



# Child Trafficking: An International Problem

by

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# Introduction

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This thesis focuses on the failure of the international law regime to effectively address child trafficking. There is a need for the establishment of a new international instrument specifically addressing the trafficking in children, separate from that of the trafficking in adults.

Chapter one shows that the trafficking in children differs from the trafficking in adults in such significant ways that a new international instrument specific to combating child trafficking is required. The more lucrative nature of child trafficking and the fact that children are trafficked to fulfill a specific demand indicates that child trafficking is not a side business for human traffickers, but is in fact a criminal enterprise on its own. Also, children are more vulnerable to being trafficked and they have different needs and interests with regards to rehabilitation and legal procedures. These needs must be attended to with the establishment of anti-trafficking measures specific to children and only the establishment of an instrument specifically addressing child trafficking will ensure that this happens.

In chapter two, the inadequacies of the definition of child trafficking in current international instruments are examined. This centers on the definition of child trafficking in the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Because the Convention defines child trafficking as a sub-issue to the trafficking in adults, the current definition of child trafficking is limited to transnational organized crime carried out by at least three or more persons; it is neutral with regards to prostitution; and it has limitations on the age of victims. Consequently, this definition is inadequate to effectively combat child trafficking.

Chapter three examines the flaws of the patchwork framework of international law addressing child trafficking. These flaws are that each international instrument has a restricted scope, essential human rights provisions in relation to children exist only as an idealistic framework of principles which act as a standard but are difficult to realize, and key provisions and guidelines are discretionary. As a result, the current international law regime is ineffective in combating child trafficking and does not fulfill its purpose in establishing a holistic approach against the trafficking in children.

Chapter four discusses the problems in national implementation of the current international framework to address child trafficking. The weaknesses of the current definition of child trafficking have led to a failure to criminalize internal child trafficking as well as to inconsistent national laws concerning prostitution, age of consent and penalties for perpetrators of child trafficking. The difficulty of realizing idealistic principles in international law concerning child trafficking is demonstrated through the implementation of the 'best interests of the child' principle, found in Article 3 of the Convention on the Rights of the Child, into national legal systems. The effect of phrasing key obligations in discretionary language, such as the obligation to 'cooperate and communicate towards the eradication of child trafficking', is revealed in the failure of individual States to effectively cooperate and communicate with non-governmental organizations and border control agencies.

Chapter five identifies the weaknesses of the existing enforcement system with regards to child trafficking. There is an unnecessary duplication of work, a lack of focus on child trafficking and each enforcement mechanism has a limited focus. Each is concerned with only certain areas of international law. The enforcement mechanisms also have limitations as the fulfillment of their mandate is dependent on State cooperation which, however, is not based on any hard obligations. Enforcement mechanisms do not compel States to answer for any allegations or proven breaches; they can only monitor progress of national implementation and make recommendations. Moreover, there is a limited accountability of individual States to some of the key mechanisms in this enforcement system with regards to their reporting obligations and other international obligations.

In conclusion, chapter six provides recommendations for the improvement of this international regime, starting with the creation of a holistic new international agreement specifically addressing child trafficking. This new international agreement will contain a new definition of child trafficking, improved international obligations addressing the prevention of child trafficking, the protection of victims and the punishment of perpetrators, a financial mechanism to assist developing country States to fulfill their obligations and a new enforcement system dedicated to ensuring the appropriate national implementation of these obligations. The new definition of child trafficking and the prevention, protection and punishment provisions in this new treaty will better assist in implementing more effective anti-child trafficking measures and the new

enforcement system would ensure the continuing progress and success of national implementation of these anti-child trafficking measures.

# Chapter 1

## Combating Child Trafficking Requires a Separate International Instrument: Child Trafficking Differs from Adult Trafficking

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The trafficking of human beings is a global issue and no country is immune from the phenomenon. As the United Nations Office on Drugs and Crime (UNODC) notes in its 2008 Annual Report: “victims from 127 countries undergo exploitation in 135 nations.”<sup>1</sup> Between 12 to 27 million people are enslaved in the world today, a figure more than all three centuries of the Trans-Atlantic slave trade combined.<sup>2</sup> Since the 1904 International Agreement for the Suppression of the White Slave Traffic (1904 White Slave Traffic Agreement) until the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime, the trafficking of children has been addressed together with the trafficking of adults. However, this approach has proven to be unsuccessful as the trafficking of children is growing at an alarming rate.

In 2009, trafficking in persons was said to be the third largest criminal enterprise in the world but in 2010, it had risen in ranks when identified by the United States State Department as the second largest criminal enterprise, after drugs. According to Kara, the industry is ‘akin to a mature, multinational corporation that has achieved steady-state growth and produces immense cash

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<sup>1</sup> U.N. OFF. ON DRUGS & CRIME, Annual Report 2008: *Human Trafficking: A Crime That Shames Us All* 5 (2008), 25 <[http://www.unodc.org/documents/about-unodc/AR08\\_WEB.pdf](http://www.unodc.org/documents/about-unodc/AR08_WEB.pdf)> at 20 June 2009.

<sup>2</sup> Kevin Bales, *Understanding Global Slavery* as cited in World Vision, *Child Trafficking and Exploitation* <<http://www.worldvision.org/content.nsf/learn/globalissues-child-trafficking>> at 19 August 2010.

flows'.<sup>3</sup> It is clear that as the second most profitable transnational organized crime after trafficking in drugs<sup>4</sup>, human trafficking is driven by economic gain. The United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) 2008 report 'Human Trafficking: An Overview' prepared by the United Nations Office on Drugs and Crime (UNODC) estimates that the annual profit from this crime is around 32 billion dollars<sup>5</sup> with a global weighted average net profit margin of almost 70 percent.<sup>6</sup> In comparison, Google's net profit margin in 2006 was 29 percent, and it is one of the most profitable companies in the United States; Microsoft was 28.5 percent; and Intel was 14.3 percent.<sup>7</sup> The point is clear, the trafficking of human beings makes profits soar. Also, costs incurred in the trafficking of human beings are low, usually with simply a one-off investment to 'buy' the victim plus perhaps a small, regular 'tax', i.e. "bribe" to law enforcement authorities.<sup>8</sup> These costs are negligible because unlike drugs or firearms, humans can be exploited over and over again.

Kara also notes that assuming a 3.5 percent growth rate, there will be 1.48 million sex slaves worldwide by the end of 2012.<sup>9</sup> This assumed growth rate has proven to be too low as it has already been estimated that there are two million children trapped in sexual slavery worldwide as of 2009.<sup>10</sup> Moreover, the United Nations (UN) estimates that approximately 80 percent of around 600,000 to 800,000 people trafficked transnationally and millions trafficked internally each year are female and about 50 percent are minors.<sup>11</sup> The International Labour Organization (ILO) estimates that at any given time, there are about 2.5 million people in forced labour, including

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<sup>3</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 17.

<sup>4</sup> Perla Trevizo, *Georgia Educators Learn about Human Trafficking*, 1 February 2012 <<http://www.timesfreepress.com/news/2012/feb/01/georgia-educators-learn-about-human-trafficking/>> at 23 April 2012.

<sup>5</sup> UNODC, *Human Trafficking: An Overview*, UN.GIFT (2008) <<http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>> at 12 March 2010.

<sup>6</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 21-22.

<sup>7</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 21-22.

<sup>8</sup> UNIAP, *Human Trafficking in the GMS*, UNIAP (2005) <[http://www.no-trafficking.org/content/About\\_Human\\_Trafficking/about\\_human.htm](http://www.no-trafficking.org/content/About_Human_Trafficking/about_human.htm)> at 26 May 2009.

<sup>9</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 17.

<sup>10</sup> US State Department, *Trafficking in Persons Report* (2010) p.11; World Vision, *Child Trafficking and Exploitation* <<http://www.worldvision.org/content.nsf/learn/globalissues-child-trafficking>> at 19 August 2010.

<sup>11</sup> *Data Comparison Sheets*, UNESCO Bangkok <<http://cms.unescobkk.org/index.php?id=1963>> at 26 May 2009.

sexual servitude, and most victims are between the ages 18 to 24.<sup>12</sup> The United Nations estimated in 2004 that 700,000 children were forced into domestic servitude in Indonesia; 559,000 in Brazil; 264,000 in Pakistan; 200,000 in Kenya; and 250,000 in Haiti.<sup>13</sup>

It must be noted that statistics with regards to child trafficking are problematic. There is a lack of accuracy due to the complexity of the phenomenon, coupled with its criminal and lucrative nature which results in the perpetrators' desire to keep it undetected and flourishing. Because of this lack of accuracy, some argue that these numbers given in relation to child trafficking are exaggerated. However, it is more likely that these numbers and estimations are too low since the statistics are based on the successful prosecution of traffickers and not all traffickers are successfully prosecuted. This is because victims' testimonies are essential to each successful prosecution and most victims are unwilling to come forward for various reasons, including a fear for family, a fear of being prosecuted themselves, a fear of stigma and of not knowing who to trust.

International law has not had much success in eradicating child trafficking. As mentioned above, international law only addresses human trafficking generally and not child trafficking specifically because at a glance, child trafficking seems similar to the trafficking of adults. In actual fact, the trafficking of children is a unique phenomenon requiring specific solutions and needs to be dealt with separately from the trafficking of adults. Therefore this chapter addresses the need for such a distinction, which is based on the fact that:

- (i) Trafficked children bring in more money than trafficked adults;
- (ii) Children are demanded for specific types of work;
- (iii) Children are more vulnerable than adults; and
- (iv) Children have special needs as compared to adults.

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<sup>12</sup> International Labour Organization, *A Global Alliance Against Forced Labour* (Geneva, International Labour Office, 2005) as cited in the 2008 report by UNODC, *Human Trafficking: An Overview*, UN.GIFT (2008) <<http://www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf>> at 12 March 2010.  
; International Organization for Migration, *Counter-Trafficking Database, 78 Countries, 1999-2006* (1999) as cited in UN.GIFT, *Human Trafficking : The Facts*, UN.GIFT <[http://64.22.127.124/docs/issues\\_doc/labour/Forced\\_labour/HUMAN\\_TRAFFICKING\\_-\\_THE\\_FACTS\\_-\\_final.pdf](http://64.22.127.124/docs/issues_doc/labour/Forced_labour/HUMAN_TRAFFICKING_-_THE_FACTS_-_final.pdf)> at 12 March 2010.

<sup>13</sup> ILO, *Helping Hands or Shackled Lives? Understanding Child Domestic Labour and Responses to it*, 2004 (prepared by June Kane) noted in David Batstone, *Not for Sale: The Return of the Global Slave Trade and How we can Fight It* (2007) 6-7.



The higher profits that children bring perpetrators of trafficking make the trafficking in children a more attractive enterprise than the trafficking in adults. For this reason, and also the fact that children are trafficked to satisfy a specific demand, the trafficking in children is a criminal enterprise on its own. As perpetrators give special attention to trafficking in children and treat it as a criminal enterprise on its own, distinct from the trafficking in adults, international law should similarly not address child trafficking as a sub-issue to trafficking in adults. In addition, the fact that children are more vulnerable than adults to being trafficked and have special needs as compared to adults with regards to protection during rehabilitation and legal procedures necessitate that these differences must be addressed directly by a separate treaty specific to children.

### **1.1 Child Trafficking is a criminal enterprise on its own**

One of the reasons that child trafficking requires a separate international instrument from the trafficking in adults is that perpetrators view and treat the trafficking in children as a criminal enterprise of its own. Children are trafficked to satisfy different purposes as compared to adults, purposes that specifically demand children. The reasons children are specifically demanded vary depending on the type of work that these children are required to perform. Also, children generate more profit for their exploiters, incur less cost than adults, satisfy the specific requirements demanded for the type of work they are forced to perform, are easier to control and subdue as compared to adults and raise less suspicion when out in society performing their “work”. These reasons suggest that traffickers do not traffic children as a side business to the trafficking in adults but rather they do it as a criminal enterprise on its own.

#### **1.1.1 Higher Profits**

Like all businesses, human traffickers seek to increase their profitability. For this reason, trafficking in children is more attractive than trafficking in adults as children generate more profit. For instance, INTERPOL reports that the sexual exploitation of one woman can generate from \$75,000 to \$125,000 in one year whereas traffickers can make at least \$200,000 a year from one

young girl.<sup>14</sup> Also, virgins can be sold at a high rate; in Cambodia a virgin can be sold for at least \$600.<sup>15</sup>

Aggravating the situation is that children are easier to exploit and can be paid less, if they are paid at all, due to the fact that children are easier to control, manipulate and deceive.<sup>16</sup> In situations where children have been trafficked under the deception that their families would receive remuneration for their labour, the amount of money that is sent back to the family to keep up the deception are less than what a trafficked adult in the same situation would 'earn'.<sup>17</sup> The reason behind the higher profits that trafficked children generate is that children are being trafficked to meet specific demands for specific types of work. The more specific the demand, the higher the price paid.

### **1.1.2 Specific Demand**

Child trafficking, like any business, is carried out to satisfy a demand from customers. Customers of trafficking are described as those who procure the 'services' of the victim of trafficking.<sup>18</sup> They are significant in terms of producing the demand that keeps human trafficking profitable.<sup>19</sup> The customers of child trafficking are those who are responsible for the increase in the demand for children for sexual activities, forced labour and many other forms of exploitation. These include and are not limited to sex tourists, who seek children for sexual activities, owners of factories or businesses that use child labour, guerilla armies who force captured children to become soldiers, and those seeking cheap live-in domestic workers. The demand for children for these purposes comes from everywhere around the world and the sourcing of children to fulfill these demands is

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<sup>14</sup> Kelly M. Cotter, 'Combating Child Sex Tourism in Southeast Asia', (2009) 37 Denv. J. Int'l L. & Pol'y 493, 497; Donna Hughes, 'The Demand for Victims of Sex Trafficking' (June 2005), available at <<http://www.uri.edu/artsci/wms/hughes/pubtrfrep.htm>> at 14 September 2010.

<sup>15</sup> Dateline NBC, Children For Sale: Dateline Assists International Justice Mission In Investigating And Rescuing Children From Sexual Slavery In Cambodia (NBC television broadcast Jan. 23, 2004); see also NBC News, Children for Sale: Dateline Goes Undercover with a Human Rights Group to Expose Sex Trafficking in Cambodia, Dateline NBC, Jan. 9, 2005, <<http://www.msnbc.msn.com/id/4038249/>> at 14 September 2010.

<sup>16</sup> As cited in Dr. Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, Denv. J. Int'l L. & Pol'y Vol. 73:3 421 at 422.

<sup>17</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>18</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 The Georgia Journal of International and Comparative Law 145, 151.

<sup>19</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 The Georgia Journal of International and Comparative Law 145, 151. For instance, all of the sex tourists that visit South East Asia each year are customers as defined here. Without their paying for the services, sex trafficking would not be profitable. Thus, the customers play a very important role in trafficking.

similarly from all over the world. For instance, a 13 year old Nigerian girl was trafficked as a domestic worker in London and by 2002, more than 2000 children from Albania had been trafficked to Greece to earn money by begging.<sup>20</sup>

The forms of exploitation may vary considerably with the age and gender<sup>21</sup> of the child but may not be limited to just one type for any one child. For instance, a female child could be trafficked for the purposes of becoming a child soldier and at the same time serve as a sex slave for the men in those particular armed forces. There is inevitably an overlap of types of exploitation that trafficked children may experience. Even so, for the purposes of this discussion, some sort of categorization need to be provided and any overlaps acknowledged. Each identified category of exploitation particular to trafficked children will be briefly examined for the reasons which compel the specific demand for children. These categories are:

- (i) Child prostitution and related activity;
- (ii) Child labour, including camel jockeys and others; and
- (iii) Warfare.

#### ***i. Child Prostitution and Related Activity***

Research in Central Asia and Europe shows that the most common form of exploitation in the trafficking of children is sexual exploitation.<sup>22</sup> However, it is unclear whether this is because sexual exploitation of children is the most prevalent type of exploitation in child trafficking or because it is the most visible and therefore the most frequently reported form of exploitation, with greater interest shown by media, researchers and others.<sup>23</sup> The sexual exploitation of children in child trafficking is not limited to child prostitution but also includes production of pornographic material, strip dancing and related activity, and as sex slaves in warfare.

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<sup>20</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.3.1 and 2.4.3.2.

<sup>21</sup> M Dottridge, *Kids as Commodities? Child Trafficking and What to Do About It* (International Federation Terre des Hommes, 2004) 23.

<sup>22</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 12.

<sup>23</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 12.

One reason why children are increasingly demanded for sexual activities is the fear of AIDS which has led to the demand for younger and younger prostitutes.<sup>24</sup> Local myths have exacerbated this by saying that having sex with a virgin will cure one of AIDS and other sexually transmitted diseases or prevent one from contracting them.<sup>25</sup> This myth has also contributed to the trafficking in children for child marriage.<sup>26</sup>

Another reason is that there is undeniably an existing demand for children for the sexual gratification of adults. One only has to look at the media to see that this is true. For instance, in 2008, "millions of archives of videos and photographs" that show child sex abuse were seized in a series of nationwide raids in Spain. The operation uncovered a widespread network which spanned 75 countries and in which two of those arrested were using their own children in the creation of these videos and photographs.<sup>27</sup> Unfortunately, this report is only one of the many depicting the sexual exploitation of children. Thus it is clear that there exists a strong demand for the sexual exploitation of children; leading to an increase of trafficking in children for this sole purpose.

## **ii. Child Labour**

Trafficking of children for the purpose of child labour is another common form of exploitation in child trafficking. Children are trafficked for the purposes of domestic service, sweatshops<sup>28</sup> and

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<sup>24</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 The Georgia Journal of International and Comparative Law 145, 156; Stacey Mathews, 'Comment, International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?', (2005) 27 Hous. J. Int'l L. 649, 664 However, this belief is misguided. Karene Jullien, The Recent International Efforts to End Commercial Sexual Exploitation of Children, (2003) 31 Denv. J. Int'l L. & Pol'y 579 601-02 ("[D]octors believe that sexually active children [in the context of trafficking] are more likely to carry the virus than adults.")

