism worldwide can be linked to weak laws that fail to adequately prevent and punish sexual offences against children in destination countries. In some cases laws do exist, but they are not sufficiently enforced. In sending countries, the perception of impunity is also fuelled by the ease with which child sex tourists may evade prosecution simply by returning home.

Recognising the global nature of a growing problem and acknowledging that their own nationals do engage in the sexual exploitation of children, some sending countries have opted to strengthen their legal frameworks through the enactment of **extraterritorial legislation** or the application of an existing jurisdiction to offences against children. As of October 2007, over 40 countries have enacted, or will apply, such laws, with varying levels of success in their implementation.

²⁹²ECPAT is aware that there is a discussion in psychological and medical circles around the categorisation of paedophilia as a clinical or pathological condition. However, for the purposes of this publication, ECPAT seeks to underline a particular pattern of behaviour targeting pre-pubescent children. This is not to engage in a debate regarding chemical, psychological or social factors behind paedophilia and the sexual abuse of children.

Through extraterritorial jurisdiction, countries can deem an offence committed abroad as an offence committed within their borders. In other words, the prosecution of a country's nationals at home, under national laws is made possible, even for offences committed abroad.

Extraterritorial jurisdiction is particularly useful because:

- It provides a basis for arresting and prosecuting offenders who escape from the destination countries and return to their countries of origin trying to get away from prosecution.
- It sends a clear message that countries will not let their citizens take a 'holiday' from their own legal systems.

ECPAT believes that extraterritorial jurisdiction is a key element of national legal frameworks aimed at combating child sex tourism.

This section explains the foundations and functioning of extraterritorial jurisdiction. As the very low rates of arrests and prosecutions worldwide point to the urgent need for improvement of existing extraterritorial jurisdiction schemes, recommendations for strengthening such jurisdiction are also provided.

Basic principles of criminal jurisdiction

The term jurisdiction generally refers to the power or right of a State to exercise legal authority over a particular individual or matter. Under international law, there is a recognition that in order for a State to assert jurisdiction over a crime, i.e. to proceed to arrest and prosecution, there must be a sufficient link, or 'nexus', between the alleged acts and the State claiming jurisdiction.

Criminal jurisdiction may be based on a number of principles. These include first and foremost the **territorial principle** and four other principles underlying extraterritorial jurisdiction namely (1) the active personality principle; (2) the passive personality principle; (3) the protective principle and (4) the universality principle.²⁹³

²⁹³Amnesty International. Universal Jurisdiction: *The duty of States to enact and enforce legislation*, ch. 1. 1 September 2001. Accessed on 30 September 2008 from: <http://web.amnesty.org/library/index/engior530032001?OpenDocument>.

Territorial jurisdiction: the general rule

For the prosecution of crimes, the primary and most widely accepted form of jurisdiction is territorial jurisdiction, which implies that States may prosecute crimes committed in their territory irrespective of the offender's and/or victim's nationality.²⁹⁴ Thus, as a general rule, if a crime is committed in a given country, it is this country that will be the primary 'jurisdiction holder' with the authority to arrest and prosecute the offender at the place the crime was allegedly committed.

The OPSC makes this principle mandatory:

Article 4 OPSC

"1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, when the offences are committed in its territory or on board a ship or aircraft registered in that State."²⁹⁵

As the territorial State is the one where victims, witnesses, written and material evidence and the suspect are usually located,²⁹⁶ in many instances it constitutes the most appropriate forum for investigation and prosecution. However, as we also know, in many instances the country where the crime is committed may be unwilling or unable to prosecute for a variety of reasons. In such cases extraterritorial jurisdiction may provide a solution.

²⁹⁴Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

²⁹⁵Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

²⁹⁶Amnesty International. *Universal Jurisdiction: The duty of States to enact and enforce legislation*, ch. 1. 1 September 2001. Accessed on 30 September 2008 from: <http://web.amnesty.org/library/index/engior530032001?OpenDocument>.

Extraterritorial jurisdiction: the exception

Extraterritoriality can be seen as the jurisdictional element that allows for prosecution of citizens for crimes committed outside of one's country.²⁹⁷

Extraterritorial provisions may be based on different principles of international law, some of which are briefly explained below. There is no universally accepted basis for the provisions, but all countries will base their extraterritorial jurisdiction on one or more of these principles.

- **The Passive Personality Principle**

The Passive Personality Principle prescribes that States may assert jurisdiction on the basis of the nationality of the victim. It derives from the idea that States must protect their own nationals, even when abroad.²⁹⁸ In practice, this means that State A could prosecute a crime committed by a national of State B against a child who is a national of State A, even if the offence was committed outside of the borders of State A.

Both the OPSC and the recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse²⁹⁹ encourage States to prescribe jurisdiction under this principle, but none actually makes it mandatory.

Article 4 OPSC

"2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases [...]

(b) When the victim is a national of that State"³⁰⁰

Bearing in mind that one of the objectives of the OPSC is to counter child sex tourism, in many cases it would make sense to ensure that jurisdiction is as broad as possible in order to allow maximum ground for prosecution.

²⁹⁷ See Fraley, Amy. Child Sex Tourism Legislation under the Protect Act: does it really protect? *St. John's Law Review*, vol. 79:445, April 2005, p. 462.

²⁹⁸ Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 7. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/L-1%20Tom%20Vander%20Beken.pdf>.

²⁹⁹ Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25. Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

³⁰⁰ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

- **The Nationality Principle (Active Personality Principle)**

The Nationality Principle (Active Personality Principle) is particularly important as it allows States to exercise jurisdiction on the basis of the nationality of the suspect, e.g. over offences committed abroad by their own nationals. The Nationality Principle is reflected in several extraterritorial laws worldwide and serves as a good basis to prosecute child sex tourists, allowing States to prosecute their own nationals under their own laws for crimes committed outside their borders. For example, the Government of Canada could prosecute a Canadian citizen under Canadian law for a crime committed against a child in any other country.

The OPSC encourages the exercise of extraterritorial jurisdiction based on the Nationality Principle but does not compel States to establish jurisdiction based on this principle.

Article 4 OPSC

"2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3, paragraph 1, in the following cases:

- (a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory"³⁰¹

As the OPSC suggests, the Nationality Principle should be interpreted broadly to allow States to exercise jurisdiction over offences committed abroad not only by their nationals, but also by their residents. The CoE Convention on the Protection of children against sexual exploitation and sexual abuse, on the other hand, makes mandatory the establishment of jurisdiction over offences committed by a State's national or habitual resident.³⁰²

³⁰¹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁰²Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25(1)(d) & (e). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>. Note, however, that the application of this jurisdiction rule to habitual residents is subject to reservation, see art. 25(3).

- **Aut Dedere Aut Judicare**

Article 4 OPSC

“3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the aforementioned offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence has been committed by one of its nationals.”³⁰³

The OPSC reiterates and makes mandatory the application of the *Aut Dedere Aut Judicare* principle (‘extradite or prosecute’). This principle serves to ensure that countries that do not extradite their citizens take action to ensure culprits do not go unpunished.

- **The Universality Principle**

The Universality Principle is based on the idea that there are crimes so heinous by their very nature that they justify prosecution regardless of the place of their commission or the nationality of the perpetrator or victim. Its application is understood to be reserved for crimes considered “[so] universally repugnant that every State has jurisdiction over them.”³⁰⁴

The Universality Principle is not based on the link between the crime and the State willing to prosecute (as in the case of *locus delicti*, or the status of the victim or the offender). The only element that renders prosecution legitimate is the heinous nature of the crime. To sum up, universality differs from other principles of jurisdiction in that,

³⁰³Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 4. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁰⁴Watson, Geoffrey R. Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction, p. 45. *Yale Journal of International Law*, 17, 1992, p. 41.

“Universality does not require a direct connection such as the place of the offence, the nationality of the offender, or the effects of the offence on the prescribing State. The required connection is more abstract. Universal jurisdiction over the specific offences is a result of the universal condemnation of those activities. They are subject to universal jurisdiction as a matter of customary law or as a matter of international agreements.”³⁰⁵

In the realm of customary international law, universal jurisdiction extends to crimes of “piracy, slave trading, war crimes, hijacking and sabotage of aircraft, hostage-taking, crimes against internationally protected persons, apartheid, torture and genocide”,³⁰⁶ although there is no final consensus on a list of crimes to which the Universality Principle could be applied.³⁰⁷

There have been some indications by the international community that sexual crimes against children fall under the category described above. However, this very far from having gained universal acceptance and recent trends in international law are not indicative of such acceptance. In fact, the recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse does not mention universal jurisdiction.

The Committee on the Rights of the Child has welcomed the Government of **Spain's** affirmation that offences covered by the OPSC are subject to extraterritorial jurisdiction and the principle of universal justice and, in particular, that prosecution is not conditional on the perpetrator being Spanish, resident in Spain or whether the act is classified as a crime in the State in which it was committed.³⁰⁸

³⁰⁵Wilske, Stephen & Schiller, Teresa. International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, pp. 131-132. *Federal Communications Law Journal*, 50, 1997, p. 117.

³⁰⁶Watson, Geoffrey R. Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction, p. 44. *Yale Journal of International Law*, 17, 1992, p. 41. Quoting Randall, Kenneth C. Universal Jurisdiction Under International Law, p. 839. *Texas Law Review*, 66, 1988, p. 785.