<sup>25</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 The Georgia Journal of International and Comparative Law 145, 156; Stacey Mathews, 'Comment, International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?', (2005) 27 Hous. J. Int'l L. 649, 664-665; Linda Smith & Mohamed Mattar, 'Global Challenges: Trafficking in Persons, Humanitarian Intervention, and Energy Policy: Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the U.N., and Global Responses and Challenges', (2004) 28 Fletcher F. World Aff. 155, 167.

<sup>26</sup> Elizabeth Warner, 'Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls', 12 Am. U.J. Gender Soc. Pol'y & L. 233, 242.

<sup>27</sup> BBC News, *Spain holds 121 over child porn*, 1 October 2008 <<http://news.bbc.co.uk/2/hi/7645626.stm>> accessed at 22 September 2011.

<sup>28</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 12.

agriculture where they are forced to work for little or no money at all.<sup>29</sup> Other types of forced labour include camel jockeys and others, such as organized begging and illicit activities.

The use of trafficked children as camel jockeys has been documented; children from Bangladesh, Pakistan, Sudan and Mauritania are trafficked to the Gulf States for this purpose.<sup>30</sup> Children, not adults, are used for this practice because they are smaller and lighter than adults, and tend to scream louder at a higher pitch than adults, causing the camels to run faster.<sup>31</sup> International denunciation by the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography in 1999<sup>32</sup> of this dangerous practice, as the children can be injured or even die falling from the camels, has had the effect of producing some positive effects with Qatar, Kuwait and Oman enacting laws to ban the use of children for these races.<sup>33</sup>

Other forms of labour exploitation of trafficked children include organized begging, illicit activities and trade of human organs<sup>34</sup>. Organized begging is a form of exploitation that is rampant in Europe but from reports it is also clear that not all children who are involved in organized begging

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<sup>29</sup> Dr. Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, Denv. J. Int'l L. & Pol'y Vol. 73:3 421 at 422.

<sup>30</sup> US State Department, Trafficking in Persons Report (2006) 68, 198 and 250.

<sup>31</sup> Daoud Khan, 'Riding for their lives', *New Internationalist Magazine*, Issue 381 <<http://www.newint.org/columns/essays/2005/07/01/camel-jockies/>> at 14 September 2010; Stephen MacNeil, 'The Realities of Camel Racing', November 2005 IHS Child Slave Labor News <[http://ihscslnews.org/view\\_article.php?id=74](http://ihscslnews.org/view_article.php?id=74)> at 14 September 2010.

<sup>32</sup> UNCHR, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography*, Ms. Ofelia Calcetas-Santos (1999) UN Doc E/CN.4/1999/71 [79].

<sup>33</sup> US State Department, Trafficking in Persons Report (2006) 157, 197, 208 and 250.

<sup>34</sup> There is a lack of research in this area and what is more commonly suggested through media is that trafficking and adoption is linked in cases whether pregnant women, sometimes under the age of 18, are trafficked for the sale and adoption of their newborn babies. There may also be a link with trafficking where children are moved from one country to another for the purpose of illegal adoption to create monetary gain for those organizing the adoption. However, the element of exploitation in the adoption process is hard to define unless the adoption or the way in which it was conducted does not give due consideration to the child's best interest. Therefore, instead of child trafficking, it is more likely that such adoption may be related to the sale of children or the illegal transfer of children instead. Even so, the definitions of these terms as found in national law, often linked to the implementation of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (2000), creates a blurring between these terms as some address child trafficking and the sale of children together, making no differentiation between the two. In any case, studies indicate that statistics on children who leave one country for adoption do not always coincide with the number of children who actually reach their destination country. Thus it is possible that trafficking of children could happen under the guise of adoption and even though child trafficking and adoption may be related to some extent, there is a need to better understand the connection between the two issues as they are two distinct phenomena.\* Therefore, for the purposes of this thesis, this aspect of exploitation in relation to child trafficking would not be discussed any further.

\* UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 13.

have been trafficked.<sup>35</sup> Even so, the existence of trafficking for the purpose of street begging is very real. Ms Ofelia Calcetas-Santos, a Special Rapporteur on the Sale of Children from 1994-2001, acknowledged in her 1999 report that this is rampant in the Mekong region, particularly from Cambodia to Thailand.<sup>36</sup> It can be argued that children are favoured for this purpose as they garner more sympathy and trust from people whom these children are sent to beg from.

Human trafficking for the removal and trade of organs has been documented in respect to adults, as early as 1994 when Mr Vitit Muntarbhorn, another former Special Rapporteur on the Sale of Children from 1991-1994, acknowledged the issue. However, Mr Vitit Muntarbhorn could not say that the same market for organs existed concerning child victims.<sup>37</sup> Ms Ofelia Calcetas-Santos stated five years later that she received allegations of street children being killed for their organs to be used in transplant operations, allegations which have recurred repeatedly for over 20 years, but nobody has yet been convicted of being connected with such an offence.<sup>38</sup> Whether or not these children were killed for the purposes of harvesting their organs remains a question with no clear answer. In 2006, Mr Juan Miguel Petit, also a former Special Rapporteur on the Sale of Children from 2001-2008, noted that knowledge of the trafficking of children for the removal and trade of organs is still scarce and this is mainly due to the existence of an 'overload of rumours and hearsay'.<sup>39</sup>

Similarly, there is not much information available on the use of trafficked children in illicit activities such as drug production, drug trafficking and petty theft. However, an investigation led by the United Kingdom (UK) demonstrated that around two thirds to three quarters of cannabis farms are run by Vietnamese criminal gangs who are trafficking Vietnamese children into the UK to cultivate the drug in exploitative conditions.<sup>40</sup> It also seems that the phenomenon might be

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<sup>35</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 13.

<sup>36</sup> UNCHR, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos* (1999) UN Doc E/CN.4/1999/71 [74].

<sup>37</sup> UNCHR, *Report submitted by Mr. Vitit Muntarbhorn, Special Rapporteur, in accordance with Commission on Human Rights resolution 1993/82* (1994) UN Doc E/CN.4/1994/84 [100].

<sup>38</sup> UNCHR, *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Ms. Ofelia Calcetas-Santos* (1999) UN Doc E/CN.4/1999/71 [85].

<sup>39</sup> UNCHR, *Report submitted by the Special Rapporteur on the sale of children, child prostitution and child pornography, Juan Miguel Petit* (2006) UN Doc A/HRC/4/31 [20].

<sup>40</sup> M Daly, *Plant Warfare*, Druglink (London, March/April 2007).

widespread in the UK as an average of one child a week is rescued.<sup>41</sup> It can again be argued that children are used in these activities because of their vulnerability and tendency to raise less suspicion.

### **iii. Warfare**

In warfare, children play roles as child soldiers, sex slaves, porters and spies.<sup>42</sup> Children are used for warfare because they are easier to control and obey orders with less questioning than adults. Additionally, children are used because they provide an advantage in warfare. Enemy soldiers are less likely to injure or kill a child. Also, a child is smaller in size and may be faster than an adult thus making better messengers and spies. And, a child raises less suspicion than an adult and has a higher chance of surviving when entering into enemy territory to spy or attack.<sup>43</sup> There are also instances where guerilla armies have forced captured children to fight against their own people,<sup>44</sup> a great advantage for the guerilla armies as the people would most likely not kill their own children.

## **1.2 Children have different protection needs from adults**

Another reason that supports the need for a separate treaty addressing child trafficking is that the needs of child victims of trafficking differ from the needs of adult victims. The fact is that children are more vulnerable to being trafficked as compared to adults and thus require anti-trafficking measures established specifically to protect children. Also, the impact of trafficking on children is different as they suffer abuse during the developmental years of their life. Accordingly, they have special rehabilitation needs and special protection needs during legal procedures as compared to adult victims of trafficking.

### **1.2.1 Heightened Vulnerability**

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<sup>41</sup> M Daly, *Children trafficked from Asia to UK to work in cannabis factories*, The Independent (London, 23 September 2007) <<http://www.independent.co.uk/news/uk/crime/children-trafficked-from-asia-to-uk-to-work-in-cannabis-factories-403251.html>> at 11 August 2010.

<sup>42</sup> Dr. Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, Denv. J. Int'l L. & Pol'y Vol. 73:3 421 at 422.

<sup>43</sup> Silvia Scarpa, 'Fourth Annual World Congress on Family Law and Children's Rights: Child Trafficking: International Instruments to Protect the Most Vulnerable Victims' (2006) 44 Fam. Ct. Rev. 429, 433.

<sup>44</sup> US State Department, *Trafficking in Persons Report* (2005) 5-31; US State Department, *Trafficking in Persons Report* (2010) p.116.

The methods involved in the trafficking of children are similar to the trafficking of adults. For instance, children, like adults who having decided to migrate in search of a better future, sometimes end up becoming the victims of human trafficking. According to the *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, the majority of children trafficked in Europe come from the age group of 15-17 years<sup>45</sup>; just before attaining majority, and it is in this age group where most trafficked children leave home voluntarily, with or without the permission of parents or their guardian. They are able to do so since this age group has completed compulsory education, are old enough to enter employment legally and to migrate.<sup>46</sup>

Similarly, victims of trafficking, both adults and children, are said to be 'vulnerable to deceit due to economic desperation'. Over one billion people today are living on an average of one dollar per day or less.<sup>47</sup> Kara suggests that the phenomenon itself is 'directly produced by the harmful inequalities spread by the process of economic globalization'<sup>48</sup>. Increasing poverty, starvation of financial opportunities, exploitation of poorer economies by richer ones and the 'general erosion of human freedoms across the developing world' all contribute to the success of human trafficking.<sup>49</sup> Traffickers or the facilitators of human trafficking include a variety of people who often stem from organized criminal groups.<sup>50</sup> Similar to all other businesses, modern technology aids communication and trade, making it irrelevant that these criminal groups are small, loosely organized and dispersed.<sup>51</sup> The key player is usually a local person who appears trustworthy and ensnares victims with promises of work, marriage or educational opportunities.<sup>52</sup> Also, some of

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<sup>45</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.1.

<sup>46</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.1.

<sup>47</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>48</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>49</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>50</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 *The Georgia Journal of International and Comparative Law* 145, 151; US State Department, *Trafficking in Persons Report* (2010) p.67. Organized criminal groups are defined as "a structured group of three or more persons, existing for a period of time and . . . [having] the aim of committing . . . [a] serious crime[] . . . in order to obtain, directly or indirectly, a financial or other material benefit." U.N. Gen. Assembly, Convention Against Transnational Organized Crime, U.N. Doc. A/55/383 (Nov. 2, 2000). The Protocol is contained within this Convention.

<sup>51</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 *The Georgia Journal of International and Comparative Law* 145, 151; Stacey Mathews, 'Comment, International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?', (2005) 27 *Hous. J. Int'l L.* 649, 660; LeRoy G. Potts, Jr., 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons', (2003) 35 *Geo. Wash. Int'l L. Rev.* 227, 231.

<sup>52</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 *The Georgia Journal of International and Comparative Law* 145, 151; Kelly Schwab, 'Comment, The



these victims, when they are older, become traffickers themselves or get involved in the trafficking process in order to avoid being exploited any further.<sup>53</sup>

As a result, many victims of human trafficking are procured through sale by family and recruitment by former victims. Other methods used are seduction or romance, and less frequently, abduction.<sup>54</sup> Besides that, victims of trafficking have few resources available to them. Usually the victim is in a new place or country with little or no knowledge of the local language, possessing little or no money, no passport, no visa and no one to turn to. They are normally subjected to a wide variety of methods to control them and make them obey orders. These vary from physical and sexual abuse, forced use of alcohol, drugs or sedatives<sup>55</sup> and even being told by their traffickers or 'owners' that if they tried to escape, law enforcement authorities will prosecute them or that their families back in their home country will be killed.<sup>56</sup> Thus the victims themselves are too afraid to seek help.

However, what sets the child victims of trafficking apart from the adult victims is the fact that by their very nature, children are more vulnerable than adults to trafficking and its consequences. Children are younger, more easily exploited, more susceptible to deception and control, and are less able to demand their rights.<sup>57</sup> They are more dependent for food, shelter or emotional needs, therefore making it easier to persuade the children to do as they are told. They also have a less-developed capacity than adults to assess risk, voice their worries, distinguish right from wrong, or to take action to defend themselves from harm.<sup>58</sup>

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Sexual Exploitation of Children: Suppressing the Global Demand and Domestic Options for Regulating Prostitution', (2005) 13 Tul. J. Int'l & Comp. L. 333, 334; LeRoy G. Potts, Jr., 'Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons', (2003) 35 Geo. Wash. Int'l L. Rev. 227, 229

<sup>53</sup> UNODC, *Profiling Human Traffickers*, UN.GIFT (2008) <<http://www.ungift.org/ungift/en/stories/profiling-human-traffickers.html>> at 26 May 2009.

<sup>54</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>55</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.5.2.

<sup>56</sup> UNODC, *Trafficking in Persons: Global Patterns* 11 (Apr. 2006), <[http://new.vawnet.org/category/www.unodc.org/pdf/traffickinginpersons\\_report\\_2006ver2.pdf](http://new.vawnet.org/category/www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf)> at 20 June 2009; Amanda Kloer, *10 Reasons Trafficking Victims Can't Leave*, End Human Trafficking (2009) <<http://humantrafficking.change.org/>> at 26 May 2009.

<sup>57</sup> World Vision Australia School Resources, World Vision 2007 <[http://www.worldvision.com.au/Libraries/3\\_1\\_1\\_-\\_Issues\\_-\\_Children/Child\\_Trafficking.sflb.ashx](http://www.worldvision.com.au/Libraries/3_1_1_-_Issues_-_Children/Child_Trafficking.sflb.ashx)> at 19 August 2010.

<sup>58</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.5.2.

An even more crucial fact is that children often do not have an independent legal status and thus often do not have a say in what happens to them.<sup>59</sup> Children are traditionally viewed by legal systems as passive subjects who are unable to assess reality effectively, make decisions and act with initiative, self-reliance and responsibility. Consequently, entire legal systems are built upon the concept where the adult will be the representative of the child. Therefore government laws and practices consistently place a child's fate in the hands of an adult: a family member, state official or appointed guardian.<sup>60</sup> This societal structure and thinking makes children more vulnerable than adults in two ways: to being trafficked and to harm from trafficking after extraction.

For example, children, whose families are stricken with poverty, are usually more vulnerable to being trafficked<sup>61</sup> as they can be sent away from home by their parents or guardians, with or without the child's consent. There are always intermediaries willing to take advantage of the vulnerability of poverty-stricken families by suggesting to the parents that their child will have a better future abroad and may offer an advance to the parents on the child's subsequent earnings<sup>62</sup>, thus deceiving them when in actual fact the children will be delivered to brothels, factories, fishing boats, private homes as domestic servants and even onto the streets to beg. In some cases, parents or guardians take the initiative to send the child away due to their financial difficulties and in other cases, parents or guardians are not fully informed of the risk of serious abuse to the child.<sup>63</sup> However, some parents or guardians close their eyes and ears to reports of abuse to children in similar situations and simply hope that their child will be one of the lucky ones who will earn a significant amount of money instead.<sup>64</sup>

For instance, in Thailand and the Mekong Subregion, the rural and hill tribe families are stricken by poverty. In order to survive, they sometimes have no choice but to sell their daughters to slave traders impersonating as job agents who give them false promises of providing good jobs and

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<sup>59</sup> World Vision Australia School Resources, World Vision 2007 <  
[http://www.worldvision.com.au/Libraries/3\\_1\\_1\\_-\\_Issues\\_-\\_Children/Child\\_Trafficking.sflb.ashx](http://www.worldvision.com.au/Libraries/3_1_1_-_Issues_-_Children/Child_Trafficking.sflb.ashx)> at 19 August 2010.

<sup>60</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First*, 2008 at 40-43.

<sup>61</sup> Kevin Bales, *Disposable People: New Slavery in the Global Economy* (1999) 15-16.

<sup>62</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.1 and 2.5.1.

<sup>63</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.1.

<sup>64</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.4.1.

better lives to the girls.<sup>65</sup> The same situation happens in Nepal as well, one of the poorest regions in the world. Kara records his encounter with Maya, a victim of trafficking, who has worked in Mumbai for 4 years as a sex slave. Maya was born in Nepal where her parents sold her for \$55 to an agent on the promise that she would have a good job at a carpet factory from which she could send home up to \$10 per month.<sup>66</sup>

In addition, as adults often act as representatives of children, any movement of trafficked children is harder to detect than the movement of trafficked adults. Traffickers could easily bring the trafficked children with them under the guise of being a parent or relative. Even more alarming is that family members of victims participate in the trafficking of children.<sup>67</sup> It is not uncommon to hear of reports where teenage girls are trafficked by relatives, including female relatives, as well as young men posing as boyfriends or fiancés, and where younger children are trafficked into begging by relatives.<sup>68</sup> Moreover, the nature of a child generally makes it easier for the trafficker to control them in order not to alert anyone of what is really happening.

Another effect of the absence of an independent legal status for children is that it makes children particularly vulnerable after being extracted from trafficking. There is difficulty in deciding the appropriate long-term care for such children, especially for children whose nationality is unknown. These children would have to have appointed guardians to act as representatives for them; but unfortunately not all legal systems have this requirement built into them. Thus some of these children would have to navigate legal systems on their own, legal systems which were designed primarily for adults. In addition, having been under the control of traffickers and exploiters, the fact that they would still have no say over what happens to them after being extracted from trafficking could further aggravate their emotional and mental trauma and social fragility.

### **1.2.2 Special Needs**

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<sup>65</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 175-176.

<sup>66</sup> Siddharth Kara, *Sex Trafficking: Inside the Business of Modern Day Slavery* (2009) 8-9.

<sup>67</sup> Virginia Garrard, 'Sad Stories: Trafficking in Children--Unique Situations Requiring New Solutions' (2006) 35 *The Georgia Journal of International and Comparative Law* 145, 151; Stacey Mathews, 'Comment, International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?', (2005) 27 *Hous. J. Int'l L.* 649, 660.

<sup>68</sup> *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF 2006, 2.5.4.

Victims of child trafficking differ from victims of adult trafficking because of the special needs of such children. Trafficking has a different impact on children than on adults. The recognition of this fact is highly important and must be kept in mind throughout this thesis. However, despite recommendations from the Human Rights Caucus, the UN High Commissioner for Human Rights, UNICEF, the International Organization for Migration and others to address the special needs and legal status of children, there has been a failure to do so.<sup>69</sup> The factors which compose these special needs of children are discussed below. They are a large part of why the trafficking of children warrants targeted efforts.

***i. Rehabilitation Needs***

Scientific studies have generated a deeper understanding of the developmental years of the human being and have a deeper appreciation of:

- (i) the importance of early life experiences and how it can affect the development of the brain and subsequent unfolding behavior,
- (ii) the central role of early relationships that either provide support and adaptation or risk and dysfunction,
- (iii) the capabilities, emotions and essential social skills that develop during the early years of life, and
- (iv) the capacity to increase the chances of favourable development through planned intervention.<sup>70</sup>

Due to the fact that victims of child trafficking are subjected to abuse in their years of physical, mental and emotional development, the trauma and harm resultant from that abuse is different from that experienced by adult victims of human trafficking. Under normal circumstances, children receive the proper guidance and role models in the development of their morality, personality and identity, significantly through their parents and the society around them.<sup>71</sup> Thrust into trafficking, the proper development of the child is violated as victims are not only deprived of

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<sup>69</sup> Ann D. Jordan, *The Annotated Guide to the Complete UN Trafficking Protocol*, May 2002 (Updated August 2002) 12.

<sup>70</sup> Jack P. Shonkoff, Deborah Phillips, 'From Neurons to Neighborhoods: The science of early childhood development' (2000) 1-2.

<sup>71</sup> David A. Wolfe, 'Child Abuse: Implications for child development and psychopathology', 1999 (2<sup>nd</sup> edition) 25; UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.3.

these proper role models and guidance but their social, psychological and emotional development is deformed by the extremely harmful situation that they are in.

Therefore the rehabilitation and reintegration process of victims of child trafficking would be unlike that which an adult victim of trafficking would need. This is affirmed by UNICEF in its two publications:

- *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.1 states that child victims have 'special rights and needs' and should be cared for by adequately trained professionals who are aware of these needs and are knowledgeable about gender issues; and again at 8.5.4 which states that because of 'the particular harm caused to girls on account of their immaturity and the particular needs that they have in recovering...it is important to ensure that adolescent girls are given care and opportunities which would not be appropriate for adult women.'<sup>72</sup>
- *Child Trafficking in Europe, A Broad Vision to Put Children First 2008* at 39 states that 'children's increased vulnerability to exploitation and the particular harm suffered by trafficked children require that child trafficking and trafficking in adult persons be dealt with as separate issues.'<sup>73</sup>

Specific efforts are needed not only to fulfill the child's material needs but also to empower the child and give the child a sense of self-esteem and of being able to make his or her own decisions and to control his or her own life<sup>74</sup> and to cultivate the child's ability to interact with other people in society in a socially acceptable way.<sup>75</sup> The age of trafficked children also influence the type of attention they need in their rehabilitation process. For instance, younger children would need to restart school education, whereas the older adolescents may not favour a return to school and may benefit more from other forms of education such as vocational training.<sup>76</sup>

Chapter 8 of the *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* outlines the general principles of interim care and protection for a victim of child trafficking. One of these principles includes: "*Under no circumstance should a child be placed in any type of*

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<sup>72</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.1 and 8.5.4.

<sup>73</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First 2008* at 39.

<sup>74</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.6.

<sup>75</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.6.2.

<sup>76</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.4.

*detention facility, including police cells, prisons or even special detention centers for children.”*<sup>77</sup>

This suggests that even though child victims need to have a safe and secure accommodation, protected from traffickers and their associates, whether or not they are still under the trafficker’s or exploiter’s direct control, they remain vulnerable and sensitive to a range of maltreatment<sup>78</sup> including the sense of being ‘imprisoned’ which is likely to cause them further harm.<sup>79</sup> It must be noted that one of the core concepts of development is that the developing child remains vulnerable to risks and open to protective influences throughout the early years of life and into adulthood.<sup>80</sup> This is why age and gender-specific help is needed for victims of child trafficking to provide optimum chance for successful rehabilitation.

What must also be taken into consideration is the special vulnerability and innocence of children which are taken advantage of by traffickers to assert control over their victims by ‘pre-programming’ them, through the use of fear or emotional manipulation, to leave and contact them if by any chance the child was extracted from the trafficker’s direct control.<sup>81</sup> This vulnerability and innocence of children, combined with the experiences endured while being trafficked, may result in the misplaced trust or distrust of children. For example, a Ukrainian boy trafficked to Poland was with his mother who was simultaneously trafficked but she had refused to seek assistance<sup>82</sup> and sometimes child victims of trafficking, once extracted, make contact with their parents, who subsequently instruct the child to re-join their trafficker. These situations could cause a child to devalue the protective capacity of a parent or guardian and hinder a successful rehabilitation process which would require some sort of trust relationship to be built with the child’s appointed guardian. Therefore, there needs to be a balance struck, however delicate it

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<sup>77</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.1.

<sup>78</sup> Which could come from staff or other children living in the same residential facility, journalists or others who may violate their right to privacy, or even members of the public who attack, criticize or discriminate against these children because of the stigma and blame attached to trafficked children and the activities in which they may have engaged, such as prostitution or theft, UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.2.

<sup>79</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.1.

<sup>80</sup> Jack P. Shonkoff, Deborah Phillips, ‘From Neurons to Neighborhoods: The science of early childhood development’ (2000) 4.

<sup>81</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.1.

<sup>82</sup> Case cited in: Centre of Social Expertise of the Institute of Sociology, National Academy of Sciences(Ukraine), “Trafficking in Children for Labour and Sexual Exploitation in Ukraine: Results of a Rapid Assessment Survey, for” ILO-IPEC, 2003.

might be, to 'de-programme' such mindsets and provide them with the resources necessary for their recovery.<sup>83</sup>

## ***ii. Special Needs in regards to Legal Procedures***

The legal assistance and criminal justice process involving victims of child trafficking must be different from that tailored to aid adult victims of trafficking. Children have special needs and interests which are already protected in courts of justice and this should be no different when a prosecution of traffickers involves a child victim giving evidence in the case. Moreover, a child may be charged with an offence, either in connection with illegal entry into a country or another offence, or may need to seek asylum in the country to which he or she has been trafficked or may simply need to secure the most appropriate durable solution that is in the child's best interest. In all these situations, the legal representative involved should be someone who is skilled in representing children, has knowledge of the experience of trafficked children, is aware of the risks a trafficked child faces even after extraction from the control of his or her traffickers or exploiters, and has knowledge of child-specific forms of persecution and the asylum process.<sup>84</sup>

## **1.3 A United Effort**

In summary, the key failure of the international law regime against child trafficking is an absence of recognition that the trafficking in children must be dealt with separately from the trafficking in adults. There is a clear need for a separate treaty specifically addressing child trafficking as the trafficking in children differs from the trafficking in adults. It is a fact that children generate higher profits for traffickers and also that children are trafficked to fulfill a specific demand. This means that child trafficking is not a side business for human traffickers but is an enterprise of its own. Accordingly, international law should respond appropriately by no longer addressing the trafficking in children as a sub-issue to the trafficking in adults.

In addition, the needs of child victims of trafficking differ from that of adult victims of trafficking. They have a heightened vulnerability to being trafficked as compared to adults and they also have special needs and interests with regards to rehabilitation and legal procedures. Moreover, the type of societal structure and thinking where children are viewed as passive subjects with their fate constantly placed in the hands of adults, is contradictory to successful prevention and

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<sup>83</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.1.

<sup>84</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.6.3.

detection measures for the trafficking of children. To successfully prevent children from becoming victims to trafficking and to detect children who are being victimized, children must be recognized as agents of their own, having a right to have their views and opinions heard and be given means to understand the issues at stake, raising awareness of the risks that they face, make informed choices and protect themselves as fully as possible.<sup>85</sup>

These differences which set trafficking in children apart from the trafficking in adults change the dynamics of the way which this phenomenon must be dealt with. It is a unique phenomenon which requires a new solution, requiring that the trafficking in children be dealt with separately from the trafficking in adults. Addressing child trafficking together with trafficking in adults has the effect of children not receiving the adequate attention needed in the system established to combat human trafficking. Furthermore, the increasing statistics of the exploitation of children, as outlined at the beginning of this chapter, suggest that there is a need for the international community to be united and target their efforts against child trafficking to ensure that such exploitation of children will face zero tolerance.

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<sup>85</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First*, 2008 at 40-43.



## Chapter 2

# Weaknesses of the Definition of Child Trafficking in Current International Instruments

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The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime addresses child trafficking as a sub-issue to the trafficking in adults. Children are only mentioned briefly in the Trafficking Protocol's definition of human trafficking and again in Article 6.4 in the Trafficking Protocol which states that State Parties are to take into account the special needs of children in the provision of assistance and protection to victims of trafficking in persons. As a result of being addressed as a sub-issue, the current definition of child trafficking has weaknesses which make it inadequate to effectively combat child trafficking. These weaknesses are:

- (i) The scope of application is restricted to transnational organized crime carried out by at least three or more persons;
- (ii) It is neutral with regards to prostitution; and
- (iii) It has limitations on the age of victims.

As a necessary introduction, the current definition of child trafficking will first be given and the intention of the drafters of this definition will be examined to establish the purpose which this definition is intended to serve. Subsequently, the identification of the weaknesses of this definition will demonstrate how it does not fulfill its intention of addressing child trafficking effectively. The repercussions of this inadequate definition of child trafficking are mainly in the national implementation of the international law with regards to child trafficking; which will be discussed in the later chapters.

## 2.1 Current Definition of Child Trafficking

A number of existing international instruments define child trafficking. Article 3 of the International Labour Organisation (ILO) C182 Worst Forms of Child Labour Convention 1999 states that child trafficking is a form of slavery. Under Article 7 of the Rome Statute of International Criminal Court which defines crimes against humanity, the trafficking of children is mentioned under the definition of enslavement as being a process whereby enslavement could occur.

However, the most comprehensive and widely utilized definition of child trafficking which has achieved international status and acceptance is contained in the Trafficking Protocol, but not as a separate or stand alone definition. It is included within the overarching definition of human trafficking. Therefore to understand the current definition of child trafficking, it is necessary to first outline the elements of the definition of human trafficking in the Trafficking Protocol:

*“ ‘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.”*

Article 3(a) of

the Trafficking Protocol

This definition of human trafficking can be broken down into three key elements:

- (i) the conduct associated with moving people across borders,
- (ii) with coercive or deceptive means,
- (iii) and for the purpose of exploitation.<sup>86</sup>

In addition, because any apparent, implied or express consent is mitigated by the use of deception, coercion, or other forms of violence, it is implied that consent will be relevant where

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<sup>86</sup> PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN (SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME), G.A. Res. 55/25, Annex II, U.N. Doc A/Res/55/25/Annex II (Nov. 15 , 2000)  
<[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf)> at 26 May 2009.

none of those coercive or deceptive means are present. Therefore, consent is irrelevant in identifying victims of human trafficking but is considered to be relevant as an element of evidence.<sup>87</sup>

The Trafficking Protocol makes a reference to children in its definition of human trafficking in subparagraph (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”*

Article 3(c) of the Trafficking Protocol deletes the requirement for coercion and deception; therefore, as long as a child has been moved elsewhere to be exploited, it is regarded as the trafficking of children. Thus, because of the removal of the requirement for coercion and deception, consent is considered irrelevant.<sup>88</sup> The reasons for child trafficking being defined as such requires examining the intention of the drafters of the existing definition in the Trafficking Protocol.

### **2.1.1 Intention of the Drafters**

In 1904, the understanding of human trafficking was such that it was suggested to affect only women and girls for ‘immoral purposes’ or prostitution with no distinctions made between forced or voluntary prostitution, or to issues of consent.<sup>89</sup> However, the 1921 Convention for the Suppression of the Traffic in Women and Children<sup>90</sup> expanded the understanding of human trafficking to apply to not only women and girls, but also to boys, with the focus remaining on trafficking for the purposes of prostitution only. The 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Convention)<sup>91</sup> adopted

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<sup>87</sup> Anna Gekht, ‘Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings’ (2008) Denver Journal of International Law and Policy, Volume 37 Number 1 29, 35.

<sup>88</sup> Dr. Ranee Khooshie Lal Panjabi, ‘Born Free Yet Everywhere in Chains: Global Slavery in the Twenty-First Century’ (2008) Denver Journal of International Law and Policy, Volume 37 Number 1 1, 20.

<sup>89</sup> International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83, Article 1.

<sup>90</sup> International Convention for the Suppression of the Traffic in Women and Children, opened for signature Sept. 30, 1921, 9 L.N.T.S. 416 (entered into force June 15, 1922).

<sup>91</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature Mar. 21, 1950, 96 U.N.T.S. 273 (entered into force June 25, 1951).

more gender-neutral language by referring to "persons" rather than to women and/or children but still focused only on trafficking for the purposes of prostitution, regardless of the consent of the "victim". As prostitution mainly affected women and female children, the political focus thus remained on them.<sup>92</sup> In addition, one of the numerous criticisms of the 1949 Convention is that its definition of trafficking limited the scope to prostitution and did not address trafficking for other purposes, such as other sex work, domestic, manual or industrial labour, or marriage, adoption or other intimate relationships.<sup>93</sup>

The 2000 Trafficking Protocol was drafted partly in response to these criticisms. It attempts to address human trafficking more effectively by adopting a holistic approach.<sup>94</sup> This effort is reflected in the Trafficking Protocol's definition of human trafficking which attempts to address all the existing types of human trafficking.

First, as exploitation is considered as fundamental to the trafficking experience, this definition attempts to address all the different types of trafficking by including a non-exhaustive list of exploitative acts. The definition thus incorporates trafficking for the other purposes besides prostitution, such as trafficking for the purposes of forced labour, slavery, servitude and the removal of organs. This demonstrates a shift away from prostitution as being the only identified purpose of human trafficking, widening the scope of the definition. In addition, this definition also attempts to identify all possible actors involved in human trafficking. Facilitators of trafficking are identified to include all those from recruiters to recipients of trafficked persons and it also identifies victims as to encompass all persons and not just women and children.

Thus the Trafficking Protocol's attempt to establish a holistic, and hence more effective, approach towards human trafficking by addressing all the different types of trafficking is the reason that the definition of child trafficking is drafted as a part of the overarching definition of human trafficking. Some may even argue that the current definition of human trafficking in the Trafficking Protocol has given special consideration to children by providing a separate paragraph in article 3 to define what constitutes the trafficking of children. However, even though it recognizes the increased

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<sup>92</sup> Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor', (2007) 36 Denv. J. Int'l L. & Pol'y 9, 13.

<sup>93</sup> Special Rapporteur on Violence Against Women, Report on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, at 10, delivered to the U.N. Economic & Social Council [ECOSOC] and the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000), at paras. 22, 24, 25.

<sup>94</sup> Discussed further in Chapter 3.

vulnerability of children as compared to adults by deleting the requirement of coercion or deception, this attempt to give extra protection to child victims of trafficking is insufficient to effectively address the complexity and gravity of this phenomenon.

As discussed in chapter one, the trafficking of children is different from the trafficking of adults and thus entails distinct responses and solutions.<sup>95</sup> Therefore, this all-inclusive definition in the Trafficking Protocol is particularly ineffective in addressing child trafficking. It is difficult to address the issues particular to child trafficking with a definition which has been sufficiently generalized to be all-inclusive. This inadvertently causes some limitations and weaknesses in the current definition of child trafficking.

## **2.2 Weaknesses of the Current Definition**

The current definition of child trafficking is merely a sub-text, necessitating that it draws from and refers back to the over-arching definition of human trafficking. The words “does not involve any of the means set forth in subparagraph (a) of this article” in subparagraph (c) of Article 3 requires going back to the definition of human trafficking as found in Article 3(a) of the Trafficking Protocol. Similarly, “exploitation” is not defined in the Trafficking Protocol definition of child trafficking and therefore again requires referring back to the general definition of human trafficking. Consequently, there is a danger of issues particular to child trafficking not being effectively addressed in the implementation of international obligations into national law.

For instance, the context in which the current definition has been placed limits the scope of the definition to transnational trafficking in children in the context of organized crime carried out by at least three or more persons. This means that trafficking in children with no transnational aspect and/or carried out by less than three persons falls outside the scope of the Trafficking Protocol.

There is also neutrality in the current definition with regards to criminalizing or legalizing prostitution; an issue that need not be debated and should be straightforward with regards to children.

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<sup>95</sup> Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, (2007) 36 Denv. J. Int'l L. & Pol'y 9, 15.

In addition, there is a limitation placed on the age of victims; there is no acknowledgment that the age of victims of child trafficking may be over 18 years at the point of extraction from the trafficking experience. The absence of such an acknowledgement, together with neutrality towards prostitution, places victims of child trafficking at further risk. Due to the age specification or lack thereof, victims of child trafficking are difficult to identify and/or classify if they are extracted from their trafficking experience at over 18 years of age. They are also at risk of being prosecuted themselves if the national law of the country they are found in penalizes prostitutes, with no distinction made towards child prostitutes.

Subsequently, because of this age limitation, victims of child trafficking may not receive their due protection and assistance in both legal and rehabilitation procedures.

### **2.2.1 Restricted to Transnational Organized Crime by Three or More Persons**

The Trafficking Protocol is a supplement to the United Nations Convention against Transnational Crime. Due to this connection, the scope of application of the child trafficking definition in the Trafficking Protocol is restricted to transnational child trafficking in the context of organized crime carried out by at least three or more persons.<sup>96</sup>

Article 4 of the Trafficking Protocol states that the Protocol shall apply “where those offences are **transnational** in nature and involve an **organized criminal group**” (emphasis added).

As this Protocol supplements the United Nations Convention against Transnational Organized Crime and is meant to be interpreted together with the Convention<sup>97</sup>, the meanings of the terms “transnational” and “organized criminal group” are found in Articles 2(a) and 3.2 of the Convention.

Article 2(a) of the Convention states that an “organized criminal group shall mean a structured group of **three or more persons**, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established [by] the Convention [or Trafficking Protocol], in order to obtain, directly or indirectly, financial or other material benefit” (emphasis added).