³⁰⁷Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 8. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

³⁰⁸Committee on the Rights of the Child. *Concluding observations: Spain*, para. 29. UN Convention on the Rights of the Child. 17 October 2007. Accessed on 30 September 2008 from: <http://www2.ohchr.org/english/bodies/crc/crcs46.htm>.

In Spain, one of the most innovative aspects introduced by the *Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999* was to extend the Universality Principle so that Spanish tribunals would be vested with the required competence to hear cases of ‘child prostitution’ and ‘corruption of minors’ committed by Spanish nationals or aliens outside its territory.

But, as of June 2008, the principle of universal jurisdiction does not extend to cases of ‘sexual abuse’ and ‘sexual assault’. Accordingly, the Spanish clients/exploiters of children under the age of 13 years outside of Spanish territory would not be punished because under Spanish law these are considered acts of sexual abuse/assault, which are not subject to extraterritorial jurisdiction.

In order to address these gaps, a proposal for legal reform was introduced by an *Anteproyecto* of July 2006, recommending the criminalisation of the acts of client-exploiter. The proposal had not been approved as of June 2008.

ECPAT believes that states should ensure jurisdiction over crimes to the maximum extent possible on the basis of the above territorial and extraterritorial jurisdiction principles.

Summary of the basic forms of jurisdiction in the context of the OPSC

Type of Jurisdiction	OPSC Requirements
Territorial If a crime is committed in country A, this country is the primary ‘jurisdiction holder’ with the authority to arrest and prosecute.	States <i>must</i> exercise territorial jurisdiction. In addition, States who do not extradite must prosecute.
Extraterritorial <ul style="list-style-type: none"> • If the victim is a national of country A • If the suspect is a national of country A • If the national interests of country A are threatened • If country A applies the principle of universal jurisdiction 	States <i>may</i> chose to exercise jurisdiction based on any of these principles but are not legally bound to do so.

EXTRATERRITORIAL LEGISLATION REGARDING OFFENCES AGAINST CHILDREN AS IMPLEMENTED IN SELECTED DOMESTIC JURISDICTIONS

A comparative study of the domestic legal systems of a number of States that have enacted extraterritorial laws reveals the existence of three types of extraterritorial jurisdiction applicable to offences against children committed abroad.

Extraterritoriality as a general principle for certain serious crimes

Extraterritorial laws are not a new phenomenon. In fact, several countries such as **Japan**, the **Netherlands**, **Norway**, **Sweden** and **Switzerland** apply extraterritorial jurisdiction, as a general principle, to offences committed abroad by their nationals. There may not be any distinct provisions to deal with crimes related to child sex tourism; the jurisdiction is simply there under the general category of crimes that can be prosecuted at home even though they were committed abroad.

For example, the **Swedish** *Penal Code* establishes the principle of extraterritoriality of Swedish crimes committed abroad by Swedish citizens and other Nordic citizens.

Extraterritoriality under the Swedish *Penal Code*

“Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden;
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or [...]”³⁰⁹

³⁰⁹Penal Code, pt. 1, ch. 2. English translation. Sweden. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/2707/a/15194>; see also Ministry of Justice of Sweden. *New legislation on sexual crimes*. Fact Sheet. June 2005. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/5076/a/46797>.

Extraterritoriality in Swedish law is based in part on the Nationality Principle. The law's scope is not restricted to Swedish citizens, but also reaches other individuals, such as those residing in Sweden.

Extraterritoriality as applied specifically to sexual offences against children

As will be explained below, the application of extraterritorial jurisdiction is often subject to a number of conditions, such as the requirement of double (or dual) criminality. Such conditions may present some practical obstacles to the prosecution of crimes in the country of the suspect.

Fortunately, over the past years, countries that apply extraterritorial jurisdiction as a matter of general principle have amended their laws to address child sex tourism and to facilitate the prosecution of offences committed against children.

Other countries have enacted new, comprehensive laws to target the problem. In 1994, **Australia** enacted Part IIIA of the *Crimes Act 1914*, which contains offences that apply where Australian citizens and residents engage in sexual activity with children under the age of 16 years while overseas.³¹⁰

Crimes Act 1914

Part IIIA – Child Sex Tourism

Division 2 - Sexual offences against children overseas

50BA. Sexual intercourse with a child under 16

"A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16.

Penalty: Imprisonment for 17 years."³¹¹

50BB. Inducing child under 16 to engage in sexual intercourse

"A person must not induce a person who is under 16 to engage in sexual intercourse with a third person outside Australia and in the presence of the first – mentioned person.

Penalty: Imprisonment for 17 years."³¹²

³¹⁰Crimes (Child Sex Tourism) Amendment Act 1994 No. 105, 1994. Australia. Accessed on 30 September 2008 from: <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/frameLodgmentAttachments/332EE746136CDDF6CA256F720018338C>.

³¹¹*Ibid.*

³¹²*Ibid.*

Extraterritoriality applied even for attempted crimes

Some countries have chosen to set the bar higher and criminalise even the acts preceding the actual commission of sexual offences with children, e.g. the making of travel arrangements for that purpose. This broadens the scope of extraterritoriality and serves to strengthen preventive measures and stop child sex tourists before they act upon their malevolent intents.

In April 2003, **United States** President George W. Bush signed into law the *Prosecuting Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act)*.³¹³ The *PROTECT Act* criminalises not only sexual acts committed with children abroad, but also:

“Any United States citizen or alien admitted for permanent residence who travels in foreign commerce, and engages in any illicit sexual conduct with another person shall be fined under this title or imprisoned not more than 30 years, or both.”³¹⁴

It also criminalises the intent to do so.³¹⁵ As such, it allows for prosecution based on evidence of intent to travel abroad with the purpose of having sexual intercourse with a child. Therefore, evidence that the misconduct actually took place is not an element of the offence. The term “illicit sexual conduct” includes sexual acts with a person under 18 years of age that would be a crime under US law, as well as any commercial sex act (as defined in the law) with a person under 18 years of age.³¹⁶

John W. Seljan was arrested in October 2003 by US government agents in Los Angeles airport as he attempted to board a flight to the Philippines where he intended to have sex with two girls aged 9 and 12 years. Federal agents arrested Seljan after customs inspectors conducting routine checks discovered sexually suggestive letters in internationally bound packages sent by Seljan. Seljan was eventually convicted and sentenced to 20 years’ imprisonment on multiple counts, including attempting to travel to engage in sexual acts with minors and possessing and producing child pornography.³¹⁷

³¹³Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003. United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³¹⁴*Ibid.* s. 105(c).

³¹⁵Before the *PROTECT Act* became law in 2003, the law required the Government to prove that the defendant traveled to a foreign destination for the purpose of engaging in specified sexual conduct with a person under the age of 18 years. The *PROTECT Act* removed the intent requirement so that the Government would only have to prove that the defendant engaged in illicit sexual conduct with a minor while in a foreign country.

³¹⁶Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003, s. 105(f). United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³¹⁷*United States v. Seljan*. US Court of Appeals for the Ninth Circuit. 14 August 2007. Accessed on 30 September 2008 from: [http://www.ca9.uscourts.gov/ca9/newopinions.nsf/CB77EE6802F2B37F8825733700587A8B/\\$file/0550236opiniononly.pdf?openement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/CB77EE6802F2B37F8825733700587A8B/$file/0550236opiniononly.pdf?openement).

The Department of Homeland Security's Office of Immigration and Customs Enforcement (ICE) developed Operation Predator, an initiative launched in 2003 to identify, investigate and arrest child predators. Operation Predator draws on ICE's unique investigative and enforcement authority to safeguard children from foreign national paedophiles, human traffickers, international sex tourists and other predatory criminals. Coordinated nationally and internationally through ICE's headquarters, Operation Predator brings together an array of ICE disciplines and resources to target these child sexual abusers. As part of the effort, ICE agents stationed abroad are working with foreign governments and their foreign law enforcement counterparts to enhance coordination and cooperation in the investigation and prosecution of transnational crimes.³¹⁸ Through cooperation with local police forces in Southeast Asia, the US Immigration and Customs Enforcement agency has made 67 arrests under the child sex tourism provisions of the *PROTECT Act*. Of those, 47 have been convicted and others are still being prosecuted.³¹⁹

ECPAT adopts the view that domestic legal systems should criminalise both the acts of travelling with intent to commit a sexual offence against a child and the actual commission of sexual offences against children abroad, thus targeting both predatory and situational/opportunistic offenders.

SOME OBSTACLES TO EXTRATERRITORIAL JURISDICTION

Practical difficulties

Extraterritorial jurisdiction is difficult to apply in practice. It is complicated to obtain evidence across jurisdictions due to associated costs, differences in language, delays in transferring or exchanging documents, support needed for child witnesses, etc.³²⁰

It is also difficult to know how States that have applied extraterritorial jurisdiction have managed, because there is very little data available on arrests and convictions in 'destination' countries, with separate information on cases prosecuted in the 'sending' country.

The Committee on the Rights of the Child asks States who are reporting to it under the OPSC to submit disaggregated data, including data on prosecutions and convictions.³²¹ However, even if a State submits its figures for arrests and convictions, the convictions recorded in the 'sending' country would not be part of the criminal statistics of the 'destination' country; although the arrest might be.

³¹⁸The White House, President George W. Bush. *Fact Sheet: Operation Predator*. 7 July 2004. Accessed on 30 September 2008 from: <http://www.whitehouse.gov/news/releases/2004/07/20040707-10.html>.

³¹⁹US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

³²⁰See Muntarbhorn, V. *Extraterritorial Criminal Laws against Child Sexual Exploitation*. UNICEF. Geneva. 1998.

³²¹Committee on the Rights of the Child. *Revised Guidelines Regarding Initial Reports to be Submitted by States Parties under Article 12, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. UN Convention on the Rights of the Child. 3 November 2006. Accessed on 30 September 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRC/C/OPSC/2&Lang=E>.

From the information available from the Committee’s reports and other sources, it would appear that, although it is known that many sexual offences are committed by tourists and visitors, not many offenders are actually arrested or convicted, and there are certainly very few known cases of convictions in a ‘sending’ country. The following table is not exhaustive, but it provides a snapshot of experiences from around the world in applying extraterritorial jurisdiction. **Australia**, the **United States** and **France** stand out for the numbers of convictions they have achieved.

Country	Law	Description	Number of Convictions ³²²
Australia	<i>Crimes Act 1914</i> , as amended by the <i>Crimes (Child Sex Tourism) Amendment Act 1994</i> ³²³	The <i>Crimes Act 1914</i> contains a chapter entitled “Child Sex Tourism” which contains offences applying to Australian citizens and residents who engage in sexual activity with children under the age of 16 years while overseas. ³²⁴	20 convictions ³²⁵
Canada	<i>Criminal Code</i> ³²⁶	Since 1997, under section 7(4.1) of the <i>Criminal Code</i> , Canadian citizens and permanent residents can be prosecuted in Canada for certain sexual offences committed against children in other countries. ³²⁷	1 ³²⁸

³²²As of January 2008. Based on research conducted by ECPAT International.

³²³Crimes (Child Sex Tourism) Amendment Act 1994 No. 105, 1994. Australia. Accessed on 30 September 2008 from: <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/frameLodgmentAttachments/332EE746136CDDF6CA256F720018338C>.

³²⁴*Ibid.*

³²⁵Information provided to ECPAT International by the Australian Federal Police Transnational Sexual Exploitation & Trafficking Team Intelligence. October 2007.

³²⁶Criminal Code. Canada. Accessed on 30 September 2008 from: <http://laws.justice.gc.ca/en/showtdm/cs/C-46>.

³²⁷Including offences of sexual interference, invitation to sexual touching, sexual exploitation, incest, child pornography and obtaining the sexual services of a child under 18 years of age. *Ibid.* s. 7(4.1).

³²⁸Donald Bakker of Vancouver was the first to be prosecuted and convicted under Section 7 (4.1). In May 2005, he pleaded guilty to, among other domestic crimes, 7 counts of sexual interference involving children younger than 14 years of age in Cambodia. After he was arrested on sexual assault charges in Vancouver, videotapes were found in his possession depicting him sexually assaulting 7 to 12 year old girls in Svay Pak, Cambodia, between February and March 2003. As of February 2008, there had also been 2 arrests. Kenneth Robert Klassen was charged in 2007 for alleged sex crimes in Cambodia, Colombia and the Philippines. That case has not yet gone to trial. In February 2008, two Quebec humanitarian workers were charged under Canadian extraterritorial law with multiple counts of sexual assaults on minors in a Haitian orphanage.

Country	Law	Description	Number of Convictions
France	<i>Penal Code</i> ³²⁹	French penal law applies to crimes and misdemeanours committed by French persons outside of the French territory. This includes sexual offences against children. ³³⁰	6 convictions ³³¹
Italy	<i>Penal Code</i>	Under Article 604 of the <i>Penal Code</i> , crimes related to CSEC committed abroad by an Italian citizen can be prosecuted in Italy. ³³²	2 convictions ³³³
Japan	<i>Act Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children</i> ³³⁴	Under the first law, crimes of child prostitution and child pornography committed by Japanese nationals outside of Japan are subject to extraterritorial jurisdiction. ³³⁵	4 arrests, 0 convictions ³³⁶

³²⁹Code Pénal [Penal Code], arts. 113-6 to 113-9. France. Accessed on 30 September 2008 from: <http://www.legifrance.gouv.fr>.

³³⁰*Ibid.*

³³¹Information provided by ECPAT France as of December 2007.

³³²*Initial reports of States parties due in 2004: Italy*, para. 19. UN Convention on the Rights of the Child. 15 July 2005. Accessed on 1 October 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.OPSA.ITA.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CRC.C.OPSA.ITA.1.En?OpenDocument).

³³³Gruppo di Lavoro per la Convenzione sui diritti dell'infanzia e dell'adolescenza. *I diritti dell'infanzia e dell'adolescenza in Italia*, p. 103. Terzo rapporto di aggiornamento sul monitoraggio della convenzione sui diritti dell'infanzia e dell'adolescenza in Italia 2006-2007.

³³⁴As amended by the Law Amending a Part of the Law for Punishing Acts Related to Child Prostitution and Child Pornography, and for Protecting Children (Law No. 106 of 2004) Unofficial English translation. Japan. Accessed on 30 September 2008 from: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=53924.

³³⁵*Ibid.* art. 10.

³³⁶Japan's extraterritorial law is one of the most structurally complete, however, it is not enforced and, as such, fails to protect children. See Svensson, Naomi L. Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws. *Loyola of Los Angeles International and Comparative Law Review*, vol. 28, p. 641. Accessed on 30 September 2008 from: http://ilr.lls.edu/documents/Article6Svensson_000.pdf.

Country	Law	Description	Number of Convictions
New Zealand	<i>Crimes Amendment Act 2005 and Films, Videos and Publications Classification Act 1993</i>	<p>The <i>Crimes Amendment Act 2005</i> created a new extraterritorial offence that makes it illegal to engage in certain sexual conduct with children overseas that would be an offence if it occurred in New Zealand.³³⁷</p> <p>The 1993 <i>Films, Videos and Publications Classification Act</i> also provides for extraterritorial jurisdiction of offences related to child pornography.³³⁸</p>	4 apprehensions ³³⁹
Spain	<i>Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999</i>	This law extended the principle of universal justice so that Spanish jurisdiction could be exercised over crimes of “prostitution and corruption of minors” committed by Spaniards or foreigners outside of the national territory. ⁴⁰⁰	0
United States	<i>PROTECT Act</i> ³⁴¹	The 2003 <i>PROTECT Act</i> makes it a crime to engage in illicit sexual conduct while travelling abroad, regardless of whether that was the intended purpose of the travel. ³⁴²	Approximately 67 arrests and approximately 47 convictions ³⁴³

³³⁷These offences include sexual intercourse and attempted sexual intercourse with children under 16 years of age. See Crimes Amendment Act 2005 No 41 (as at 26 June 2008), Public Act, s. 144A. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/2005/0041/latest/DLM346172.html?search=ts_act_Crimes+Act#DLM346172.

³³⁸Films, Videos and Publications Classification Act 1993, s. 145A(1) & (2). New Zealand.

³³⁹Statistics New Zealand. *National Annual Apprehensions for the latest 10 Fiscal Years*. Fiscal year 2007/08. Accessed on 1 October 2008 from: <http://www.stats.govt.nz/products-and-services/table-builder/crime-tables/apprehensions/apprehension-fiscal.htm>; New Zealand Ministry of Justice. *Protecting Our Innocence: New Zealand's National Plan of Action against the Commercial Sexual Exploitation of Children*, pp. 11-12. February 2002. Accessed on 1 October 2008 from: <http://www.justice.govt.nz/pubs/reports/2002/protect-innocence/index.html>.

³⁴⁰Ley Orgánica del Poder Judicial [Law on the Judiciary] 11/1999. Spain.

³⁴¹Prosecutorial Remedies and Tools to End the Exploitation of Children Today Act of 2003. United States. Accessed on 30 September 2008 from: <http://thomas.loc.gov/cgi-bin/query/F?c108:6:./temp/~c108P7Quhu:e0:>

³⁴²*Ibid.*

³⁴³US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

Procedural obstacles to the application of extraterritorial jurisdiction

Apart from the practical difficulties associated with extraterritorial jurisdiction, it is usually also subject to a number of conditions that further complicate its application. The most common are explained below.

Procedural prerequisites for prosecution: victim's complaint and formal State requests

Some countries make prosecution conditional upon the filing of a complaint by the victim or on a formal request of the State of which the victim is a national. Such formalities can cause delays and, in some cases, a failure to prosecute if the officials in the destination country are unfamiliar with the requirements of the offender's country. Children are also very seldom predisposed to filing complaints against their offenders, and those who are may not have the capacity to do so. Finally, this requirement provides an opportunity for offenders to bargain with the victim or the victim's family, and dissuade them from filing a complaint.

Some countries, mainly in Europe, have eliminated this requirement in recent years. For example, in 2002 **Dutch** extraterritorial jurisdiction was made more effective in child sex tourism cases through the abolition of the requirement for a complaint by the victim for the prosecution of offences of sexual abuse of children between 12 and 16 years of age. Before this change was implemented, the criminal justice authorities could not prosecute such offences without a complaint having first been made.³⁴⁴

The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse fills a gap on this specific issue as well, by prohibiting the subordination of the initiation of proceedings to the complaint of the victim, or to a denunciation from the authorities of the State in which the offence took place, further mentioning that "certain states (...) do not always have the necessary will or resources to carry out investigations."³⁴⁵

ECPAT encourages countries whose laws impose such conditions to repeal them.