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<sup>96</sup> Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, (2007) 36 Denv. J. Int'l L. & Pol'y 9, 15.

<sup>97</sup> Article 1 of the Trafficking Protocol and Article 37.4 of the UN Convention against Transnational Organized Crime.

Article 3.2 of the Convention provides that an offence is transnational in nature if:

- (a) It is committed in **more than one State**;
- (b) It is **committed in one State but a substantial part** of its preparation, planning , directing or control **takes place in another State**;
- (c) It is **committed in one State but involves** an organized criminal group that engages in criminal activities in **more than one State**; or
- (d) It is **committed in one State** but has **substantial effects in another State**.(emphasis added)

Thus, transnational trafficking of children involves the movement of children between countries of origin, transit and destination. The 2008 UNICEF publication, *Child Trafficking in Europe, A Broad Vision to Put Children First*, provides definitions for these terms:<sup>98</sup>

(i) *Country of origin*

Country where a person is first recruited or abducted for trafficking. Usually, it is the home country of the trafficked person but it also may be the country of residence or the country to which the trafficked person has migrated before being recruited by traffickers.

(ii) *Transit country*

Country through which the trafficking route leads, for geographic or logistic reasons, before reaching the destination country.

(iii) *Country of destination*

Country to which a trafficked person is brought for the purpose of exploitation.

However, the trafficking of children from one place to another is not only transnational but can also happen within borders. The same 2008 UNICEF publication provides a definition of this process described as “internal trafficking”:

“Trafficking which occurs within a country’s own borders and the country is considered both a country of origin and destination.”<sup>99</sup>

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<sup>98</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 9.

<sup>99</sup> UNICEF, *Child Trafficking in Europe, A Broad Vision to Put Children First* (2008) at 9.

This type of trafficking is not a minor issue. In fact, the internal trafficking of children is an increasingly rampant phenomenon. For instance, in Sierra Leone, it has been reported that a “significant proportion of...trafficked persons appear to be trafficked internally, primarily from rural areas to towns and cities.”<sup>100</sup> In China, it has been reported that there is a “significant” number of internally trafficked children for sexual and labour exploitation estimating from 10,000 to 20,000 each year.<sup>101</sup> Also, there are reports that there are more indications of an increase of internal trafficking within the Western Balkans.<sup>102</sup>

Internal trafficking of children is increasing because it involves less risk compared to transnational child trafficking. Internal trafficking reduces the opportunity and ability of law enforcement to identify victims to subsequently detect the trafficker.<sup>103</sup> Also, there is less expense involved in the transportation of the child when the trafficking is within a country’s borders and there is also no need to provide false travel and/or identity documents for the victim.<sup>104</sup> Therefore, internal trafficking is a growing concern and even more so when it is often not recognized as trafficking, as in Sierra Leone.<sup>105</sup>

A 2005 UNICEF assessment of child trafficking in Sierra Leone found that there was much confusion amongst civil society, government and the population in general over what did and did

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<sup>100</sup> Rebecca Surtees, Child Trafficking in Sierra Leone (2005) UNICEF at 22  
<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>>  
accessed at 21 June 2011.

<sup>101</sup> China, HumanTrafficking.org <<http://www.humantrafficking.org/countries/china>> accessed at 21 June 2011.

<sup>102</sup> Trafficking of Women and Children for Sexual Exploitation in the EU: The Involvement of Western Balkans, Organised Crime (2006), EUROPOL at 6  
<[http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Western\\_Balkans\\_THB\\_Threat\\_Assessment.PDF](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Western_Balkans_THB_Threat_Assessment.PDF)> accessed at 21 June 2011.

<sup>103</sup> Trafficking of Women and Children for Sexual Exploitation in the EU: The Involvement of Western Balkans, Organised Crime (2006), EUROPOL at 6  
<[http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Western\\_Balkans\\_THB\\_Threat\\_Assessment.PDF](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Western_Balkans_THB_Threat_Assessment.PDF)> accessed at 21 June 2011.

<sup>104</sup> Trafficking of Women and Children for Sexual Exploitation in the EU: The Involvement of Western Balkans, Organised Crime (2006), EUROPOL at 21  
<[http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Western\\_Balkans\\_THB\\_Threat\\_Assessment.PDF](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Western_Balkans_THB_Threat_Assessment.PDF)> accessed at 21 June 2011.

<sup>105</sup> Rebecca Surtees, Child Trafficking in Sierra Leone (2005) UNICEF at 21  
<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>>  
accessed at 21 June 2011.



not constitute trafficking.<sup>106</sup> Many of the reported cases of sexual assault, street children and child labour were also cases of child trafficking but were not recognized as such whereas many cases of migration were classified as trafficking cases even where there was no clear evidence of exploitation.<sup>107</sup> Various surveys also revealed that the general population, even those who are more likely to have had encounters with child trafficking experiences, have limited knowledge on what constitutes child trafficking.<sup>108</sup> This confusion and limited knowledge is even more pronounced when it comes to the internal trafficking of children as it does not involve any aspect of migration or border-crossing.

Also, internal traffickers of children are less likely to be organized crime groups and are more likely to be smaller groups or individual perpetrators.<sup>109</sup> As discussed in chapter one, these perpetrators can even include family members.<sup>110</sup>

Therefore, there is arguably a strong need for a change when it comes to defining child trafficking, both transnational and internal. The fact that the Trafficking Protocol definition of child trafficking omits internal trafficking and fails to recognize that children could be trafficked by one or two persons, including family members, is a major weakness. The harm that arises from the trafficking of children is just as destructive to the victims and to society, no matter whether it is done by individual traffickers or organized criminal groups, internationally or internally. Therefore, regardless of the number of perpetrators involved and whether the trafficking was internal or international, the international law regime's definition of child trafficking should encompass these types of child trafficking.<sup>111</sup> The Trafficking Protocol's restricted scope of application to

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<sup>106</sup> Rebecca Surtees, *Child Trafficking in Sierra Leone* (2005) UNICEF at 21  
<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>>  
accessed at 21 June 2011.

<sup>107</sup> Rebecca Surtees, *Child Trafficking in Sierra Leone* (2005) UNICEF at 21  
<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>>  
accessed at 21 June 2011.

<sup>108</sup> Rebecca Surtees, *Child Trafficking in Sierra Leone* (2005) UNICEF at 21  
<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>>  
accessed at 21 June 2011.

<sup>109</sup> *Trafficking of Women and Children for Sexual Exploitation in the EU: The Involvement of Western Balkans, Organised Crime* (2006), EUROPOL at 21  
<[http://www.europol.europa.eu/publications/Serious\\_Crime\\_Overviews/Western\\_Balkans\\_THB\\_Threat\\_Assessment.PDF](http://www.europol.europa.eu/publications/Serious_Crime_Overviews/Western_Balkans_THB_Threat_Assessment.PDF)> accessed at 21 June 2011.

<sup>110</sup> Refer to Chapter One at 1.2.1

<sup>111</sup> Ann D. Jordan, *The Annotated Guide to the Complete UN Trafficking Protocol*, May 2002 (Updated August 2002) 13.

transnational trafficking by organized criminal groups limits the effectiveness of the Trafficking Protocol in addressing internal trafficking in children.

### **2.2.2 Neutral with regards to Prostitution**

In the case of adults, the ongoing debate about legalizing or criminalizing prostitution, which stems largely from the question whether or not any form of prostitution can be considered as ‘free choice’, has led to the decision to legalize or criminalize prostitution to be left to the individual States.<sup>112</sup> This has warranted the need for international anti-trafficking treaties, such as the Trafficking Protocol, to remain neutral about the issue to receive support from the international community. However, in the case of children, there need not be such a debate concerning the criminalization of prostitution and related activity. The concept of ‘free choice’ is irrelevant to child prostitution as sex with a child can never involve the consent of the child. Widespread, global agreement from the international community on this matter is reflected in the support of the Convention on the Rights of the Child 1989 (CRC) and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC).<sup>113</sup> The CRC and the OPSC clearly state that children are to be protected from “all forms of sexual exploitation and sexual abuse”.<sup>114</sup> Therefore, another failure of the definition of child trafficking in the Trafficking Protocol is to explicitly criminalize child prostitution and related activity, especially when one of the major purposes of child trafficking is prostitution and similar activity. Instead, the listed exploitative acts given at the end of the definition in the Trafficking Protocol implies that this list is only meant to function as examples of “exploitation” and not to oblige States Parties to criminalize these forms of exploitation.

This failure to explicitly require State Parties to criminalize the procurement and provision of child prostitutes is a weakness in the child trafficking definition as it places victims of child trafficking at further risk of being denied their rights to protection and justice. They are at risk of being wrongly identified as criminals, prosecuted and penalized, instead of being rightly recognized as victims to be protected, rehabilitated and given justice and effective redress. That being said, it must be

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<sup>112</sup> Joyce Outshoorn, ‘The Political Debates on Prostitution and Trafficking of Women’, 12 Soc. Pol.: Int'l Stud. Gender, St. & Soc'y 141 (2005), for a discussion of the history of this debate.

<sup>113</sup> The CRC is the most widely adopted human rights treaty in history with up to 193 State Parties and the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 has 137 State Parties.

<sup>114</sup> Article 34 of the CRC.

noted that there are international instruments which call for the criminalization of child prostitution and similar activity. The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC) is a prime example of such an instrument. However, as further discussed in the next chapter, instruments such as the OPSC do not approach these matters from a trafficking perspective. Such instruments do not comprehend the complexity of child trafficking where the victims, trafficked for such exploitation, may start their trafficking experience at a young age but are only extracted at the age of majority, over 18 years old. Therefore, the full effect of this particular weakness is more clearly seen when taken into consideration with the next identified weakness of the Trafficking Protocol child trafficking definition; which is the limitation placed on the age of victims.

### **2.2.3 Limitation on the Age of Victims**

The Trafficking Protocol defines a child in article 3(d) as “any person under eighteen years of age”. Although this definition is generally accepted where it concerns child trafficking and would still serve well in anti-child trafficking efforts, the limitation placed on the age of victims must be considered in light of another aspect of child trafficking, which is that its victims age beyond 18 years old. This puts the Trafficking Protocol’s definition of child trafficking in perspective as it omits to recognize that victims of child trafficking could be over 18 years of age at extraction from the trafficking experience and would thus be considered to have undergone their trafficking experience as adults.

This limitation on the age of victims is another major weakness of the Trafficking Protocol’s definition of child trafficking as it increases the likelihood of misidentifying victims of child trafficking as victims of the trafficking in adults. This sort of misidentification leads to many unfavorable consequences. For instance, the misidentification of victims results in the misclassification of cases of trafficking which in turn leads to the erroneous, although deserved, prosecution of traffickers. Instead of being prosecuted for child trafficking, these traffickers would instead be prosecuted as traffickers of adults. This is disadvantageous as the trafficking of adults is harder to prove than the trafficking of children. It requires the satisfaction of more elements<sup>115</sup>

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<sup>115</sup> PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN (SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME), G.A. Res. 55/25, Annex II, U.N. Doc A/Res/55/25/Annex II (Nov. 15, 2000)

and means that the issue of consent is relevant as evidence<sup>116</sup> whereas it is completely irrelevant in relation to the trafficking of children.<sup>117</sup> The rationale for making consent irrelevant in child trafficking is that its victims are more susceptible to coercion, deception, control and domination, and therefore easier to procure “consent” from, especially after a long period of duress. If these victims are misidentified and traffickers are prosecuted for the trafficking in adults instead of children, there could possibly be a miscarriage of justice as consent of the victim can be used as evidence towards the acquittal of the trafficker.

Also, the penalty for the offence of trafficking in adults is often lower than for trafficking in children. For instance, in Thailand, the 2008 Anti-Trafficking in Persons Act B.E 2551<sup>118</sup> stipulates that the penalty for the trafficking in adults is imprisonment from four to ten years and a fine from eighty thousand to two hundred thousand Baht. However, the penalty for the trafficking in children is imprisonment from six to fifteen years and a fine from one hundred twenty thousand to three hundred thousand Baht, depending on the age of the victim.<sup>119</sup> Also, in the United States of America, the penalty for the trafficking in adults is up to 20 years imprisonment where the penalty for the trafficking in children is up to 40 years imprisonment with the possibility of life imprisonment if the victim is under 14 years old.<sup>120</sup> Furthermore, if these misidentified victims were trafficked for the purposes of sexual exploitation, depending on the stance the relevant national law has taken towards prostitution, these victims may be treated as criminals instead of victims.<sup>121</sup> In addition, the misclassification of cases of trafficking would result in the erroneous collection and analysis of data.

Moreover, misidentifying victims would result in those victims not receiving the age and gender-specific help needed. It must be acknowledged that harm to the child could occur even during rehabilitation. This is because if the appropriate age and gender-specific help is not administered to the victim, not only is the victim unable to recover properly and be reintegrated into society,

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<[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf)> at 26 May 2009.

<sup>116</sup> Anna Gekht, ‘Shared but Differentiated Responsibility: Integration of International Obligations in Fight Against Trafficking in Human Beings’ (2008) *Denver Journal of International Law and Policy*, Volume 37 Number 1 29, 35.

<sup>117</sup> Dr. Ranee Khooshie Lal Panjabi, ‘Born Free Yet Everywhere in Chains: Global Slavery in the Twenty-First Century’ (2008) *Denver Journal of International Law and Policy*, Volume 37 Number 1 1, 20.

<sup>118</sup> The Anti-Trafficking in Persons Act B.E 2551 (2008).

<sup>119</sup> Section 52 of The Anti-Trafficking in Persons Act B.E 2551 (2008).

<sup>120</sup> Chapter 77 of the United State's Code Title 18.

<sup>121</sup> Refer to discussion at 2.2.2

the victim may suffer further harm. This could happen through re-victimization into trafficking or choosing to enter into a lifestyle not dissimilar from his or her trafficking experiences. For example, a child who was trafficked for the purposes of sexual exploitation might, after extraction from trafficking at a later age, become a prostitute due to feelings of self-loathing and unworthiness. Even though there is little actual evidence for this, various professionals involved in combating trafficking have voiced such a fear and it is still alarming that a significant number of children disappear after they are extracted from trafficking with no information available about what happened to them.<sup>122</sup>

### **2.3 Conclusion**

In conclusion, as a result of child trafficking being addressed as a sub-issue to human trafficking in general, the current definition of child trafficking in the Trafficking Protocol fails to address the special needs and interests of victims of child trafficking. This definition is restricted to transnational child trafficking by organized criminal groups by virtue of the connection between the Trafficking Protocol and the United Nations Convention against Transnational Organized Crime. This means that the scope of the Trafficking Protocol does not cover internal trafficking in children and/or carried out by less than three persons. This is a significant weakness as internal trafficking in children is increasingly rampant and usually is carried out by groups smaller than organized criminal groups. In fact, the internal trafficking in children is more likely to be done by individual perpetrators, including family members of the victim.

Furthermore, the current child trafficking definition adopts a neutral stance towards prostitution. This places victims of child trafficking at further risk of being wrongly treated as criminals instead of as victims, which is even more likely with the limitation placed upon the age of the victims, because there is a failure to recognize that victims of child trafficking may be over 18 years of age at the point of extraction from their trafficking experience. This could lead to victims of child trafficking being treated as victims of trafficking in adults. Such misidentification of victims leads to many subsequent problems such as the misclassification of trafficking cases, erroneous prosecution of traffickers, possible miscarriage of justice, victims not receiving the age and gender-specific help needed and the erroneous collection and analysis of data.

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<sup>122</sup> UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe 2006* at 8.5.2.

These weaknesses of the current definition of child trafficking limit the effectiveness of the Trafficking Protocol as a specific instrument in addressing child trafficking, the opposite effect to the original intention of the drafters. Therefore, there is a strong need for the establishment of a new definition of child trafficking which overcomes the shortcomings identified in this chapter.

# Chapter 3

## International Law Framework

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As noted in Chapter Two, the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol),<sup>123</sup> supplementing the UN Convention on Transnational Organized Crime<sup>124</sup> defines child trafficking as a sub-issue to the trafficking in adults which limits its effectiveness in combating the trafficking in children. There exists a framework of international law consisting of a number of treaties and soft law instruments attempting to address child trafficking and its related issues, and this chapter examines the success of this framework in combating child trafficking. Thus as a necessary introduction, the development of the international law against the trafficking in persons illustrates the type of system which international law has sought over the years to establish to combat human trafficking.

An outline of the current international law framework pertaining to child trafficking follows and shows that it is a patchwork framework with overlaps and gaps. These international instruments all try to address different aspects of child trafficking while dealing with the same subject matter. In addition, most of the instruments in this framework are not even necessarily focused on child trafficking. Moreover, the patchwork framework has weaknesses, such as:

- (i) each international instrument has a restricted scope;
- (ii) essential human rights provisions in relation to children exist as an idealistic framework of principles which act as a standard but are difficult to realize; and
- (iii) key provisions and guidelines are discretionary.

As a result, the current international law regime is ineffective in combating child trafficking and does not fulfill its purpose of establishing a holistic approach against the trafficking in children.

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<sup>123</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, opened for signature Dec. 12, 2000, S. Treaty Doc. No. 108-16, 40 I.L.M. 335 (entered into force Dec. 25, 2003) [hereinafter Trafficking Protocol 2000]. Australia, Brazil, Malaysia and the United States are among the 137 State Parties to this Protocol with Haiti, India and Thailand as only signatory States.

<sup>124</sup> United Nations Convention Against Transnational Organized Crime, opened for signature Dec. 12, 2000, S. Treaty Doc. No. 108-16, 40 I.L.M. 335 (entered into force Sept. 29, 2003).

### 3.1 Development of International Law

The development of the international law against human trafficking shows that a holistic approach is sought as an ideal. International anti-trafficking treaties were established beginning in the early 1900s. The 1904 International Agreement for the Suppression of the White Slave Traffic (1904 White Slave Traffic Agreement)<sup>125</sup> and the subsequent 1910 International Convention on the Suppression of the White Slave Traffic (1910 White Slave Traffic Convention)<sup>126</sup> both limited the scope of the international law regime to trafficking in white women or girls for the purposes of prostitution.<sup>127</sup> In the 1904 White Slave Traffic Agreement, the protection of victims was emphasized rather than the prosecution or punishment of perpetrators. However, this was considered ineffective and there was a shift away from the victim-centered approach to the perpetrator-centered approach when the 1910 White Slave Traffic Convention sought to punish procurers<sup>128</sup> of victims of human trafficking.