³⁴⁴Criminal Code, arts. 245, 247 & 248. Netherlands; Code of Criminal Proceedings, art. 167a. Netherlands.

³⁴⁵CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 173. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf. This paragraph is referring to Article 25(6) of the Convention which reads: "For the prosecution of the offences established in accordance with Articles 18, 19, 20, paragraph 1a, and 21 of this Convention, each Party shall take the necessary legislative or other measures to ensure that its jurisdiction as regards paragraphs 1d and e is not subordinate to the condition that the prosecution can only be initiated following a report from the victim or a denunciation from the state of the place where the offence was committed." Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 25(6). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>. This provision affects the offences of sexual abuse, child prostitution, production of child pornography and participation of children in pornographic performances.

The discretionary character of the prosecutor's decision to press charges

In some countries prosecution is discretionary (as opposed to compulsory).³⁴⁶ ECPAT adopts the view that a prosecutor who refuses to prosecute a case involving a child victim should always be required to justify her/his decision. Furthermore, it should be possible in all jurisdictions for a foreign victim, or a person or organisation on their behalf, to initiate a prosecution, even where the State authorities have decided not to do so, or to appeal against a decision not to prosecute.³⁴⁷

The prohibition on double-jeopardy

The principle of double jeopardy is interpreted differently across legal systems. In criminal matters it is generally understood to mean that a person cannot be penalised twice for the same offence. In other words, a child sex offender having served a sentence in a foreign country could not be tried again at home for the same crime.

The requirement of double criminality

Most legal systems require that the alleged facts amount to an offence both in the country where the offence is to be tried as well as in the foreign country.

In the light of the significant discrepancies in legal protections for children worldwide, most notably around the age of consent, the requirement for double criminality may constitute a significant obstacle to the prosecution of child sex tourists. For instance, an offender of country A, where the laws protect children up to the age of 18 years and where double criminality is required, travels to country B, where children are protected only up to the age of 15 years, and there abuses a child aged 16 years. Even though the act amounts to a crime according to the legislation of country A, courts of that country would be barred from prosecuting the offender since the act does not amount to a crime in the legal system of country B.

Apart from constituting an obstacle to prosecution, double criminality may also encourage 'forum shopping' among child sex tourists, as offenders often seek jurisdictions with weaker laws where children are not adequately protected.³⁴⁸

³⁴⁶For example, the Japanese *Code of Criminal Procedure* prescribes standards to be used by prosecutors in deciding whether to institute prosecution in a given case.

³⁴⁷ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

³⁴⁸*Ibid.*

In recent years a number of countries have eliminated the requirement of double criminality for the prosecution of certain sexual offences against children.³⁴⁹

In Europe, a positive feature of the CoE Convention on the Protection of children against sexual exploitation and sexual abuse is its abandoning of the double criminality principle. The stated aim is precisely “to combat the phenomenon of sex tourism, whereby persons are able to go abroad to commit acts which are classified as criminal offences in their country of nationality.”³⁵⁰ At wider level, it is unfortunate that the OPSC does not specifically call for the abolition of the double criminality requirement.

Committee on the Rights of the Child calls for the abolition of double criminality

In its review of initial States reports on the implementation of the OPSC, the Committee on the Rights of the Child recommended to several states including **Sudan, Kazakhstan** and **Iceland** that they abolish the principle of double criminality in order to allow, in any case, the prosecution of its nationals who have committed offences covered under the OPSC abroad.³⁵¹

Statutes of limitation

It is not uncommon for States to impose other conditions for the prosecution of crimes committed abroad such as **limitation periods**, which establish the time during which proceedings must be initiated. Once that period has elapsed, proceedings may not be instituted.

³⁴⁹Among those, Denmark reviewed its extraterritorial legislation in relation to crimes involving sexual abuse of children and since 2006 the principle of double criminality no longer applies. See for example Jones, Vernon. *Protecting Children in Asia against Child Sexual Exploitation: A Focus on Travelling Sex Offenders*. Save the Children, Denmark. Accessed on 30 September 2008 from: http://www.UNICEF-irc.org/research/resource_pages/worldcongress3/vernonjones.pdf. In 2005, Sweden eliminated double criminality for serious sexual crimes committed abroad against children under 18 years of age. Ministry of Justice of Sweden. *New legislation on sexual crimes*. Fact Sheet. June 2005. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/5076/a/46797>. In July 2008, the UK removed the double criminality requirement from the *Sexual Offences Act (2003)*. See Beddoe, Christine. *Return to Sender: British child sex offenders abroad - why more must be done*. ECPAT UK. 2008. Accessed on 1 October 2008 from: http://www.ecpat.org.uk/downloads/Return_to_Sender_2008.pdf.

³⁵⁰CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 171. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf. This paragraph is referring to Article 25(4) of the Convention.

³⁵¹See for example: Committee on the Rights of the Child. *Concluding observations: Sudan*, paras. 25 & 26. UN Convention on the Rights of the Child. 21 June 2007. Accessed on 30 September 2008 from: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CRC/C/OPSC/SDN/CO/1&Lang=E>; See also Committee on the Rights of the Child. *Concluding observations: Kazakhstan*, paras. 17-18. UN Convention on the Rights of the Child. 17 March 2006. Accessed on 30 September 2008 from: [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a4a6425529c05a00c1257154004ea441/\\$FILE/G0641034.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/a4a6425529c05a00c1257154004ea441/$FILE/G0641034.pdf); See also Committee on the Rights of the Child. *Concluding observations: Iceland*, paras. 15 & 16. UN Convention on the Rights of the Child. 21 June 2006. Accessed on 26 September 2008 from: http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.OPSC.ISL.CO.1_En.pdf.

The length of the limitation periods vary from country to country. There has been debate around the necessity to harmonise them so that they only start running from the time the child reaches the age of majority under the CRC (18 years of age), rather than from the moment the crime occurred.³⁵² In addition, once a State receives notice that a competent foreign authority has taken steps to initiate proceedings, time should stop running so that the limitation period cannot expire and prevent the victim from obtaining justice.³⁵³

Flexible time periods for the initiation of a prosecution are important for sexual crimes against children, as in many instances, child victims are unable to speak about their experiences until years after the event.

The application of the most lenient of two national laws

It is a general practice for States exercising extraterritorial jurisdiction to apply their domestic laws even though the events took place in a foreign State. However, in the cases of **Switzerland** and **Sweden**³⁵⁵, it is compulsory for courts to apply whichever is the most lenient of the laws of the jurisdictions involved in relation to the applicable penalty.³⁵⁶

CONCLUSION

Some efforts have been made by ‘sending’ countries in recent years to criminalise the behaviour of persons travelling and engaging in sexual activity with children abroad. However, as the above analysis illustrates, there are many obstacles to the efficient functioning of extraterritorial jurisdiction, and it can never be considered the optimum solution. The best protection for children will always be strong national laws that are enforced where offences have been committed.

³⁵²Svensson, Naomi L. *Extraterritorial Accountability: An Assessment of the Effectiveness of Child Sex Tourism Laws*. *Loyola of Los Angeles International and Comparative Law Review*, vol. 28, p. 641. Accessed on 30 September 2008 from: http://ilr.lls.edu/documents/Article6Svensson_000.pdf.

³⁵³ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

³⁵⁴See Penal Code, arts. 6 & 6bis. Switzerland.

³⁵⁵See Penal Code, pt. 1, ch. 2, s. 2. English translation. Sweden. Accessed on 30 September 2008 from: <http://www.sweden.gov.se/sb/d/2707/a/15194>.

³⁵⁶ECPAT Europe Law Enforcement Group. *Extraterritorial Legislation As a Tool to Combat Sexual Exploitation of Children: A Study of 15 Cases*, executive summary. 1999.

TOURISM INDUSTRY LIABILITY: MAKING TOUR OPERATORS AND TRAVEL AGENTS ACCOUNTABLE

This section examines the role of the tourism professionals as a critical resource in fighting child sex tourism. As individuals who are in direct contact with the tourist, they are in a unique position to actively promote responsible tourism, caution the ill-intentioned tourist against inappropriate behaviour and report incidents. Conversely, they may, in fact, be facilitating the sexual exploitation of children by making travel arrangements or transporting individuals for that purpose.

National laws should thus prohibit: the **advertising** or **promoting** of child sex tours; the **organising/making of travel arrangements** for a person for the purpose of engaging in sexual activity with a child at destination; and the **transporting** of a person for the said purpose.

Liability should extend not only to individuals but also to legal persons,³⁵⁷ thus acknowledging the **corporate liability** of the tourism sector. In this regard the OPSC specifically calls upon States to establish the “criminal, civil or administrative” liability of legal persons.³⁵⁸ The recent CoE Convention on the Protection of children against sexual exploitation and sexual abuse follows this legal trend, as will be explained below.

Advertising and promoting child sex tourism

There have been instances of tours organised specifically for the purpose of child abuse, but these are relatively uncommon. There are also several travel agencies organizing ‘pleasure tours’ in the course of which children run the risk of being abused. While the majority of child sex tourists do not travel as part of an organised tour, the global and necessary effort to stop demand, nevertheless, requires that access to sex tours be actively discouraged, and that the individuals and companies involved be subject to severe and dissuasive penalties.

³⁵⁷ ‘Legal persons’ refers to the legal construct which permits entities, such as corporations, to be treated in the same manner as real person. In this, case, for example, a tour company might be subject to prosecution for promoting child sex tourism in the same manner that an individual could be subject to prosecution for such activities.

³⁵⁸ The *Optional Protocol* provides: “Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative”. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(4). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

The **New Zealand Crimes Act**³⁵⁹ contains a section entitled “Organising or promoting child sex tours”, pursuant to which anyone who “Prints or publishes any information that is intended to promote conduct that would constitute an offence [of sexual conduct with children and young people outside New Zealand³⁶⁰], or to assist any other person to engage in such conduct” is liable to imprisonment for seven years.³⁶¹ Publication of information by any means is covered by the offence, whether by written, electronic or other form of communication, including the distribution of information.³⁶²

In **Taiwan**, the *Law to Suppress Sexual Transactions with Children and Juveniles* contains broad criminal provisions addressing the publishing or broadcasting of advertisements to facilitate involvement in sexual transactions. Violators are subject to 7 years’ imprisonment and/or a fine of up to NT\$1,000,000³⁶³ (approximately US\$30,090).

Requiring tour operators to take an active stance against child sex tourism

While sanctioning the advertising of child sex tourism is important, Italy has set the bar higher by requiring tour operators to expressly repudiate it in their promotional materials, an initiative that ECPAT encourages and supports. Italian law thus requires any ‘tour operator’ organising collective or individual travel outside of Italy to insert a warning on their printed materials and advertising, itinerary and other travel documents, regarding the existence of criminal liability in Italy for offences of child prostitution and child pornography committed abroad. Violators are subject to fines ranging from 1500 to 6000€.³⁶⁴

³⁵⁹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act. New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act.

³⁶⁰The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁶¹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(c). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM328588.html?search=ts_act_Crimes+Act.

³⁶²*Ibid.* s. 144C(2)(b).

³⁶³Law to Suppress Sexual Transactions with Children and Juveniles, art. 29. Taiwan.

³⁶⁴Legge 6 febbraio 2006, n. 38:(Disposizioni in materia di lotta contro lo sfruttamento sessuale dei bambini e la pedopornografia anche a mezzo Internet). Italy. Accessed on 1 October 2008 from: http://www.ecpat.it/cosafacciamo/leggi/legge38_06.html.

Organising child sex tourism

Tour operators and travel agents should also incur liability for facilitating the travel of persons for the purpose of sexually abusing and exploiting children, for example by making travel arrangements for that purpose. The **New Zealand Crimes Act**³⁶⁵ punishes anyone who “[m]akes or organises any travel arrangements for or on behalf of any other person with the intention of facilitating the commission by that other person of an offence [of sexual conduct with children and young people outside New Zealand] whether or not such an offence is actually committed by that other person.”³⁶⁶ Punishment is imprisonment for a term of seven years.³⁶⁷

The specific acts subject to the law include the purchase or reservation of tickets for travel to a country outside New Zealand as well as the purchase or reservation of accommodation in a country outside New Zealand.³⁶⁸

It is not necessary to prove that an actual offence has been committed in order to incur liability. This is also consistent with the general principle that anyone aiding or abetting another person in criminal acts should always be subject to severe punishment. As recognised in the OPSC, acts of **complicity or participation** should not fall outside the scope of the law.³⁶⁹

Transporting a person for the purpose of child sex tourism

Tour operators and travel agencies not only have the opportunity to make travel arrangements for illicit purposes, but they also transport offenders at destinations, possibly enabling them to commit their crimes. The **New Zealand Crimes Act** addresses this and applies the above mentioned penalties to anyone who “Transports any other person to a place outside New Zealand with the intention of facilitating the commission by that other person of an offence [of sexual conduct with children and young people outside New Zealand] , whether or not such an offence is actually committed by that other person”.³⁷¹

³⁶⁵The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁶⁶Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(a). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html?search=ts_act_Crimes+Act#DLM328588.

³⁶⁷*Ibid.*

³⁶⁸*Ibid.* s. 144C(2)(a)(i) & (ii).

³⁶⁹Article 3(2) of the *Optional Protocol* provides that the criminalisation/penalisation of offences shall also apply, subject to the provisions of the national law, to attempts as well as to complicity or participation. Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 3(2). Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁷⁰The *Crimes Act* refers to section 144A of the same Act, establishing a series of sexual offences.

³⁷¹Crimes Act 1961 No 43 (as at 26 June 2008), Public Act, s. 144C(1)(b). New Zealand. Accessed on 29 September 2008 from: http://www.legislation.govt.nz/act/public/1961/0043/latest/whole.html?search=ts_act_Crimes+Act#DLM328588.

In keeping with the main objective of eradicating child sexual exploitation, acknowledging the responsibility of the various stakeholders involved and upholding the principle that all acts of aiding or abetting another person in criminal acts should always be subject to severe punishment. Liability should also extend to tour operator partners at destination. Tour operators working in partnerships should, thus, be required to ensure that their commercial colleagues also respect their child protection obligations.

Italy has been innovative in addressing the wide spectrum of the tourism business, and its Penal Code now directly addresses tour operators and exposes anyone who “organises or advertises travels promoting prostitution, or is involved in such activities” to imprisonment for 6 to twelve years, in addition to fines.³⁷² Interestingly, this responsibility extends to local partners in the country of destination, thus obliging tour operators to hire local contractors who do not promote the prostitution of children. Involving children less than 14 years of age is considered an aggravating circumstance and attracts a penalty of up to eighteen years’ imprisonment.

Corporate liability

The concept of corporate criminal liability is well established in western legal systems. There are different bases for establishing corporate liability, the discussion of which is beyond the scope of the current work. It is worth noting, however, that there is some recognition at the international level of the need to impose liability on legal persons involved in the commission of sexual offences against children. The need to establish corporate liability was recently affirmed in the CoE Convention on the Protection of children against sexual exploitation and sexual abuse. The treaty seeks to make commercial companies, associations and similar legal entities liable for criminal actions that are performed on their behalf, for the entity’s benefit, by anyone in a leading position in them.³⁷³

Under the CoE Convention, sanctions must be effective, proportionate and dissuasive, including imprisonment. They must include monetary criminal or non-criminal fines. States must also provide measures for the seizure and confiscation of the proceeds derived from the offences committed, and measures to enable the temporary or permanent closure of any establishment used to carry the said offences.³⁷⁴

³⁷²Penal Code, art. 600-*quarter*. Italy. As amended by Law No. 269 of 3 August 1998 (1) Norms Against the Exploitation of Prostitution, Pornography, and Sex Tourism Harmful to Juveniles, as New Forms of Slavery, art. 5. Italy. Accessed on 1 October 2008 from: http://www.minori.it/cd/cd_lucca_2003/4/4.3.4_en.pdf.

³⁷³CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, paras. 177 *et seq.* Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

³⁷⁴Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, art. 27(2) & (3). Accessed on 26 September 2008 from: <http://conventions.coe.int/Treaty/EN/treaties/Html/201.htm>.

The Convention also contemplates the liability of legal persons where someone in a position of leadership fails to supervise or check on an employee or agent of the entity, thus enabling them to commit one of the offences established in the Convention, for the benefit of that legal person.³⁷⁵

The Protection Project has developed a *Model Law on Combating Child Sex Tourism*.³⁷⁶ It is meant to serve as a guide to countries that wish to enact a comprehensive legal framework against child sex tourism, and to provide a model for harmonisation of existing legislation

Soft law initiatives: The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism

The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (Code of Conduct) is an instrument of self-regulation and corporate social responsibility, which was initiated by the ECPAT network to provide increased protection to children from sexual exploitation in travel and tourism. It is regarded as one of the world's major tools for combating child sex tourism and comprises a set of 6 criteria which participating travel and tourism companies follow in order to provide protection to vulnerable children in tourism destinations. Signatory companies must implement the 6 criteria according to a set of minimum standards, a timeframe and subject to reporting requirements.

The criteria are:

1. To establish an ethical policy regarding CSEC;
2. To train the personnel in the country of origin and travel destinations;
3. To introduce a clause in contracts with suppliers, stating a common repudiation of CSEC;
4. To provide information to travellers by means of catalogues, brochures, in-flight films, ticket slips, homepages, etc.;
5. To provide information to local key persons at the destinations; and
6. To report annually.

³⁷⁵ *Ibid.* art 26(2); see also CoE. *Draft Convention on the Protection of children against sexual exploitation and sexual abuse*, para. 177. Explanatory Report to the CoE. 11 July 2007. Accessed on 25 September 2008 from: http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_sexual_exploitation_of_children/1_PC-ES/EXPLANATORY%20REPORT%20E.pdf.

³⁷⁶ The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced *International Studies. International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*, p. 187. January 2007.

As of late 2007, the Code of Conduct had been signed globally by nearly 600 tour operators, hotels, travel agents and their associations and tourism workers' unions from 26 countries in Europe, Asia, North America and Central and Latin America. More information on the Code of Conduct can be found at www.thecode.org.

CONCLUSION

The fight against child sex tourism calls for a broad range of legislative measures targeting not only the individual offenders who travel for the purpose of committing sexual offences against children, but also the tourism sector, to dissuade it from facilitating the commission of such offences.