In the 1920s and 1930s, the League of Nations established two anti-trafficking treaties with a perpetrator-centered approach: the 1921 Convention for the Suppression of the Traffic in Women and Children (1921 Convention);<sup>129</sup> and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age (1933 Convention).<sup>130</sup> The 1921 Convention called for the prosecution of persons involved in trafficking in women and children,<sup>131</sup> and the 1933 Convention called for the punishment of persons who participate in the trafficking in women of full age, regardless of the woman's consent. The scope of these two treaties remained limited to trafficking for prostitution but the 1921 Convention recognized the links between migration and

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<sup>125</sup> International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>126</sup> International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 3 L.N.T.S. 278 [hereinafter 1910 White Slave Traffic Convention].

<sup>127</sup> Special Rapporteur on Violence Against Women, Report on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, at 10, delivered to the U.N. Economic & Social Council [ECOSOC] and the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000); Article 1 of the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>128</sup> Article 1 and Article 2 of the 1910 White Slave Traffic Convention.

<sup>129</sup> International Convention for the Suppression of the Traffic in Women and Children, opened for signature Sept. 30, 1921, 9 L.N.T.S. 416 (entered into force June 15, 1922)[hereinafter 1921 Convention].

<sup>130</sup> International Convention for the Suppression of Traffic in Women of Full Age, opened for signature Oct. 11, 1933, 53 U.N.T.S. 50 (entered into force Aug. 24, 1934).

<sup>131</sup> Article 2 of the 1921 Convention.



the risk of migrants being trafficked by calling for the licensing of employment agencies,<sup>132</sup> and the protection of women and children who immigrate or emigrate.<sup>133</sup>

Following World War II, the United Nations attempted to establish an anti-trafficking treaty with a more gender-neutral approach to trafficking: the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Trafficking Convention).<sup>134</sup> It identified victims as 'persons' rather than 'women and/or children'. Even so, the scope of the 1949 Trafficking Convention remained squarely on trafficking in persons for the purposes of prostitution, regardless of the consent of the victim. Notably, it sought to criminalize acts associated with prostitution by expanding criminalization to persons who keep, manage, knowingly finance or take part in the financing of brothels, or knowingly let or rent a building or other place for the purpose of the prostitution.<sup>135</sup> However, it did not criminalize prostitution itself<sup>136</sup> and because of its limited scope on prostitution, the political focus remained on women and children.<sup>137</sup>

Furthermore, the 1949 Trafficking Convention was generally criticized for:

- (a) failing to take a human rights or victims' rights approach,
- (b) limiting the scope to prostitution and not addressing trafficking for other purposes for which trafficking was said to be undertaken, such as other sex work, domestic, manual or industrial labour, or marriage, adoption or other intimate relationships,
- (c) failing to protect victims or 'sex workers' from being prosecuted, and
- (d) sanctioning the expulsion of victims of trafficking.<sup>138</sup>

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<sup>132</sup> Article 6 of the 1921 Convention.

<sup>133</sup> Article 6 and Article 7 of the 1921 Convention.

<sup>134</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, opened for signature Mar. 21, 1950, 96 U.N.T.S. 273 (entered into force June 25, 1951)[hereinafter 1949 Trafficking Convention].

<sup>135</sup> Article 2 of the 1949 Trafficking Convention.

<sup>136</sup> Special Rapporteur on Violence Against Women, Report on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, at 10, delivered to the U.N. Economic & Social Council [ECOSOC] and the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000), at para. 22.

<sup>137</sup> Alice Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor', (2007) 36 Denv. J. Int'l L. & Pol'y 9, 13.

<sup>138</sup> Special Rapporteur on Violence Against Women, Report on Trafficking in Women, Women's Migration and Violence Against Women, Submitted in Accordance with Commission on Human Rights Resolution

Partly in response to these criticisms, the more recent 2000 Trafficking Protocol was established. Its three specific purposes are:

- (i) to prevent and combat trafficking in persons, paying particular attention to women and children;
- (ii) to protect and assist the victims of such trafficking, with full respect for their human rights; and
- (iii) to promote cooperation among States Parties in order to meet those objectives.<sup>139</sup>

The Trafficking Protocol is the first international anti-trafficking treaty to explicitly state that the protection of the human rights of trafficking victims is one of its objectives. By doing so, it incorporates aspects of a victim-centered approach as well as a perpetrator-centered approach to human trafficking. Thus it is clear that the Trafficking Protocol was intended as a holistic international agreement against human trafficking. This advancement of the international law against trafficking in persons since the early 1900s implies that a holistic approach against trafficking in persons, including children, is sought as an ideal.

### **3.2 The Child Trafficking International Law Framework**

The primary international instrument addressing child trafficking is the Trafficking Protocol,<sup>140</sup> which is supposed to establish a holistic approach against child trafficking. However, it has its shortcomings as it addresses child trafficking only as a sub-issue to the trafficking in adults. Therefore, the Trafficking Protocol is supplemented by a framework of other international instruments.

This patchwork framework consists of over a dozen relevant international instruments.<sup>141</sup> Because of the staggering amount of law and guidelines available, it might seem that child trafficking and its related issues would be sufficiently addressed. However, the reality is just the opposite. This patchwork framework has many overlaps and gaps which result in the ineffective combat of trafficking in children. These overlaps and gaps occur either because each international instrument attempts to address the same issue from different perspectives, there is a repetition

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1997/44, at 10, delivered to the U.N. Economic & Social Council [ECOSOC] and the Commission on Human Rights, U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000), at paras. 22, 24, 25.

<sup>139</sup> Article 2 of the Trafficking Protocol 2000.

<sup>140</sup> Refer to Annex 2 Table 2 for further information on the Trafficking Protocol.

<sup>141</sup> Refer to Annex 2 Table 1.

of similar provisions or the provisions are not concerned with addressing child trafficking specifically. Examples are evident in the outlined five areas of international law: human rights of children, criminal justice, asylum, border control, and international cooperation and communication.

### **3.2.1 Human Rights of Children**

The primary treaty addressing the protection of human rights of trafficked children is the Convention on the Rights of the Child 1989 (CRC), the most widely adopted human rights treaty in history.<sup>142</sup> The CRC has two optional protocols with specific focus on the protection of child victims of sexual exploitation and armed conflict: the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC);<sup>143</sup> and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000 (OPAC).<sup>144</sup> Additional relevant international instruments include the African Charter on the Rights and Welfare of the Child 1990 (ACRC)<sup>145</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>146</sup>

There are overlaps in this area of international law although it may seem that each instrument approaches the protection of human rights of trafficked children from different perspectives. The CRC addresses all children in general, the OPSC and OPAC have a more specific focus on child victims of sexual exploitation and armed conflict, the ACRC addresses the children in Africa and the ECHR addresses both adults and children in Europe. The reality is that each of these instruments echoes provisions expressed in the other instruments. They all essentially serve the same purpose, providing protection and assistance to trafficked children from exploitation,<sup>147</sup> in legal procedures such as in the criminal justice process<sup>148</sup> and through rehabilitation.<sup>149</sup> There is also a constant emphasis in each of these instruments, with the exception of the ECHR,<sup>150</sup> that the

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<sup>142</sup> Refer to Annex 2 Table 3 for further information on the CRC.

<sup>143</sup> Refer to Annex 2 Table 4 for further information on the OPSC.

<sup>144</sup> Refer to Annex 2 Table 5 for further information on the OPAC.

<sup>145</sup> Refer to Annex 2 Table 9 for further information on the ACRC.

<sup>146</sup> Refer to Annex 2 Table 10 for further information on the ECHR.

<sup>147</sup> Articles 19, 22, 32-34, and 36 of the CRC; Article 9 of the OPSC ; Articles 1, 15, 16, 22, 24, 27, 29 of the ACRC; Articles 3, 4, 17 and 53 of the ECHR.

<sup>148</sup> Articles 7, 8 and 9 of the OPSC.

<sup>149</sup> Article 19 of the CRC; Article 9 of the OPSC; Article 6 of the OPAC; Article 13 of the ECHR.

<sup>150</sup> ECHR is more concerned with the protection of human rights in general rather than just children.

best interests of the child are to be the primary consideration in all resulting actions and policies.<sup>151</sup>

As none of these instruments are directly focused on the trafficking in children, there are numerous soft law instruments providing comprehensive guidance specifically to the protection of child trafficking victims such as the 2006 UNICEF Guidelines on the Protection of Child Victims of Trafficking, the 2006 UNICEF Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe, and the 2008 UNICEF Child Trafficking in Europe: A Broad Vision to Put Children First. These guidelines all provide similar detailed recommendations with regards to identification measures, appointment of a guardian, registration and documentation procedures, interim care and protection, procedures for deciding on durable solutions, access to justice, security and protection of the victim.

In addition to these overlaps pertaining to the protection of human rights of trafficked children, there are also gaps. One such gap is illustrated by Article 1 of the ACRC, which call for the protection of children from customs or practices inconsistent with the ACRC, and its impact on trafficking in children for forced marriage. Article 1 of the ACRC calls for the discouragement of any custom, tradition, cultural or religious practice that is inconsistent with the ACRC, for instance, the use of children in cults or forced marriage.<sup>152</sup> Notably, the word ‘discouraged’ in this provision results in an extremely weak obligation which is unlikely to lead to the eradication of such customs or practices inimical to the human rights of children. Furthermore, there are no specifics given as to the factors used to determine what is inconsistent with the ACRC. An example of a contentious area would be the trafficking in children for forced child marriage.

As neither the ACRC nor the Trafficking Protocol specifically address child trafficking for the purposes of forced marriage, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages 1962 (Marriage Convention)<sup>153</sup> provides some guidance to fill this gap. The purpose of the Marriage Convention was to ensure that there is “complete freedom in

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<sup>151</sup> Article 3 of the CRC, Article 8(1) and (3) of the OPSC, Preamble of the OPAC, and Articles 4 of the ACRC.

<sup>152</sup> Bill Graham (with the Plight of the Child International), *Child Trafficking Must Stop* (2010) <<http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=186407>> at 19 August 2010; Jon Gambrell, *Tony Alamo Cult Compound Raided in Child Porn Case*, Associated Press, 20 September 2008 < <http://religiouschildabuse.blogspot.com/2008/09/tony-alamo-cult-compound-raided-in.html>> at 19 August 2010.

<sup>153</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Nov. 9, 1962, 521 U.N.T.S. 231[hereinafter Marriage Convention].

the choice of a spouse” and to completely eliminate “child marriages and the betrothal of young girls before the age of puberty.”<sup>154</sup>

Article 1(1) of the Marriage Convention provides that “no marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.” Consent of both parties is then central to the legality of the marriage. However, the Marriage Convention also does not go far enough in specifying what is meant by ‘consent’ or how consent is determined or disputed.<sup>155</sup> This may raise difficult issues of consent as a child cannot consent to being trafficked for exploitation, including marriage, but domestic law can simply provide for the recital of the wedding vows as evidence of consent to such marriage.<sup>156</sup>

Moreover, although the Marriage Convention stipulates in Article 2 that State Parties are to specify a minimum age for marriage in domestic legislation, it does not specify an absolute minimum. The only hint towards this issue is in the preamble where it admonishes the betrothal of girls before puberty. But as this is mentioned in the preamble, it is neither mandatory nor binding on States. This is a stumbling block as the minimum age for marriage specified by domestic legislation can be overridden by customary law.<sup>157</sup> Customary law is usually local, tribal or religious law, which often sets a lower age limit for the bride and/or permits early marriage with the consent of the girl’s parents or guardian.<sup>158</sup> This again raises contentious issues as family members are not exempt from trafficking their own child or children.

The discussion above reveals some of the overlaps and gaps in the patchwork framework of international law addressing the trafficking in children. It shows the beginnings of a framework where provisions relevant to protecting victims or potential victims of child trafficking have to be

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<sup>154</sup> Preamble of the Marriage Convention at 232.

<sup>155</sup> “Competent authority” is not defined and it seems that this was to encompass religious and other partisan authorities as long as the marriage ceremonies performed by them are given legal effect under domestic law.

<sup>156</sup> The Forum on Marriage and the Rights of Women and Girls, Early Marriage: Whose Right to Choose? (May 2000) <<http://www.crin.org/docs/resources/publications/WhoseRighttoChoose.pdf>> (September 22, 2010) at app. 2.

<sup>157</sup> The Forum on Marriage and the Rights of Women and Girls, Early Marriage: Whose Right to Choose? (May 2000) <<http://www.crin.org/docs/resources/publications/WhoseRighttoChoose.pdf>> (September 22, 2010) at app. 2.

<sup>158</sup> United Nations Children's Fund, Innocenti Research Centre, Early Marriage; Child Spouses, 7 Innocenti Digest (Mar. 2001) <<http://www.unicef-icdc.org/publications/pdf/digest7e.pdf>> (September 22, 2010) at 7.

sourced from various instruments, most of which are not particularly concerned with child trafficking. Repetition of similar provisions and guidelines, along with gaps in the framework, not only results in an inefficient approach to the protection of human rights of child victims of trafficking but also diminishes the effectiveness of this framework in combating child trafficking.

### **3.2.2 Criminal Justice**

The Trafficking Protocol provides a broad scope for the criminalization of trafficking in children in Articles 5 and 8. Article 5 calls for States to criminalize trafficking in persons, including attempts to commit trafficking, participation as an accomplice in trafficking and the organization or direction of other persons to commit trafficking; and Article 8 provides for the criminalization of corruption of public officials.<sup>159</sup> However, Article 5 of the Trafficking Protocol fails to require the criminalization of offences which were committed extraterritorially by non-nationals. Considering that child trafficking is a transnational phenomenon, this gap is significant as it makes the investigation and subsequent prosecution of perpetrators difficult and in some cases, impossible. This is because before criminal jurisdiction can be invoked by a State, the person in question must either be a national or resident of the State and the offence committed within the territory of that State, or be a national of the State, present in the State and the offence committed abroad, or the victim is a national of the State. If there is no such nexus, whereby the alleged offender is a non-national allegedly having committed the offence in another State where the victim is not a national of the State, the State in which the alleged offender is currently residing in is unable to exercise criminal jurisdiction over such a person.

Also, the Trafficking Protocol does not address the criminalization of the specific forms of exploitation of trafficked children. This is dealt with in other treaties such as the OPSC, the OPAC, and the International Labour Organization C182 Worst Forms of Child Labour Convention 1999 (ILO C182).

Each of these treaties has a specific focus: the OPSC is concerned with the sexual exploitation and sale of children; the OPAC is concerned with the use of children in armed conflict; and the ILO C182 is concerned with the worst forms of child labour. Even so, there are overlaps as there is unnecessary repetition amongst these instruments. All of them have similar provisions

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<sup>159</sup> Under Article 8 of the Trafficking Protocol, it would be a criminal offence to offer or give a public official or for a public official to accept or solicit an undue advantage in order that the official act or refrain from acting in the exercise of his or her official duties.

contributing towards the achievement of one purpose, the prevention and suppression of exploitation of children. For instance, each instrument obliges States to identify the particular forms of exploitation of children that occur within each individual State and to criminalize these forms of exploitation.<sup>160</sup> The ILO C182 also has guidelines in the R190 Worst Forms of Child Labour Recommendation 1999 (R190)<sup>161</sup> as to what forms of child labour should be criminalized. The R190 provides details as to what the 'programmes of action'<sup>162</sup> need to address, what is considered to be hazardous work for children,<sup>163</sup> what information should be gathered and kept up to date to determine priorities for prohibition and elimination of the worst forms of child labour and what member States should do to this end including gathering and exchanging information, detecting, prosecuting and registering offenders. If there was a child trafficking-specific instrument which provides for both the criminalization of child trafficking and its resultant forms of exploitation, the obligations for the provision of such measures need not be sourced from separate international instruments.

### **3.2.3 Asylum**

The Trafficking Protocol calls for the adoption of measures which permit victims of trafficking in persons to remain in the relevant State's territory, temporarily or permanently, and not to repatriate those victims.<sup>164</sup> Even so, the principal treaty governing the provision of asylum for victims of trafficking is the Convention Relating to the Status of Refugees 1951 (1951 Refugee Convention). This Convention provides for the international protection of individuals outside their country of origin who have a well-founded fear of being persecuted in their countries of origin on account of their race, religion, nationality, membership of a particular social group, or political opinion.<sup>165</sup>

In the United Nations High Commissioner for Refugees (UNHCR) 2006 Guidelines on International Protection, the UNHCR identified victims of trafficking or those at risk of trafficking as possibly being refugees within the meaning of the 1951 Refugee Convention. It also adopted the definition

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<sup>160</sup> Article 3 of the OPSC, Article 4 of the OPAC, Articles 3, 4 and 7 of the ILO C182.

<sup>161</sup> Refer to Annex 2 Table 7 for further information on the R190.

<sup>162</sup> Article 6 of the ILO C182.

<sup>163</sup> Article 3(d) of the ILO C182.

<sup>164</sup> Article 7 and 8 of the Trafficking Protocol.

<sup>165</sup> Article 1A(2) of the 1951 Refugee Convention.

of trafficking as provided by the Trafficking Protocol<sup>166</sup> and stated that a fear of trafficking can be categorized as persecutory conduct but that it can also include other types of persecutory conduct that arose because of the trafficking experience, such as community and family ostracism, social exclusion, re-traumatization or victimization, or other forms of violence. There have been some cases in Australia<sup>167</sup> and Canada<sup>168</sup> which have reinforced this approach.

Notably, there is a significant gap in this area of international law as there are no obligations or guidelines explicitly concerning the provision of asylum for child victims of trafficking. It may seem that the current provisions are sufficient for application to children. However, the consequence of the existing framework is that child victims of trafficking are forced to navigate national asylum systems designed primarily for adults and also have to satisfy the same requirements as adults to receive asylum.<sup>169</sup> Therefore, the reality is that child victims of trafficking require specific attention in this area of international law as they are more vulnerable than adults and have special needs and interests as compared to adults.<sup>170</sup>

### **3.2.4 Border Control**

There are only a few provisions in international law which deal with border control for the specific purpose of detecting and preventing human trafficking. Article 11 of the Trafficking Protocol calls for States to take measures to strengthen border controls including preventing the misuse of commercial carriers as a means of transport for trafficking offences and the increase of cooperation and communication amongst border control agencies. Also, Article 3 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 (1956 Slavery Convention)<sup>171</sup> emphasizes the importance of ensuring proper border control by States.