While extraterritorial laws are a necessary tool in combating child sex tourism, and while ECPAT encourages 'sending' countries to strengthen their legal frameworks based on the recommendations made in this section, they are usually not a substitute for a trial in the State in which the offence occurred. In practice several States will only exercise extraterritorial jurisdiction if the State in which the offence was committed is unwilling or unable to prosecute.³⁷⁷ For a variety of reasons, the best solution is generally for the offender to be tried in the country in which he/she committed the offence; that is where the victim is situated, and where witnesses and other evidence are found. For the same reasons, where an offender has escaped the jurisdiction in which he committed the offence, extradition back to that country is the best option.³⁷⁸

Extraterritorial jurisdiction should, therefore, be regarded as a subsidiary tool of international law, available only when other avenues are not open. The availability of extraterritorial jurisdiction in itself does not lessen the obligations of 'destination' countries to strengthen their laws and provide effective law enforcement and prosecutions within their own domestic legal systems. **More support must therefore be given to 'destination' countries by building their capacity to enact and enforce local laws to stop child sex tourism.**

The involvement of the tourism industry is essential and requires specific legislative measures. Those individuals and companies encouraging and promoting child sex tourism must be subject to strict criminal laws coupled with severe punishments that reflect the grave nature of sexual offences against children. There has been some progress in this connection but further discussion is to be expected; most notably in the area of corporate liability.

³⁷⁷Vander Beken, Tom. *The best place for prosecution of international corruption cases. Avoiding and solving conflicts of jurisdiction*, p. 5. The Third Global Forum on Fighting Corruption and Safeguarding Integrity. Seoul. 29 May 2003. Accessed on 30 September 2008 from: <http://www.ircp.org/uploaded/1-1%20Tom%20Vander%20Beken.pdf>.

³⁷⁸O Brian, Muireann, ECPAT International. *Extraterritorial Jurisdiction: What's it About?* Accessed on 1 October 2008 from: <http://www.preda.org/archives/research/ecpat031001.html>.

LEGAL REFORM CHECKLIST

- √ Child sex tourism is defined and specifically criminalised/penalised in national legislation
- √ Elements of child sex tourism offences include:
 - (1) Engaging in sexual conduct with a child abroad: includes non-commercial and commercial illicit sexual conduct with a child under 18 years
 - (2) Travelling with the intent of engaging in sexual activities with a child abroad
 - (3) Advertising or promoting child sex tours
 - (4) Organising/making of travel arrangements for a person for the purpose of engaging in sexual activity with a child at destination
 - (5) Transporting of a person for the above purpose. Liability of tour operators should extend to local partners on the ground in order to ensure that the operator's liability does not end once the clients have reached the destination
- √ States exercise jurisdiction over child sex tourism crimes based on the Active and Passive Personality Principles (applying to both nationals and residents) and whenever possible, the Universality Principle. The obligation to 'extradite or prosecute' forms part of the national legal system
- √ Eliminate the requirement of a victim complaint or formal State request
- √ Prosecutors' refusal to proceed requires justification
- √ The principle of double jeopardy should not apply unless the person was acquitted or the sentence was served in full
- √ Eliminate the requirement of double criminality in relation to child sex tourism offences
- √ Flexible limitation periods for the initiation of prosecution of sexual crimes against children
- √ Corporate entities are subject to criminal and non-criminal sanctions

SECTION 6

EXTRADITION AND MUTUAL LEGAL ASSISTANCE AS TOOLS TO FIGHT CHILD SEX TOURISM

This section looks at some measures that are available to strengthen international cooperation in investigating and prosecuting sexual crimes against children.

EXTRADITION ARRANGEMENTS

When offences are committed abroad or when offenders escape to another jurisdiction, the State where the offender is found may be required to send the latter back to the country where the offence was committed in order to stand trial in the prosecuting country. This is known as extradition and is defined as the official process by which one nation or State requests and obtains from another nation or State the surrender of a suspected or convicted criminal. The purpose of extradition is to prevent culprits from evading criminal proceedings.

Under international law states do not have an obligation to extradite in the absence of an extradition treaty. This is because under the principle of sovereignty, the consensus is that every State exercises legal authority over people within its borders. Extradition being an exception to the rule, it is therefore often based on a legally binding instrument such as a bilateral extradition treaty, even though states also extradite on the basis of comity, which is the courteous recognition accorded by one nation to the laws and institutions of another.

Australian national Clinton Rex Betteridge, age 35, was arrested and sentenced *in absentia* to 10 years' imprisonment by a Cambodian court in February 2003 for raping a 14 year old girl and assaulting two girls aged between 15 and 18 years. Betteridge fled back to Australia to escape trial. A Brisbane court ruled that Betteridge was eligible for extradition to Cambodia to serve the sentence imposed.³⁷⁹

³⁷⁹Lyall, K. & Saunders, M. Paedophile on Wednesday, Home Free Today. *The Weekend Australian*, 1-2 February 2003.

As a general rule, it is preferable that offenders be tried at the place where the offences were committed. As outlined in Section 5 above, that is where the victim is situated, and where witnesses and other evidence are available. **Therefore, when an offender has escaped the jurisdiction where he committed the offence, extradition back to that country is usually the best option, provided the country possesses resources to ensure efficient prosecution.**

Most countries make extradition conditional upon the existence of a treaty with the requesting country. Where states have concerns about the human rights record of a country and/or its treatment of prisoners, including its application of the death penalty for crimes, they may not be prepared enter into any such agreement to extradite their citizens to that country. Generally speaking there are two kinds of extradition agreements. The most common is the 'list treaty', under which extradition is only possible for an offence that is named in the treaty. These treaties present some difficulties because of the periodic updating they require. The second type of treaty is the 'dual criminality treaty' and generally allows for extradition if the offence attracts a penalty of more than one (or two) year's imprisonment in both countries.

A **Model Treaty on Extradition** was developed to facilitate the development of extradition treaties and can be used as guidance for states that seek to develop such agreements.

Under the Model:

- "Each Party agrees to extradite to the other, upon request and subject to the provisions of the present Treaty, any person who is wanted in the requesting State for prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence."
- Extraditable offences are offences that "are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty."
- "A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the ministries of justice or any other authorities designated by the Parties." The request shall be accompanied by an accurate description of the person sought, the text of the relevant law creating the offence and other documents.

There is no country in the world that has extradition treaties with all other countries. However, when circumstances so require, extradition may still take place upon the basis of national legislation.³⁸⁰ The OPSC encourages extraditions by requiring all the offences under its scope to be deemed included in existing treaties. When a country that makes extradition conditional upon a treaty receives a request from a country with which it does not have a treaty, they are invited to consider the OPSC as a basis for extradition. The conditions of extradition will be determined by the laws of the country receiving the request.

Article 5 OPSC

“1. The offences [of sale of children, child prostitution and child pornography], **shall be deemed to be included as extraditable offences in any extradition treaty** existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in such treaties.

2. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, **it may consider the present Protocol to be a legal basis for extradition** in respect of such offences. **Extradition shall be subject to the conditions provided by the law of the requested State.**”³⁸¹

Whether extradition takes place pursuant to a treaty or pursuant to national laws, in many countries the double criminality principle applies and serves to restrict jurisdiction to that extent.

³⁸⁰O Brian, Muireann, ECPAT International. *Extraterritorial Jurisdiction: What's it About?* Accessed on 1 October 2008 from: <http://www.preda.org/archives/research/ecpat031001.html>; see also Article 5(3) of the OPSC which provides: “States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.” Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 5. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

³⁸¹Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 5. Entered into force 18 January 2002. Accessed on 29 September 2008 from: <http://www2.ohchr.org/english/law/crc-sale.htm>.

Committee on the Rights of the Child on Extradition

In its Concluding Observations to the initial state reports on the implementation of the OPSC, the Committee on the Rights of the Child has noted in many instances that legislation regarding extradition was inadequate.

For example, the Committee welcomed the Government of Spain's affirmation that the offences covered by the OPSC were subject to universal jurisdiction, but nevertheless expressed concern that extradition required acts to be defined in both countries' laws as offences.³⁸²

The Committee has expressed similar concerns to the Governments of **Guatemala, Bangladesh, Sudan, the Syrian Arab Republic, Qatar and Morocco.**

The procedural requirements applying to extradition are many and the process may be lengthy and cumbersome. All States should have clear processes for compliance with extradition requests, and sexual crimes against children should be given priority.

Crimes of child sexual abuse and exploitation should be considered as serious offences worldwide. Therefore the requirement of double criminality should never apply to extradition related to such offences and national laws should be amended to be as supportive as possible of extradition.

When extradition does not take place, the OPSC requires ratifying countries to prosecute their nationals for offences covered by the Protocol committed abroad. If an extradition request is made with respect to an OPSC offence, and the requested State party does not extradite on the basis of the nationality of the offender, that State must take suitable measures to submit the case to its competent authorities for the purpose of prosecution.³⁸³ In such case, extraterritorial provisions could be used to prosecute offenders.

³⁸² *Ibid.*

³⁸³ Article 5(5) of the OPSC reads: "If an extradition request is made with respect to an offence described in article 3, paragraph 1, and the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution." *Ibid.* art. 5(5).

MUTUAL LEGAL ASSISTANCE

Treaties

Securing the presence of an accused through extradition back to the jurisdiction where a crime was committed is one step in the legal process. There are many other obstacles to investigating and prosecuting transnational sexual crimes against children: difficulties in gathering material evidence and testimony from abroad, additional associated costs, complications resulting from the use of different languages, difficulties to identify the victims or witnesses, additional protections needed where the victims and witnesses are children. A lack of information sharing between national police and prosecution services can increase these problems.

Countries request and provide assistance in obtaining evidence located in one country to assist in criminal investigations or proceedings in another country through a process of Mutual Legal Assistance. It can take the form of a treaty but can also be informal.

A mutual legal assistance treaty is an agreement between two countries, for the purpose of gathering and exchanging information in an effort to enforce criminal laws. As holds true for extradition, human rights concerns and double criminality may prevent the provision of mutual legal assistance.

The UN Office on Drugs and Crime (UNODC) has developed a **Model Treaty on Mutual Assistance in Criminal Matters** for states without such treaties or wishing to revise existing treaties.³⁸⁴ The Model provides a basis for legal assistance in taking evidence or statements executing searches and seizures providing information and evidentiary items etc.

Under the Model:

- Parties shall afford to each other the widest possible measure of mutual assistance in investigations or court proceedings.³⁸⁵
- Mutual legal assistance may include: taking evidence or statements from persons; executing searches and seizures; and examining objects and sites.³⁸⁶

³⁸⁴Model Treaty on Mutual Assistance in Criminal Matters. Adopted by UN General Assembly resolution 45/117, subsequently amended by UN General Assembly resolution 53/112. Accessed on 1 October 2008 from: http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

³⁸⁵*Ibid.* art. 1.

³⁸⁶*Ibid.* art. 2.

- A central authority should be designated to handle requests for mutual legal assistance.³⁸⁷ In order to help practitioners draft effective requests, receive more useful responses and streamline the process, the Legal Advisory Programme of the UNODC has also developed a *Mutual Legal Assistance Request Writer Tool*.³⁸⁸ The Tool can be used for all serious offences in a State, not just those covered by the international conventions.
- A list of grounds for refusal is suggested, for example if “the assistance requested requires the requested State to carry out compulsory measures that would be inconsistent with its law and practice had the offence been the subject of investigation or prosecution under its own jurisdiction.”³⁸⁹
- Countries may wish to render assistance even in the absence of dual criminality (if the act on which the request is based is not an offence in the requested State) (absence of dual criminality).

ASEAN now has a Treaty on Mutual Legal Assistance in Criminal Matters. In September 2008 it has been ratified by six ASEAN member countries, namely **Brunei, Indonesia, Laos, Malaysia, Singapore** and **Vietnam**.

Some countries also have laws on the provision of mutual legal assistance. For example, under **Thailand’s** *Mutual Legal Assistance in Criminal Matters Act* of 1992, the Attorney General can provide assistance in criminal matters to foreign countries including taking the testimony and statements of witnesses and providing documents, records and evidence to the requesting State. The Act allows for that kind of cooperation even in the absence of a formal treaty between Thailand and the other country.

In addition, Thailand has entered into bilateral mutual assistance treaties with a number of countries, including Britain, 1994; Canada, 1994; China, 2003; France, 1997; Korea, 2003; India, 2004; Norway, 1999; Poland, 2004; Sri Lanka, 2004; and the United States, 1986.

³⁸⁷ *Ibid.* art. 3.

³⁸⁸ <http://www.unodc.org/mla/>.

³⁸⁹ Model Treaty on Mutual Assistance in Criminal Matters, art. 4. Adopted by UN General Assembly resolution 45/117, subsequently amended by UN General Assembly resolution 53/112. Accessed on 1 October 2008 from: http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

In practice the provision of mutual legal assistance can be subject to a number of constraints such as:

- Requests being unclear and returned to the requesting state for clarifications³⁹⁰
- The lack of specialised law enforcers and prosecutors to handle and execute requests
- Incompatibilities between legal systems (for example concerning the admissibility of evidence)

Requests in relation to sexual crimes committed against children should be handled rapidly and effectively. Unduly restrictive conditions on the provision of mutual legal assistance should be removed, including double criminality.

Other Measures

Over the past years some countries have posted police liaison officers abroad with the mandate to collaborate with other national law enforcement agencies. For example:

- The **Australian Federal Police** (AFP) has liaison offices in several countries. For instance, in Phnom Penh it works with the **Cambodian National Police** to assist effective investigation and prosecution of suspected offenders in Cambodia.³⁹¹
- The **US Immigration and Customs Enforcement** agency cooperates with local police forces in Southeast Asia and has to date made 67 arrests under the child sex tourism provisions of the PROTECT Act. Of those, 47 have been convicted and others are still being prosecuted.³⁹²
- **Cambodian** authorities work together with the **British police** to track down sex tourists travelling from the UK to Cambodia to abuse children. British officers assist their counterparts with advice on how to investigate and prosecute child sex offenders.³⁹³

³⁹⁰Van Thiel, Marita. *Challenges in Mutual Legal Assistance (MLA)*. Background Paper presented at Regional Seminar for Asia-Pacific. Making international anti-corruption standards operational: Asset Recovery and mutual legal assistance. Bali, Indonesia (2007). (Commenting on the experience of the Netherlands with the Asian Pacific region). Accessed on 1 October 2008 from: www.baselgovernance.org/fileadmin/docs/pdfs/Bali/Marita_van_Thiel.pdf.

³⁹¹Australian Government, Department of Foreign Affairs and Trade. *Cambodia Country Brief – August 2008*. Accessed on 1 October 2008 from: http://www.dfat.gov.au/geo/cambodia/cambodia_brief.html.

³⁹²US Immigration and Customs Enforcement. *Operation Predator Fact Sheets*. 25 January 2008. Accessed on 2 October 2008 from <http://www.ice.gov/pi/news/factsheets/070607operationpredator.htm>.

³⁹³The Protection Project, The Johns Hopkins University Paul H. Nitze School of Advanced International Studies. *International Child Sex Tourism: Scope of the Problem and Comparative Case Studies*. January 2007.

Other more informal cooperation mechanisms can be developed and the facilitation of personal contacts between the law enforcers of countries of origin and destination should also be encouraged.

Note that **Interpol** provides information³⁹⁴ about the police and judicial systems of individual countries in Europe, including information on Liaison Officers.

Group of Eight (G8) Experience in the Implementation of Extraterritorial Jurisdiction for Sexual Crimes against Children

1. Victim and witness statement testimony

Due to their frequent movement, child victims are often difficult to find during the initial investigation. Statements should be taken from victims as soon as possible.³⁹⁵

2. Statements of the offender

Whenever possible, law enforcement in destination countries should also be encouraged to record any interview of the offender. Without such recording on file, it may be impossible to go back and correct any errors in a translated text of what the offender initially said.³⁹⁶

3. Documents from destination country

Documents from destination country, such as customs or border control records, can be key documents in a child sex tourism case as they establish when the offender entered or exited that country. Similarly, hotel records from the destination country may often be crucial in such cases, particularly when the hotel is where the sexual activity took place.³⁹⁷

4. Physical evidence

In international child sexual exploitation cases, relevant physical evidence can include contraception, sexual toys, and items of clothing purchased for children. Where sex tourism is suspected in a specific case, law enforcement authorities investigating child sex tourism crimes should be especially alert for cameras,

³⁹⁴Interpol. *European police and judicial systems*. Accessed on 8 October 2008 from: <http://www.interpol.int/Public/Region/Europe/pjsystems/Default.asp>.

³⁹⁵*G8 Experience in the Implementation of Extraterritorial Jurisdiction for Sex Crimes Against Children*, pp. 4-5. Document from the Meeting of G8 Justice and Home Affairs Ministers, Munich, 23-25 May 2007. 18 April 2007. Accessed on 1 October 2008 from: <http://www.usdoj.gov/criminal/ceos/Extraterritorial%20Jurisdiction.pdf>.

³⁹⁶*Ibid.* p. 5.

³⁹⁷*Ibid.*

computers and electronic storage equipment. That equipment may contain illegal sexually explicit images of children, including images that were produced by the offender while abroad. There is an increasing connection between sex tourism and the production of such sexually explicit images of minors. Not infrequently, sex tourists not only engage in sex acts with children while abroad, but also film or photograph the victims and return home with those illegal images. Unlike sex tourism cases, which usually require the testimony of the victim, prosecutions for the production of sexually explicit images can sometimes proceed without the victim, as the image can speak for itself.³⁹⁸

5. Preservation procedures

With respect to preservation procedures, law enforcement in destination countries may not have evidence custody procedures that are consistent with requirements for admitting physical evidence in home country courts. Accordingly, when physical evidence is seized, home country law enforcement should consider, to the extent possible, taking steps to ensure its admissibility, such as logging the serial numbers of seized cameras and computers, as soon as possible during the investigation.³⁹⁹

The establishment of **national databases** on incidents of child sexual exploitation should also be considered, in order to facilitate the exchange of information among countries as regards victims and perpetrators. Indeed “the end result of the work undertaken by Interpol should be that member states see the need of sharing information and issue Green Notices⁴⁰⁰ on the offenders that travel to commit their crime.”⁴⁰¹

Sex offenders registries should also be put in place with limitations on high risk convicted offenders from leaving their countries.

- In the **United Kingdom**, all sex offenders who are placed on the Sex Offenders Register must notify the police of their intention to travel outside the country. However this only applies when travelling is intended for over three days. ECPAT UK reports that the three-day loophole has allowed British offenders to easily travel and commit sexual offences against children offences and has lobbied for the obligatory notification of all travel abroad regardless of the length of the stay. In 2008, Ministers have announced their intention to close this loophole.⁴⁰²

³⁹⁸*Ibid.* pp. 5-6.