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<sup>166</sup> UNHCR, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, P 8, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006). See also UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

<sup>167</sup> *VXAJ v. Minister for Immigration & Anor*, (2006) F.M.C.A. 234 (Australia) (granting status to sex workers who might be forcibly re-trafficked as being a "particular social group").

<sup>168</sup> *In re X*, [1999] C.R.D.D. T98-06186 1, 4&7 (regarding Thai woman in sex trade).

<sup>169</sup> The provision of asylum for victims of child trafficking is further discussed in Chapter 4.

<sup>170</sup> Refer to Chapter One for further discussion on the differences between the trafficking in adults and children.

<sup>171</sup> Refer to Annex 2 Table 8 for further information on the 1956 Slavery Convention.



Again, there is a noteworthy gap in this area of international law. There are no specifics as to the type of border control measures that need to be established to prevent and detect child trafficking. Child trafficking is harder to detect than the trafficking in adults as not only is it easier to control children, it is easier for traffickers to deceive border officials into believing that the child or children they are trafficking are their own children or relatives. In fact, there are even children who are trafficked by their own relatives, making it all the more difficult for detection.<sup>172</sup> Thus there needs to be border control measures which are customized towards the prevention and detection of the trafficking in children.

### **3.2.5 International Cooperation and Communication**

International cooperation and communication regarding eradicating child trafficking cannot be ignored and is confirmed as such by numerous international instruments such as the Trafficking Protocol, 1956 Slavery Convention, ILO C182 and OPSC. These treaties all emphasize that international cooperation and communication is essential to the achievement of their purposes<sup>173</sup> but each at best only gives a limited illustration as to what this actually entails. For instance, the Trafficking Protocol and ILO C182 call for bilateral and multilateral cooperation to strengthen preventive measures such as the provision of education, poverty eradication programs and social and economic development;<sup>174</sup> the 1956 Slavery Convention calls for the exchange of information;<sup>175</sup> and the OPSC calls for inter-State cooperation towards mutual legal assistance in relation to investigation of criminal or extradition proceedings.<sup>176</sup> Moreover, soft law instruments such as the R190 simply repeat what has already been stated in these treaties.<sup>177</sup> None of these instruments actually establish a proper framework of international cooperation and communication for States to adopt towards eradicating child trafficking. As a result of this gap, this area of international law leaves much to be desired.

## **3.3 Weaknesses of the Framework**

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<sup>172</sup> Refer to Chapter One for more information and further discussion on the differences between trafficking in adults and children.

<sup>173</sup> Article 8 of the 1956 Slavery Convention, Article 10 of the OPSC and the Preamble of the ILO C182.

<sup>174</sup> Article 9 of the Trafficking Protocol and Article 8 of the ILO C182.

<sup>175</sup> Article 8 of the 1956 Slavery Convention.

<sup>176</sup> Article 6 of the OPSC.

<sup>177</sup> Article 16 of the R190.

In sum, the existing overlaps and gaps in the framework of international law pertaining to child trafficking, has made the efforts against child trafficking inefficient and inadequate.<sup>178</sup> In addition to these overlaps and gaps, this framework also has weaknesses that further emphasize its failure to establish a holistic approach against child trafficking, such as:

- (i) each international instrument has a restricted scope;
- (ii) essential human rights provisions in relation to children exist as an idealistic framework of principles which act as a standard but are difficult to realize; and
- (iii) key provisions and guidelines are discretionary.

### **3.3.1 Restricted Scope**

The consequence of a patchwork framework of international law addressing child trafficking is that each international instrument has a restricted scope. Individual States face difficulties in their implementation of anti-child trafficking measures as they have to navigate a patchwork framework where most of these instruments are not even concerned with child trafficking in particular. Moreover, the establishment of a holistic approach against child trafficking is hindered as each instrument is concerned with fulfilling one particular purpose, whether it is law enforcement, the protection of human rights or others.

For instance, the Trafficking Protocol is primarily a law enforcement instrument, not a human rights instrument. Several factors contribute to this inference. First, the Trafficking Protocol is attached to the United Nations Convention against Transnational Organized Crime and falls under the responsibility of the United Nations Office on Drugs and Crime (UNODC).<sup>179</sup> Also, the United Nations Crime Commission, a law enforcement body, developed this Protocol with the main purpose of targeting specific types of crime, evidenced by the fact that the Trafficking Protocol was established at the same time as the Protocol against the Smuggling of Migrants by Land, Sea and Air.<sup>180</sup>

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<sup>178</sup> Refer to Chapter One for more information and further discussion on the differences between trafficking in adults and children.

<sup>179</sup> The website of the United Nations Office on Drugs and Crime can be found at <<http://www.unodc.org>> at September 20, 2010.

<sup>180</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, (supplementing the United Nations Convention against Transnational Organized Crime), G.A. Res. 55/25, Annex III, U.N. Doc A/Res/55/25/Annex III (Nov. 15, 2000) [hereinafter Smuggling Protocol 2000].

Furthermore, the first obligation of State Parties in the Trafficking Protocol is to criminalize the trafficking of human beings and recognize it as a serious and specific crime.<sup>181</sup> Also, the inclusion of the definition of human trafficking in the Trafficking Protocol seems to read more like a criminal offense and not a human rights violation. Although the Trafficking Protocol does refer to the protection of the human rights of trafficking victims, the effect of its restricted scope is that trafficking victims are given protection under national law only when they assist in the criminal justice process.<sup>182</sup> In addition, the Trafficking Protocol does not refer to other international instruments, such as the CRC, as support for the fulfillment of its purposes. Thus it can be argued that the Trafficking Protocol's scope of application revolves solely around criminalization of trafficking in persons and the criminal justice process.

Most of the other international instruments, such as the CRC, OPSC, OPAC and the ILO C182, are not even particularly concerned with addressing issues from a child trafficking perspective. Even though the provisions in the CRC are used as guiding principles, by the Special Rapporteur on Trafficking in Persons, Especially Women and Children (SRT)<sup>183</sup> and the UNHCR,<sup>184</sup> in all works involving children, the CRC itself does not contain any provision which obligates States to protect the human rights of trafficked children. This diminishes the effectiveness of the CRC in the establishment and execution of anti-child trafficking measures when the CRC is primarily concerned with protecting the human rights of children in general and does not call for specific focus to the issues special to trafficked children.

In addition, the OPSC, OPAC and ILO C182 are concerned with the criminalization and prohibition of the different forms of exploitation of children. They are not specifically concerned with addressing exploitation resulting from and contributing to the increase of trafficking in children. For instance, neither the ILO C182 nor the OPAC even acknowledges the occurrence of the trafficking in children for the purposes of child labour and armed conflict. Notably, the OPSC does

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<sup>181</sup> Article 5 of the Trafficking Protocol 2000.

<sup>182</sup> For instance, the United States offers protection and sanctuary to victims of trafficking via the immigration system through the T-Visa but assistance to the criminal justice process is a condition attached to the grant of this visa.

<sup>183</sup> International Standards, Special Rapporteur on Trafficking in Persons, Especially Women and Children, Office of the United Nations High Commissioner for Human Rights accessed at <<http://www2.ohchr.org/english/issues/trafficking/standards.htm>> at October 5, 2011.

<sup>184</sup> Evaluation and Policy Analysis Unit, Meeting the Rights and Protection Needs of Refugee Children: An Independent Evaluation of the Impact of UNHCR's Activities, May 2002, United Nations High Commissioner for Refugees accessed at <<http://www.unhcr.org/3cd6363aa.html>> at October 5, 2011.

acknowledge in its Preamble that the trafficking in children is a “contributing factor” to the sale of children, child prostitution and child pornography and that its increase is a “grave concern.”<sup>185</sup> However this is only in the Preamble of the OPSC and does not form part of the obligations of States who are party to this treaty. Accordingly, measures which deal with the demand aspect of child trafficking would be hampered by the fact that these measures make no distinction between trafficked children and the rest of the children. As a result, the special needs and interests of children who are trafficked for these forms of exploitation would not be sufficiently addressed and data analysis, which is critical to the improvement of anti-child trafficking measures, would be even more inaccurate.

It is clear that the patchwork framework of international law does not benefit the fight against child trafficking because of the restricted scopes of most of the international instruments. The primary anti-trafficking treaty, the Trafficking Protocol, is primarily concerned with law enforcement which results in its efforts to protect the human rights of trafficking victims being limited to such protection only given during the criminal justice process. Furthermore, as most of these instruments are not particularly concerned with child trafficking, the issues special to child trafficking victims are not adequately or effectively addressed. As a result, the holistic approach sought by international law against child trafficking is not successfully established.

### **3.3.2 Idealistic Principles**

Another weakness of the patchwork framework of international law addressing child trafficking is the fact that the key provisions protecting and promoting the fundamental human rights of trafficked children exist as idealistic principles that act as a standard but are difficult to realize in anti-child trafficking measures. Two such provisions are contained in the CRC as part of its four foundation principles:

- (i) Non-discrimination, Article 2 of the CRC; and
- (ii) Respect for the views of the child, Article 12 of the CRC.

Along with the principle protecting the child’s right to life, survival and development<sup>186</sup> and the principle upholding the best interests of the child,<sup>187</sup> these principles read like umbrella provisions

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<sup>185</sup> Preamble of the OPSC.

<sup>186</sup> Article 6 of the CRC

<sup>187</sup> Article 3 of the CRC

guiding the application of children's rights set forth in the CRC in "all matters",<sup>188</sup> "all actions"<sup>189</sup> and in all measures concerning child trafficking. However, they are vaguely defined, idealistic concepts which cause much difficulty for the purpose of application in the implementation of anti-child trafficking measures. For instance, the 'best interests of the child' principle is insufficiently defined for effective application in national asylum systems.

To demonstrate how these principles diminish the effectiveness of the framework of international law established against child trafficking, the discussion of the principle to respect the views of the child and the principle of non-discrimination are particularly pertinent. This is because these two principles are essential in the implementation of protection measures for child trafficking victims. Therefore, poor definition of these principles contributes to ineffective implementation where actual realization of these principles is difficult.

### ***Non-Discrimination, Article 2 of the CRC***

The provision promoting and calling for individual States to practice non-discrimination against all children is encapsulated in Article 2 of the CRC. Its full text is as follows:

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 members.  
(emphasis added)

Paragraph one necessitates that this principle is included in the implementation of all the other rights set forth in the CRC. The rationale behind this is that discrimination is at the root of child exploitation and thus protection of trafficked children and children at risk of being trafficked call

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<sup>188</sup> Article 12 of the CRC

<sup>189</sup> Article 3 of the CRC

for action that involves challenging discrimination.<sup>190</sup> The scope of this provision covers not only issues raised by the CRC, but also extends to any “existing Constitution, relevant legislation, court decision and administrative policy and practice.”<sup>191</sup> Furthermore, the language in paragraph two emphasizes that this obligation is an active one as State Parties are called to “ensure” that this principle is upheld. The Committee on the Rights of the Child declared in its General Comment No. 5 (2003) that “this non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures.”<sup>192</sup> Accordingly, this also means that the ban on discrimination of any kind does not outlaw legitimate differentiation between children, for instance the need to give “special consideration” to children living in “exceptionally difficult conditions.”<sup>193</sup> It is for the protection of children who are particularly prone to discrimination, such as trafficked children, that provisions in the CRC are established.

However, a problem with the provision encapsulating the non-discrimination principle is that there is no definition as to what constitutes discrimination. This provision simply sets out a list of possible grounds for discrimination. It does provide for the protection of trafficked children and children at risk of being trafficked “against all forms of discrimination” but it does not define the factors used to identify such forms of discrimination. There is also an absence of an obligation to establish a mechanism or procedure for the purpose of identifying the existence of discrimination in the national implementation of anti-child trafficking measures.

As trafficked children and children at risk of being trafficked are particularly prone to discrimination, the weaknesses in this provision put these children at a further disadvantage. For instance, Thailand has a free nationwide hotline which is supposedly accessible to trafficked children to seek the necessary assistance.<sup>194</sup> However, this hotline is not specifically for attending the needs of trafficked children but is also for all other adults and children to use. In addition, this hotline is staffed by persons who are not sufficiently trained in matters concerning trafficked

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<sup>190</sup> Survey on the CRC Committee’s Concluding Observations on the last EU Countries’ Reports, June 2006 at 16 <[http://www.childoneurope.org/issues/crc\\_committee/su00-Survey.pdf](http://www.childoneurope.org/issues/crc_committee/su00-Survey.pdf)> accessed 11 June 2011.

<sup>191</sup> Survey on the CRC Committee’s Concluding Observations on the last EU Countries’ Reports, June 2006 at 17 <[http://www.childoneurope.org/issues/crc\\_committee/su00-Survey.pdf](http://www.childoneurope.org/issues/crc_committee/su00-Survey.pdf)> accessed 11 June 2011.

<sup>192</sup> General Comment No. 5 (2003)

<sup>193</sup> Preamble to the CRC.

<sup>194</sup> Thailand Country Progress Card, ECPAT at 14, accessed at <[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> at October 6, 2011.

children and who do not speak the languages common to trafficked children in Thailand. These children are usually from different countries and do not speak the native language in Thailand.<sup>195</sup> Thus it seems that a lack of a “special consideration” of the language needs of trafficked children in Thailand may indicate a form of discrimination. However, a lack of a definition of the term “discrimination” and an absence of a mechanism or procedure to identify the existence of discrimination leads to a failure of effectively ensuring non-discrimination in the implementation of anti-child trafficking measures such as the nationwide hotline in Thailand. Thus, the actual realization of this principle in anti-child trafficking measures is difficult due to its poor definition and lack of a method to identify the existence of discrimination.

### ***Respect for the Views of the Child, Article 12 of the CRC***

The provision encapsulating the principle of respect for the views of the child is Article 12 of the CRC. Its full text is as follows:

1. State 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**. (emphasis added)

This principle affirms that the child is “a full human being with integrity and personality and the ability to participate freely in society”<sup>196</sup> with no boundaries or areas in which children’s views have no place. This includes and is not limited to decisions of judicial and administrative proceedings affecting child victims of trafficking. There is also a positive obligation to listen to and take the views of the child victim seriously in accordance with the age and maturity of the child. Notably, there is no lower age limit set on this right. The only stipulated limitation is that this right is only afforded to a child who is “capable of forming his or her own views”.

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<sup>195</sup> Thailand Country Progress Card, ECPAT at 14, accessed at [http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf) at October 6, 2011.

<sup>196</sup> Freeman, M (1996) Children’s education; a test case for best interests and autonomy, in R. Davie & D. Galloway (Eds) *Listening to children in education* (London, David Fulton) at 37.

The problem with this limitation is that there may be an element of uncertainty about what constitutes the capacity to form a view, replaced by the general misconception that this capability is dependent on the “age and maturity” of the child.<sup>197</sup> However, the consideration of the “age and maturity” of the child is only applicable to the second part of Article 12(1) of the CRC, the obligation to give due weight to the child’s views. The child’s right to express his or her own views is not dependent on their capacity to express a mature view, it is dependant only on their ability to form a view, mature or not.<sup>198</sup>

Children, especially younger children, may often need the help of others in order to form a view. This does not mean that they do not have their own opinion or perspective on the issue in question but just that they need guidance and direction to formulate those views. This is especially pertinent for child victims of trafficking who would need help in establishing and regaining their own lives and their ability to participate in decision making. During the United Nations Special Summit on Children’s Rights in 2002, children and young people identified several factors essential to their effective participation. Amongst these factors are: sufficient time to understand the issues in question, access to child-friendly documentation and information and capacity building with child-led organizations.<sup>199</sup> Trafficked children may also need practical assistance to communicate such views, for instance, through assistive technology or the use of interpreters,<sup>200</sup> especially since most trafficked children usually do not speak the native language of the country to which they were trafficked into. Therefore because of these factors, there may be a mistaken belief that some trafficked children are not capable of forming their own views when in fact they just need help to form those views.

Furthermore, there is a general concern from adults that children lack the capacity to have a meaningful input into decision making, or that giving children this right would undermine the parents’ or legal guardian’s authority.<sup>201</sup> It can be supposed that the skepticism of adults would be

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<sup>197</sup> Laura Lundy, ‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol, 33, No. 6 (Dec., 2007) at 935.

<sup>198</sup> Laura Lundy, ‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol, 33, No. 6 (Dec., 2007) at 935.

<sup>199</sup> Bennett Woodhouse, B. (2003) Enhancing children’s participation in policy formulation, *Arizona Law Review*, 45, 750-763.

<sup>200</sup> Laura Lundy, ‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol, 33, No. 6 (Dec., 2007) at 936.

<sup>201</sup> Laura Lundy, ‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol, 33, No. 6 (Dec., 2007) at 929.



greater with regards to the capacity of a child victim of trafficking to formulate “meaningful” views in decisions concerning him or her due to the trauma and abuse from the trafficking experience. Nevertheless, the views of child trafficking victims in decisions and matters affecting them should be encouraged, heard and taken into consideration. This assists in the success of their rehabilitation process as it shows them that their opinions and their well-being are of utmost importance.

However, amplifying these problems is the fact that a large part of the actual fulfillment of this provision is left to the discretion of the individual States. For instance, individual States are given the discretion to determine the child’s capacity to form a view, to determine the “due weight” given to those views by taking the “age and maturity” of the child into consideration and to determine the procedural rules by which the child’s views can be heard. It is acknowledged that the international law cannot possibly govern the intricacies of national law but the problem with such discretion is that it augments the lack of commitment or compliance from the adults on whose cooperation children’s enjoyment of Article 12 is dependent.

Notably, there is a danger of “tokenistic or decorative participation”<sup>202</sup> where adults comply with the various motions of applying this principle but ultimately ignore the child’s views. Therein lays the challenge to ensure that child trafficking victims’ views are not only listened to but that those views are taken seriously. Obviously there is no universal guarantee for this but it is nevertheless a concern that there is a lack of a procedural safeguard. Therefore, while the actual realization of this principle cannot be guaranteed, its implementation in national law can and should be monitored where possible.<sup>203</sup>

From the discussion of the two principles above, it is clear that some of the key provisions in international law to combating child trafficking exist as idealistic principles that act as standards but which are in fact inadequately defined and inapt for effective implementation into national law. This is obviously a weakness in the framework of international law which can be corrected by adapting such principles into practical, executable obligations in a child trafficking-specific international instrument.<sup>204</sup>

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<sup>202</sup> Laura Lundy, ‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol, 33, No. 6 (Dec., 2007) at 938.

<sup>203</sup> The recommendation for establishment of measures to this end will be discussed in Chapter 6.

<sup>204</sup> Refer to Chapter 6.

### 3.3.3 Discretionary Obligations and Guidelines

Soft law instruments contain guidelines which address some of the weaknesses and gaps in the patchwork framework of international law established against child trafficking. For instance, there are soft law instruments which attempt to remedy the weaknesses of Article 2 of the CRC which encapsulates the non-discrimination principle.<sup>205</sup> The Human Rights Committee proposed in its General Comment No. 18 that the term “discrimination” shall mean “any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all person, on an equal footing, of all rights and freedoms”. Also, the Committee on the Rights of the Child emphasized the importance of “collecting disaggregated data” by age, gender, region, rural or urban area, social and ethnic origin to assist in judging whether discrimination exists. The problem here is that these guidelines are contained in soft law instruments which are not binding on individual States.

Furthermore, some of the provisions in relation to the protection of child trafficking victims and border control, which are vital to establishing successful efforts against child trafficking, are couched in discretionary language. As a result, many individual States pay “lip service” to such treaties and do not take the appropriate action that is needed to effectively combat child trafficking.<sup>206</sup> This can be illustrated in the discussion of relevant provisions in the Trafficking Protocol:

- (i) Articles 6, 7, 8, 9 and 11 which call for the protection of trafficked children and children vulnerable to trafficking and border control measures to prevent and detect child trafficking.

#### **Articles 6, 7 and 8: Protection of Victims**

The Trafficking Protocol attempts to establish a holistic approach against human trafficking by including provisions which call for the protection of victims, such as Articles 6, 7 and 8 of the Trafficking Protocol which deals with assistance to and protection of victims, the status of victims

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<sup>205</sup> Refer to the discussion of Article 2 of the CRC in 3.3.2.

<sup>206</sup> Dr. Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, Denv. J. Int'l L. & Pol'y Vol. 37:3 (2009) 422.

in receiving States and the repatriation of victims. However, these provisions are laid out in discretionary language<sup>207</sup> and thus do not adequately reinforce or supplement the law protecting the human rights of victims.<sup>208</sup>

Under such provisions, States are requested to “consider” the implementation of measures for the physical, psychological and social recovery of victims by providing appropriate housing, counseling, medical, psychological and material assistance, and employment, education and training opportunities.<sup>209</sup> States are also encouraged to “take into account “the age, gender and special needs of victims in doing so.”<sup>210</sup>

States are also to “endeavor to provide” for the physical safety of victims while they are within its territory.<sup>211</sup> In addition, States are to “consider” adopting measures which permit victims, in appropriate cases, to remain in its territory, temporarily or permanently, or to repatriate victims.<sup>212</sup> Moreover, States are to protect the privacy and identity of victims “in appropriate cases and to the extent possible under its domestic law”.<sup>213</sup> Notably, the discretionary language used in these provisions hinders the implementation of complementary forms of protection offered to victims of trafficking by States.<sup>214</sup> It has been drafted this way because many delegates feared that “the Protocol might inadvertently become a means of illicit migration”.<sup>215</sup>

Therefore, although the implementation of the Trafficking Protocol can help in combating child trafficking by criminalizing it, the discretionary language used in the victims’ protection provisions can have a converse effect of further victimizing child victims by refusal of sanctuary or the help they need unless they contribute to the criminal justice process. For instance, this situation was reflected in the visa system in Australia but which is now undergoing discussion to implement

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<sup>207</sup> Anne Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, 23 Hum. Rts. Q. 975, 990 (2001)

<sup>208</sup> Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, (2007) 36 Denv. J. Int’l L. & Pol’y 9, 20.

<sup>209</sup> Article 6(3) of the Trafficking Protocol 2000.

<sup>210</sup> Article 6(4) of the Trafficking Protocol 2000.

<sup>211</sup> Article 6(5) of the Trafficking Protocol 2000.

<sup>212</sup> Article 7(1) and Article 8(1) of the Trafficking Protocol 2000.

<sup>213</sup> Article 6(1) of the Trafficking Protocol 2000.

<sup>214</sup> Alice Edwards, ‘Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labor’, (2007) 36 Denv. J. Int’l L. & Pol’y 9, 20.

<sup>215</sup> L.G. Potts, Jr., Note, Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons, 35 Geo. Wash. Int’l L. Rev. 227, 240 (2003).

some changes to rectify it.<sup>216</sup> However, despite such developments, there still is a failure in various national asylum systems to offer adequate and effective protection to child victims of trafficking.<sup>217</sup>

#### ***Article 9: International Cooperation***

Article 9 of the Trafficking Protocol calls for international cooperation to alleviate factors that make children vulnerable to trafficking and discourage the demand that fosters all forms of exploitation of children that leads to trafficking.<sup>218</sup> These are honorable intentions but are couched once again in discretionary language using words such as “endeavour”, “discourage” and “as appropriate”.<sup>219</sup> As with the other obligations discussed above, these requirements lack the force that they need to require States to take effective action against trafficking in children.

#### ***Article 11: Border Control***

Another provision in the Trafficking Protocol couched in discretionary language is Article 11 which calls on States to strengthen, “to the extent possible”, such border controls as may be necessary to prevent and detect trafficking in persons, including children.<sup>220</sup> In addition, States are to adopt measures to prevent, “to the extent possible”, commercial carriers from being used as a means of transport for trafficking offences.<sup>221</sup> States are also to only “consider” strengthening cooperation

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<sup>216</sup> Reforms that have recently been made are to implement the recommendations made by the Australian Human Rights Commission and Non-Governmental Organizations at the 2008 National Round Table on People Trafficking. These include ensuring that victims get the support they need to recover from their ordeal, regardless of whether they can be of assistance to the police, and abolishing the temporary witness protection visas in order to speed up the process of granting a permanent witness protection visa for the victim and also for the victim’s immediate family. These changes show that the law in Australia is moving towards acknowledging that human trafficking is a violation of basic human rights by providing victim support on the basis of need and not conditional on providing assistance to the police.\* As Elizabeth Broderick, the Sex Discrimination Commissioner, said, these changes simplified a complex system to provide stronger protection for trafficked victims and their families.\*

\* Brinsley Marlay, ‘For trafficked people, Government changes put human rights first’ (Media Release, 17 June 2009), Australian Human Rights Commission

<[http://www.hreoc.gov.au/about/media/media\\_releases/2009/50\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/50_09.html)> at 17 June 2009.

<sup>217</sup> Susan Kneebone & Bernadette McSherry, Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights, 12 Int’l J. Hum. Rts 67 (2008) (referring to a number of failed cases).

The problems of implementation of child trafficking victims’ protection provisions into national asylum systems will be discussed in Chapter 4.

<sup>218</sup> Article 9 of the Trafficking Protocol 2000.

<sup>219</sup> Article 9 of the Trafficking Protocol 2000.

<sup>220</sup> Article 11(1) of the Trafficking Protocol 2000.

<sup>221</sup> Article 11(2) of the Trafficking Protocol 2000.

among border control agencies through the establishment and maintenance of direct channels of communication.<sup>222</sup> Clearly, Article 11 of the Trafficking Protocol has been vaguely worded, giving a wide discretion to States and providing very little actual guidance on what such border controls should actually entail. Furthermore, there is a lack of guidelines, suggestions or reviews for the effectiveness of such national border control measures. To merely oblige States to 'strengthen' what they are already doing at their borders will not effectively prevent and detect child trafficking at borders.

Necessarily, any measures of border control must be compatible with other international commitments relating to the free movement of people. However, even though this is clearly acknowledged in the Trafficking Protocol in Article 11(3) which requires compliance "without prejudice to applicable international conventions", the obligation of States to establish prevention and detection measures in relation to the migratory aspect of child trafficking is weak. As Anne Gallagher argues, "the principle emphasis of the [Trafficking] Protocol remains firmly on the interception of traffickers rather than the identification and protection of victims."<sup>223</sup> If there is to be a successful prevention and detection of child trafficking at borders, more effective obligations for border control measures must be established.

In sum, the Trafficking Protocol has important provisions which call for the protection of trafficked children and children who are vulnerable to trafficking<sup>224</sup> and which also address measures to be taken at borders to prevent and detect child trafficking.<sup>225</sup> However, the discretionary and vague language used in these provisions results in these obligations lacking the force needed to require States to take real and effective action. Not only do individual States have the freedom to disregard or implement these obligations however they choose, there is inadequate detail and a lack of actual guidance in these treaties as well. As pointed out earlier, there are soft law instruments developed to assist individual States in the implementation of these obligations relating to the protection of victims of child trafficking and establishment of border control measures, such as the UNICEF Guidelines on the Protection of Child Victims of Trafficking (2006), the UNICEF Child Trafficking in Europe: A Broad Vision to Put Children First (2008) and the

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<sup>222</sup> Article 11(6) of the Trafficking Protocol 2000.

<sup>223</sup> Anne Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis, 23 Hum. Rts. Q. 975, 994 (2001).

<sup>224</sup> Articles 6, 7, 8 and 9 of the Trafficking Protocol.

<sup>225</sup> Article 11 of the Trafficking Protocol.

UNICEF Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe (2006). However, these guidelines are not binding on States. Neither are States required to consider them. Consequently, many States pay “lip service” to the treaties but take no real effective action in their national implementation.<sup>226</sup>

### **3.4 Conclusion**

There is no treaty in international law specifically addressing child trafficking. The primary anti-trafficking treaty, the Trafficking Protocol, addresses human trafficking in general. Thus international law addresses child trafficking through a patchwork framework consisting of at least a dozen hard and soft law international instruments. There are international instruments such as the CRC and its Optional Protocols, the ACRC and the ECHR obligating States to protect the human rights of trafficked children and numerous soft law instruments providing comprehensive guidance on these matters. There are also instruments dealing with the criminal justice aspect of child trafficking, the principal one being the Trafficking Protocol. In addition, there are instruments which call for the provision of asylum to trafficked children, to strengthen border control and international cooperation and communication in relation to combating child trafficking. Thus it may seem that this framework would address child trafficking comprehensively.

This patchwork framework results in many overlaps and gaps. These overlaps and gaps are revealed in the outline of the framework of international law pertaining to child trafficking through five areas of international law: protection of the human rights of children; criminal justice; asylum; border control; and international cooperation and communication. These overlaps and gaps identified indicate that this is inefficient and ineffective in addressing the issues particular to child trafficking. Furthermore, this patchwork framework also has weaknesses which further emphasize its failure to establish a holistic approach against child trafficking.

One of these weaknesses relates to the structure of this framework where each international instrument has a restricted scope. The Trafficking Protocol is mainly concerned with law enforcement; protection of victims comes second. Also, the restricted scopes of other international instruments, such as the CRC, OPSC, OPAC and the ILO C182, result in issues special

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<sup>226</sup> Dr. Ranee Khooshie Lal Panjabi, *Sacrificial Lambs of Globalization: Child Labor in the Twenty-First Century*, Denv. J. Int'l L. & Pol'y Vol. 37:3 (2009) 422.

to child trafficking being insufficiently addressed. Furthermore, some of the essential provisions in international law protecting the human rights of children exist more “aspirational” rather than acting as a “legal” standard where the realization of those principles is difficult. For instance, the provisions encapsulating the principles calling for respect for the views of the child and non-discrimination against the child are inadequately defined and are inapt for effective application in national law. In addition, some key provisions to establish successful efforts against child trafficking, such as those in relation to the protection of victims and border control, are couched in discretionary language. The soft law instruments providing detailed guidance on these matters also lack the legal force needed as they are not binding on individual States.

Thus, it can be argued that there are many inherent overlaps, gaps and weaknesses resulting in the ineffectiveness of the patchwork framework of international law establishing a holistic approach against child trafficking and subsequently causing problems in national implementation, as discussed in the next chapter. In light of this, it is argued that a new international agreement, established specifically for the purpose of addressing child trafficking, is needed. This new treaty would not just be a human rights instrument or a law enforcement instrument but a holistic instrument that encompasses all the areas of international law discussed in this chapter.<sup>227</sup>

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<sup>227</sup> Chapter 6 will discuss this more in detail.

# Chapter 4

## National Implementation of International Obligations

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The effects of the weaknesses in the framework of international law pertaining to child trafficking are revealed in the national implementation of these international obligations. The implementation of several key obligations, in individual States such as Thailand, Sierra Leone, Cambodia, United States of America (USA) and Australia, is the focus of this chapter. Thailand, Sierra Leone and Cambodia are selected because these countries reportedly have not satisfied the minimum standards<sup>228</sup> of implementation of international obligations and have amongst the highest reported incidence of child trafficking in their respective regions. The USA and Australia are chosen because there are still reported incidences of child trafficking in these countries even

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<sup>228</sup> According to the United States Trafficking in Persons Report 2011, U.S. Department of State <<http://www.state.gov/g/tip/rls/tiprpt/2011/164228.htm>> accessed at 13 October 2011. The TVPA standards are declared as such in Section 108 of the Trafficking Victims Protection Act 2000:

- (i) To prohibit and punish acts of trafficking,
- (ii) To prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault, for knowing commission of trafficking in some of its most reprehensible forms (trafficking for sexual purposes, trafficking involving rape or kidnapping, or trafficking that causes a death),
- (iii) To prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense's heinous nature, and
- (iv) To make serious and sustained efforts to eliminate trafficking.

United States and Australia are listed as Tier One countries where the "governments fully comply with the TVPA's minimum standards." Cambodia and Sierra Leone are listed as Tier 2 countries where the "governments do not fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards, but are making significant efforts to bring themselves into compliance with those standards". Thailand is listed as a Tier 2 Watch List country which means that it is a "countries whose governments do not fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards, but are making significant efforts to bring themselves into compliance with those standards" AND:

- a) The **absolute number of victims** of severe forms of trafficking is very significant or is significantly increasing;
- b) There is a **failure to provide evidence of increasing efforts** to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on **commitments by the country to take additional future steps over the next year.**



though they reportedly satisfy the minimum standards of implementation of international obligations concerning human trafficking.

The discussion begins with an examination of the impact of the inadequacies in the Trafficking Protocol's definition of child trafficking in Article 3 on the national implementation of Article 5 of the Trafficking Protocol in Sierra Leone and Australia. First, there is a failure to criminalize the internal trafficking of children; reflecting the restricted scope of the Trafficking Protocol definition of child trafficking to transnational trafficking by organized crime groups. In addition, the neutrality of the Trafficking Protocol's definition of child trafficking towards prostitution has led to inconsistent national laws concerning prostitution, age of consent and penalties for perpetrators of child trafficking.

Next, the difficulty of realizing idealistic principles in international law concerning child trafficking is shown through the implementation of the best interests of the child principle, encapsulated in Article 3 of the CRC, in national immigration systems. As a necessary introduction, a brief overview of this provision shows that it has been inadequately defined for effective national implementation. This makes it difficult for application and subsequently may lead individual States to disregard this principle entirely as it is not mandatory for application. Consequently, the efforts of the USA immigration system in providing protection to child trafficking victims do not reflect the realization of the best interests of the child principle.

Last but not least, the effect of entrenching key obligations in discretionary language, such as the obligation to cooperate and communicate towards the eradication of child trafficking, is revealed in its national implementation. Comparative studies between Thailand, Cambodia and Australia will show failure to give full effect to this obligation to cooperate and communicate in relationships with non-governmental organizations (NGOs) and amongst border control agencies. Such failure is due to the obligation's discretionary nature and results in a weak global effort against child trafficking.

#### **4.1 Article 5 of the Trafficking Protocol: Criminalization of Child Trafficking**

The criminalization of child trafficking to ensure the prosecution and punishment of perpetrators is an international obligation entrenched in Article 5 of the Trafficking Protocol which provides that: "each State Party shall adopt such legislation and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed

intentionally.” The provision clearly shows that an incorporation of the definition of child trafficking, in Article 3 of the Trafficking Protocol, into national law is vital for the appropriate criminalization of child trafficking. The problem is that national laws would reflect the inadequacies of this current definition, such as its restricted scope to transnational trafficking by organized crime groups and its neutrality towards prostitution.

#### **4.1.1 Inadequate Criminalization of Child Trafficking: Sierra Leone**

First, the restricted scope of the Trafficking Protocol’s definition to transnational trafficking by organized crime groups has led individual States such as Sierra Leone to largely disregard the criminalization of internal child trafficking. Sierra Leone’s Anti-Human Trafficking Act 2005 (AHTA)<sup>229</sup> criminalizes trafficking in persons in Article 2 which provides:

“(1) It is an offence for any person to engage in the trafficking in persons.

(2) A person engages in the trafficking in persons if he undertakes the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.”

The AHTA makes further reference to child trafficking in Article 15(c) which states that: “(c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be regarded as trafficking in persons even if this does not involve any of the means specified in subsection (2) of section 2.”

Notably, these articles in the AHTA which criminalize child trafficking in Sierra Leone are similar to the Trafficking Protocol’s definition of trafficking. There exist the same three factors constituting the trafficking in persons with the second factor disregarded in the case of the trafficking in children:

- (i) Conduct associated with moving people,

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<sup>229</sup> The Anti-Human Trafficking Act 2005, Sierra Leone, available at <<http://www.hsph.harvard.edu/population/trafficking/sierra.traf.05.pdf>> accessed at 20 October 2011.

- (ii) with coercive or deceptive means involved, which means that the victim's consent is irrelevant,
- (iii) and for the purpose of exploitation.