³⁹⁹*Ibid.*

⁴⁰⁰Green Notices serve to provide warnings or criminal intelligence about persons who have committed criminal offences and are likely to repeat these crimes in other countries.

⁴⁰¹Interpol. *Crimes against children*. Accessed on 1 October 2008 from: <http://www.interpol.int/Public/Children/Default.asp>.

⁴⁰²Beddoe, Christine. *Return to Sender: British child sex offenders abroad - why more must be done*, p. 7. ECPAT UK. 2008. Accessed on 1 October 2008 from: http://www.ecpat.org.uk/downloads/Return_to_Sender_2008.pdf.

Hotlines and online reporting forms should be established to provide channels for the public to report child exploitation. Collaboration between law enforcement agencies and NGOs is particularly important in this regard.

- In **Australia**, the Australian Federal Police is working with government agencies and NGOs including Childwise, the ECPAT representative in Australia. Childwise receives reports relating to CSA in Australia and overseas.⁴⁰³ Child sex tourism concerns may be reported to the Australian Federal Police using an online form.⁴⁰⁴
- In **Cambodia**, the NGO World Vision supports a 24-hour public hotline for reporting child exploitation. It currently operates in five Cambodian provinces and the capital city of Phnom Penh and is publicised in tourist hotspots through leaflets, posters, and key chains. World Vision reports that “in the past two years, 1,217 cases of child sexual exploitation, human trafficking, and rape have been reported to Cambodia’s Ministry of the Interior; of those, 645 were reported through World Vision’s hotline. In the past eight months alone, 349 have been cases reported using this method. More than 1,100 investigations have led to more than 665 prosecutions of both local and foreign sex offenders.”

⁴⁰³ See Childwise. *Report Child Abuse*. Accessed on 8 October 2008 from: http://www.childwise.net/report_child_abuse.php.

⁴⁰⁴ See Australian Federal Police. *Child Sex Tourism: Suspicious Behaviour Report*. Accessed on 8 October 2008 from: https://www.afp.gov.au/online_forms/cst_form.html.

LEGAL REFORM CHECKLIST

- ✓ Sexual crimes against children should always be considered as extraditable offences
- ✓ All States should have clear processes for the execution of extradition and mutual legal assistance requests. Sexual crimes against children should be given special priority
- ✓ All States should rapidly and effectively provide mutual legal assistance in relation to all sexual crimes committed against children and ensure that extradition requests are handled in an expeditious fashion
- ✓ Unduly restrictive conditions on the provision of mutual legal assistance should be removed
- ✓ Dual criminality should never restrict the provision of mutual legal assistance in instances of sexual crimes committed against children, nor should it be a consideration in extradition procedures. At a very minimum, States should allow for extradition in cases where conduct is punishable in both States by a deprivation of liberty in excess of an agreed upon period of time

In addition:

- ✓ Exchange of information among law enforcement agencies must be facilitated and national databases should be established. Sex offenders registries should be put in place and relevant authorities (home and destination) should be notified of registered sex offenders' intents to travel
- ✓ Hotlines and other reporting systems should be established so that the general public can take action against child sexual abuse and exploitation.

STRENGTHENING LAWS TO BETTER PROTECT CHILDREN FROM SEXUAL EXPLOITATION

LEGAL REFORM CHECKLIST

ECPAT encourages States to conduct a comprehensive review of existing legislation in the following areas.

(1) State has signed and ratified international and regional instruments

- √ The CRC
- √ The OPSC
- √ The Trafficking Protocol
- √ ILO Conventions 182 and 138
- √ Other applicable regional instruments (see Section 1)

- √ State has submitted its CRC, OPSC and ILO reports and complied with its reporting obligations under the relevant regional instruments

- √ State has removed any reservations that restrict the scope of child rights treaties

(2) Legal definition of a child

- √ The law includes a nationally consistent definition of a child as anyone up to the age of 18 years

- √ Laws on the sexual exploitation of children protect children up to the age of 18 years, irrespective of the age of sexual consent

- √ The law establishes a clear age of sexual consent for the purpose of legal certainty. States with low ages of sexual consent, should amend the laws to raise that age.

- √ In order to avoid punishing consensual sexual activity between peers, States should consider providing a 'close in age' exemption in the law.

- √ Laws establish the responsibilities of parents and legal guardians to protect children under their care from abuse and exploitation. Reporting of suspected sexual abuse/exploitation should be mandatory for persons in positions of responsibility

- ✓ States should review, and if necessary increase, the minimum ages established for marriage, criminal responsibility and employment
- ✓ States should establish mandatory birth registration systems

(3) Legal provisions addressing the sexual abuse and exploitation of children

- ✓ National law establishes offences and penalties relating to the sexual abuse of children
- ✓ Sexual abuse includes:
 - (1) sexual activities with a child who has not yet reached the age of sexual consent
 - (2) sexual activities with a child up to the age of 18 years where use is made of coercion, force or threats, or when the offender abuses a position of trust, authority or influence over the child, or where abuse is made of a particularly vulnerable situation of the child
- ✓ National law addresses the conduct of making a child watch sexual or performing such acts in the presence of children, which could result in harm to the psychological health of the victim
- ✓ National law establishes offences and penalties for the sexual exploitation of children.
- ✓ Sexual exploitation includes:
 - (1) child prostitution
 - (2) child pornography
 - (3) coercing/recruiting children to participate in pornographic performances/sexual posing
- ✓ National law criminalises aiding or abetting and attempts to commit the above offences
- ✓ National law establishes offences of child trafficking for sexual purposes as a process leading to sexual exploitation, in accordance with the Trafficking Protocol

(4) Provisions addressing child prostitution

- ✓ National legislation has adopted a clear definition of 'child prostitution'
- ✓ The use of children in prostitution is defined as an offence distinct from adult prostitution (if adult prostitution has not been legalised or decriminalised), and the penalties are more stringent to reflect the gravity and impact of this crime on the lives of child victims
- ✓ If adult prostitution has been decriminalised or legalised, the use of children in prostitution remains a criminal offence
- ✓ Children are protected from exploitation until the age of 18 years
- ✓ In the context of child prostitution, 'sexual activities' are defined broadly to include any sexual conduct with a child involving any form of consideration, whether monetary or not. Activities covered include not only sexual intercourse, but also sexual touching, masturbation and sexual posing, without distinction for the sex of the victim or perpetrator
- ✓ The element of consideration is construed broadly so as to include any form of compensation
- ✓ The law criminalises all acts of offering, obtaining, procuring and providing a child for prostitution so as to capture the whole spectrum of child exploiters
- ✓ The client/exploiter must be subject to the criminal law; any form of compensation to obtain sexual services from a minor is a criminal transaction
- ✓ Recruiters and those who own, lease or manage premises where prostitution of children occurs are criminalised; there is a duty to report the use of premises for child prostitution
- ✓ Criminal/administrative measures applicable to a child found in prostitution are reviewed. Administrative/criminal codes addressing 'delinquency' or 'anti-social behaviour' on the part of children are reviewed. Legal provisions that result in administrative or other punishment of the victims of CSEC are abolished
- ✓ Guidelines/rules are available to the police and judicial authorities to deal with children found in prostitution

(5) Legal provisions addressing child pornography

- ✓ National legislation has adopted a clear definition of 'Child Pornography', excluding vague terms such as 'obscene' or 'indecent'
- ✓ The definition encompasses a broad spectrum of representations, whether fixed in visual, audio or electronic support
- ✓ National legislation includes 'virtual child pornography' and there is no requirement to prove that a 'real' child has been used
- ✓ National legislation criminalises a broad range of activities including simple possession, procuring, accessing and viewing, producing and making, distributing, disseminating, importing, exporting and offering child pornography
- ✓ Reporting of suspected sexual abuse/exploitation is mandatory for persons in positions of responsibility (see section 2, pages 47 and 55)
- ✓ Individuals and professionals who may be exposed to child pornography because of the nature of their work are subject to reporting obligations
- ✓ Internet providers and financial companies are subject to reporting obligations

(6) Provisions addressing child sex tourism

- ✓ Child sex tourism is defined and specifically criminalised/penalised in national legislation
- ✓ Elements of child sex tourism offences include:
 - (1) Engaging in sexual conduct with a child abroad: includes non-commercial and commercial illicit sexual conduct with a child under 18 years
 - (2) Travelling with the intent of engaging in sexual activities with a child abroad
 - (3) Advertising or promoting child sex tours
 - (4) Organising/making of travel arrangements for a person for the purpose of engaging in sexual activity with a child at destination

- (5) Transporting of a person for the above purpose. Liability of tour operators should extend to local partners on the ground in order to ensure that the operator's liability does not end once the clients have reached the destination
- ✓ States exercise jurisdiction over child sex tourism crimes based on the Active and Passive Personality Principles (applying to both nationals and residents) and whenever possible, the Universality Principle. The obligation to 'extradite or prosecute' forms part of the national legal system
 - ✓ Eliminate the requirement of a victim complaint or formal State request
 - ✓ Prosecutors' refusal to proceed requires justification
 - ✓ The principle of double jeopardy should not apply unless the person was acquitted or the sentence was served in full
 - ✓ Eliminate the requirement of double criminality in relation to child sex tourism offences
 - ✓ Flexible limitation periods for the initiation of prosecution of sexual crimes against children
 - ✓ Corporate entities are subject to criminal and non-criminal sanctions

(7) Extradition and mutual legal assistance

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