The problem with the AHTA adopting criminalizing provisions which are similarly worded to the Trafficking Protocol's definition of trafficking is that the Trafficking Protocol definition is not immediately suited for incorporation into national law without any practical adjustments to national circumstances. For instance, the scope of the Trafficking Protocol definition does not include internal child trafficking and as a result, the AHTA does not make an explicit criminalization of internal child trafficking in Sierra Leone. This is a significant drawback as internal child trafficking is rampant in Sierra Leone.<sup>230</sup>

Additionally, the neutrality of the Trafficking Protocol's definition towards prostitution results in an absence of law in Sierra Leone specifically criminalizing or legalizing child prostitution. There are, however, some laws and regulations which attempt to address surrounding issues, especially those in relation to child prostitution. For instance, the Freetown City Council introduced a regulation barring minors from nightclubs, a common venue for commercial sex transactions.<sup>231</sup> Also, the Prevention of Cruelty to Children Act (Cap. 31) 1960 seeks to prohibit "unlawful carnal knowledge" of girls under 14 years of age, with or without her consent<sup>232</sup> and also the separation of unmarried girls under the age of 16 from parents for "immoral purposes."<sup>233</sup> Even so, these laws do not cover boy children and do not explicitly criminalize child prostitution in Sierra Leone.

Therefore the inadequate national criminalization of child trafficking in Sierra Leone which omits internal child trafficking and an absence of laws criminalizing child prostitution diminish the effective prosecution and punishment of perpetrators of child trafficking in Sierra Leone.

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<sup>230</sup> According to a 2005 UNICEF assessment of child trafficking in Sierra Leone. Refer to Chapter 1 for further discussion on internal child trafficking in Sierra Leone; Rebecca Surtees, Child Trafficking in Sierra Leone (2005) UNICEF

<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>> accessed at 21 June 2011.

<sup>231</sup> Rebecca Surtees, Child Trafficking in Sierra Leone (2005) UNICEF at 81

<<http://www.nexusinstitute.net/publications/pdfs/Child%20Trafficking%20in%20Sierra%20Leone.pdf>> accessed at 21 June 2011.

<sup>232</sup> Section 6 and 7 of the Prevention of Cruelty to Children Act (Cap. 31) 1960.

<sup>233</sup> Section 12 of the Prevention of Cruelty to Children Act (Cap. 31) 1960.

Furthermore, another effect of the neutrality of the Trafficking Protocol definition of trafficking towards prostitution is that there is inconsistency amongst state laws in one nation concerning prostitution and age of consent such as in Australia.

#### **4.1.2 Inconsistent State Laws in One Country: Australia**

In Australia, there is no federal law defining and prohibiting the prostitution of children per se. The regulation of prostitution is state managed.<sup>234</sup> In Victoria, Western Australia and Queensland, prostitution is legal and is regulated by government authorities. In these states, prostitution and operation of “one-woman” brothels is not an offence as long as it does not involve street work<sup>235</sup> and the premises used for prostitution have permits for such purposes.<sup>236</sup>

On the other hand, in the remaining states of New South Wales, South Australia, Tasmania, Northern Territory and the Australian Capital Territory, commercial prostitution is illegal and is not regulated by government authorities. Street work is strictly prohibited<sup>237</sup> and accordingly, activities related to commercial prostitution such as procuring persons for prostitution and keeping a brothel are criminalized.<sup>238</sup> However, the act of prostitution itself remains legal. In Tasmania, brothel work itself is not an offence. In the Australian Capital Territory, a “one-woman” brothel is not an offence and in New South Wales, brothel work is also not an offence unless the premises used are held out as available for other purposes.<sup>239</sup>

In addition to these inconsistent state laws concerning prostitution, the age of consent differs from state to state. The laws pertaining to the age of consent are designed primarily for the protection of children from sexual abuse and exploitation. These laws determine that a person below the stated age does not have the psychological capacity to give legal consent to sexual

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<sup>234</sup> Erica Kotnik, Melina Czymoniewicz-Klippel, Elizabeth Hoban, ‘Human Trafficking in Australia: the challenge of responding to suspicious activities’ (2007) Australian Journal of Social Issues <[http://findarticles.com/p/articles/mi\\_hb3359/is\\_3\\_42/ai\\_n29387126/?tag=content;col1](http://findarticles.com/p/articles/mi_hb3359/is_3_42/ai_n29387126/?tag=content;col1)> at 29 April 2011.

<sup>235</sup> Street work includes soliciting, loitering or behaving in a disorderly or indecent manner in a public place or within view of hearing of a person in a public place.

<sup>236</sup> Refer to Annex 2 Table 11 for more comprehensive information.

<sup>237</sup> Refer to Annex 2 Table 11 for more comprehensive information.

<sup>238</sup> Refer to Annex 2 Table 12 for more comprehensive information.

<sup>239</sup> Refer to Annex 2 Table 11 for more comprehensive information.

activity. The age of consent varies from 16 and 17 between states in Australia<sup>240</sup> and only Queensland makes a distinction between different forms of sexual activity and the subsequent age of consent. Queensland provides in its legislation that the age of consent for sodomy is 18 years of age whereas the age of consent for all other types of sexual acts is 16 years of age.

The inconsistency in age of consent in state laws together with prostitution being legal may result in children who are trafficked for sexual purposes not being identified as victims. Therefore, there needs to be a standardization of laws when it comes to prohibiting the sexual exploitation of children and subsequently curbing the trafficking of children for such purposes.

In addition to these problems of national implementation of Article 5 of the Trafficking Protocol, there are also inconsistencies between national laws amongst various individual States with regards to penalties imposed upon perpetrators of child trafficking.

#### 4.1.3 Inconsistent Penalties: Various Countries

An important factor in the effective prevention of child trafficking is the actual punishment imposed on the perpetrators of child trafficking. A table comparing the penalties imposed on perpetrators of child trafficking by national laws in various individual States is given below.

***Table: Penalties in various individual States***

State	Offence	Penalty
Thailand	Trafficking of children between the age of 15 to 18	Three to 15 years of imprisonment and a fine <sup>241</sup>
	Trafficking of children under the age of 15	Five to 20 years of imprisonment and a fine <sup>242</sup>
	Whoever prepares to commit an offence of trafficking	One-third of the stipulated penalty <sup>243</sup>
	Whoever, from two persons upwards, conspires to	One-half of the stipulated

<sup>240</sup> Refer to Annex 2 Table 13 for more comprehensive information.

<sup>241</sup> 1997 Prevention and Suppression of Trafficking in Women and Children Act.

<sup>242</sup> 1997 Prevention and Suppression of Trafficking in Women and Children Act.

<sup>243</sup> Section 8 of The Anti-Trafficking in Persons Act B.E 2551 (2008).

	commit an offence of trafficking	penalty <sup>244</sup>
<b>India</b>	Trafficking in persons	
	(i) First conviction	Not less than seven years imprisonment
	(ii) Second or subsequent conviction	Life imprisonment <sup>245</sup>
	Attempts to commit or abets trafficking in persons	Same as the offence for trafficking in persons <sup>246</sup>
<b>United States</b>	Trafficking in persons	Up to 20 years imprisonment and/or a fine <sup>247</sup>
	Involving death or kidnapping, aggravated sexual abuse or an attempt to kill	Possibility of life imprisonment <sup>248</sup>
	Sex trafficking in children under 14 years old or use force, fraud, or coercion for sex trafficking	Possibility of life imprisonment <sup>249</sup>
	Sex trafficking in children 14-18 years old without using force, fraud, or coercion	Up to 40 years in prison and/or fines <sup>250</sup>
	Anyone knowingly in control of a victim's official or forged documentation	Fines and/or up to five years in prison <sup>251</sup>
<b>Australia</b>	Trafficking of children into and out from Australia	Up to 25 years imprisonment <sup>252</sup>
<b>Cambodia</b>	Trafficking in persons under the age of 15	15-20 years imprisonment <sup>253</sup>
	Trafficking in persons over the age of 15	10-14 years imprisonment <sup>254</sup>
<b>Bangladesh</b>	Trafficking in children for immoral or illegal purposes	Death penalty or life imprisonment <sup>255</sup>
<b>China</b>	Forced prostitution, abduction and commercial sexual exploitation of girls under the age of 14	From life imprisonment to death penalty <sup>256</sup>

<sup>244</sup> Section 9 of The Anti-Trafficking in Persons Act B.E 2551 (2008).

<sup>245</sup> Section 5B(1) of the Immoral Traffic (Prevention) Act 1956

<sup>246</sup> Section 5B(2) of the Immoral Traffic (Prevention) Act 1956

<sup>247</sup> Chapter 77 of the United State's Code Title 18

<sup>248</sup> Chapter 77 of the United State's Code Title 18

<sup>249</sup> Chapter 77 of the United State's Code Title 18

<sup>250</sup> Chapter 77 of the United State's Code Title 18

<sup>251</sup> Chapter 77 of the United State's Code Title 18

<sup>252</sup> Section 271.4 and 271.7, Division 271 of the Commonwealth Criminal Code (1995).

<sup>253</sup> 1996 Law on Suppression of Kidnapping, Trafficking and Exploitation of Humans.

<sup>254</sup> 1996 Law on Suppression of Kidnapping, Trafficking and Exploitation of Humans.

<sup>255</sup> Bangladesh, Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights and Labor, 2003 <<http://www.state.gov/g/drl/rls/hrrpt/2003/27944.htm>> accessed at 29 April 2011.

<sup>256</sup> Criminal Law of the People's Republic of China (1997).

	Forced labour	Three years imprisonment and a fine <sup>257</sup>
	Abducting and trafficking children	From five years imprisonment and a fine to the death penalty <sup>258</sup>
<b>Vietnam</b>	Trafficking of children	From three years to life imprisonment <sup>259</sup>
<b>Mongolia</b>	Human trafficking	10-15 years imprisonment <sup>260</sup>

This table shows that there is neither a standardization of the severity of penalties imposed on perpetrators, nor a standardization of the age of victims for the purposes of determining the penalties to be imposed. Therefore when there are inconsistencies between national laws amongst various individual States in the severity of punishment for those convicted of child trafficking, there are problems which arise. Some penalties may be too severe, such as the death penalty in Bangladesh and China, leaving judges and juries reluctant to convict those involved in child trafficking, and some penalties are not severe enough, consequently failing to serve as a deterrent for these perpetrators.

Thus, there should be a standardization of the severity of punishment based on the degree of involvement of perpetrators and the age of victims. This standardization can come in the form of a new provision for the criminalization of child trafficking, stipulating the range of penalties that ought to be imposed. Although some may argue that this would interfere with the sovereignty and power of individual States to self-govern, it must be remembered that child trafficking is a global phenomenon and needs a united global approach.

In sum, the national implementation of Article 5 of the Trafficking Protocol shows that the inadequacies of the definition of trafficking in Article 3 of the Trafficking Protocol and its neutrality towards prostitution diminish the effective prosecution and punishment of perpetrators of child trafficking. Moreover, the inconsistent national laws between various

<sup>257</sup> Article 244 of the Criminal Law of the People's Republic of China (1997).

<sup>258</sup> Article 240 of the Criminal Law of the People's Republic of China (1997).

<sup>259</sup> 2007 US Department of State Trafficking in Persons Report.

<sup>260</sup> 2007 US Department of State Trafficking in Persons Report.

individual States regarding penalties imposed upon perpetrators results in a lack of a united global approach in preventing child trafficking through the prosecution and punishment of perpetrators.

Another weakness in the framework of international law pertaining to child trafficking is that there are idealistic principles which are difficult to realize; the effects of this weakness is shown clearly through the national implementation of the best interests of the child principle encapsulated in Article 3 of the CRC. The following discussion focuses on this particular principle because without making the best interests of the child central, any efforts against child trafficking will potentially be adverse or ineffective. For instance, if efforts against child trafficking are made from the sole perspective of an adult and with the interests of the parents or guardian of the child primarily in mind, it is detrimental towards children who are at risk of, are now or have been victims of trafficking.

#### **4.2 Article 3 of the CRC: Best Interests of the Child**

The ‘best interests of the child’ principle is the guiding principle for interpretation of other articles and rights regarding children in international instruments.<sup>261</sup> This principle was first introduced in 1959, when the United Nations Declaration on the Rights of the Child declared that “the best interests of the child shall be a paramount consideration.”<sup>262</sup> This principle was then formalized into an obligation when the CRC was adopted in November 1989. Article 3 provides that:

**“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. (emphasis added)”**

The CRC further stipulates that State Parties are to undertake “all appropriate legislative and administrative measures” to ensure that the child is afforded the “protection and care as is necessary for his or her well-being”.<sup>263</sup> Accordingly, State Parties are to “ensure that the

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<sup>261</sup> Bridgette A. Carr, *Incorporating a “Best Interests of the Child” Approach into Immigration Law and Procedure*, 12 Yale H.R. & Dev. L.J. 120, 127; Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 Colum. Hum. Rts. L. Rev. 159, 171 (1998).

<sup>262</sup> Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), princ. 2, 14 U.N. GAOR Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959).

<sup>263</sup> Article 3(2) of the CRC.



institutions, services and facilities responsible” for providing such protection and care for the child shall conform to standards “established by competent authorities” particularly in relation to “safety, health”, “number and suitability of staff” and “competent supervision.”<sup>264</sup>

The difficulty of realizing such a principle which exists largely as an ideal is that it is inadequately defined for effective national implementation. The attempts of the CRC to elaborate on the meaning of the ‘best interests of the child’ principle has fallen short of clearly defining who it is that determines what is in the best interests of the child and what exactly that entails in implementation. Critics argue that that this principle is “arbitrary, vague, and overreaching.”<sup>265</sup> In the United States, the Wisconsin Supreme Court noted that the ‘best interests of the child’ standard often “means one thing to a juvenile judge, another thing to adoptive parents, something else to natural parents, and still something different to disinterested observers.”<sup>266</sup> The tendency of the court “is to apply intuition” in deciding what a child would be better with and then express this intuition as being a legal standard of the best interests of the child.<sup>267</sup>

Notably, the meaning of this principle changes with every situation and every child but it seems highly inappropriate that the primary guiding principle in international law concerning children is so ill defined. Consequently, application becomes difficult and may lead individual States to set aside the principle altogether due to the fact that this principle “shall be a primary consideration”<sup>268</sup> and is not mandatory for application. The effects of this are best demonstrated through implementation of this principle in national immigration systems as these are central to providing protection to victims of child trafficking and thus appropriate implementation of this principle is important.

#### **4.2.1 National Immigration Systems: United States of America (USA)**

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<sup>264</sup> Article 3(3) of the CRC.

<sup>265</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131, 145; Elizabeth P. Miller, Note, *DeBoer v. Schmidt and Twigg v. Mays: Does the “Best Interests of the Child” Standard Protect the Best Interests of the Child?*, 20 J. Of Contemp. L. 497, 509.

<sup>266</sup> *State ex rel. Lewis v. Lutheran Social Servs.*, 207 N.W.2d 826, 831 (Wis. 1973)

<sup>267</sup> *State ex rel. Lewis v. Lutheran Social Servs.*, 207 N.W.2d 826, 831 (Wis. 1973)

<sup>268</sup> Article 3 of the CRC.

National immigration systems are vital in protecting child trafficking victims from further abuse and persecution arising in both their home and destination country.<sup>269</sup> It answers the international obligations under Article 7 of the Trafficking Protocol, which calls for State Parties to adopt “legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases,” and Article 22 of the CRC which states that a child seeking refugee status should receive appropriate protection and humanitarian assistance.

However, many national immigration systems do not reflect an appropriate implementation of the best interests of the child principle by providing effective relief for minors seeking asylum. For instance, in the USA, its 1998 Immigration and Naturalization Service’s Guidelines for Children’s Asylum Claims (INS Guidelines) have explicitly disregarded the ‘best interests of the child’ principle “in determining substantive eligibility under the U.S. refugee definition.”<sup>270</sup> The INS Guidelines emphasize that “regardless of how sympathetic the child’s asylum claim may be”, the ‘best interests of the child’ principle does not alter the legal standard in the refugee definition that children seeking asylum must meet.<sup>271</sup> Subsequently, as the USA immigration system is designed primarily for adults and children are not recognized as having independent rights from their parents, child victims of trafficking are disadvantaged as they have to navigate the system themselves and satisfy a legal standard which was created for adults in order to receive asylum.

In the USA immigration law, a ‘child’ is defined in relation to a parent, by establishment of a recognized parent-child relationship such as birth in wedlock, creation of a stepchild relationship, bona fide relationship with a natural father, or adoption.<sup>272</sup> This means that the USA immigration law does not recognize a child without a parent. Consequently, child victims of trafficking would not technically be regarded as children since they arrive in the United States without any parents

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<sup>269</sup> Home country is where the victim originated from. Destination country is where the victim is transported to through trafficking for exploitation.

<sup>270</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children’s Asylum Claims (1998) at 2 <[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>271</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children’s Asylum Claims (1998) at 18 <[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>272</sup> s101(b)(1) Immigration and Nationality Act.

or legal guardians from which to gain legal status. Thus, child victims of trafficking seeking asylum in USA are referred to as ‘unaccompanied minors.’ An ‘unaccompanied minor’ is defined as “any person under the age of eighteen who is separated from both parents and is not being cared for by an adult who, by law or custom, has a responsibility to do so, and who is an asylum seeker, recognized refugee or other externally displaced person.”<sup>273</sup> These ‘unaccompanied minors’ are arguably the most vulnerable group seeking refuge through the immigration system because in addition to being children and refugees, they also have no primary caretaker.<sup>274</sup>

Additionally, these ‘unaccompanied minors’ are forced to navigate an immigration system designed mainly for adults without a parent or legal guardian<sup>275</sup> and are assessed against a legal standard which was created for adult asylum seekers. This legal standard is contained in the definition of a ‘refugee.’<sup>276</sup> The Immigration and Nationality Act (INA) defines ‘refugee’ as “a person who is unable or unwilling...[to return to their] country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”<sup>277</sup> Since age is not included in this definition, one of these five enumerated grounds; race, religion, nationality, membership in a particular social group, or political opinion; have to be established as a basis of persecution by a child victim of trafficking. This requirement would seemingly not pose any difficulty because the United Nations High Commissioner for Refugees (UNHCR) 2006 Guidelines on International Protection states that a fear of trafficking can be categorized as persecutory conduct. In addition, other types of persecutory conduct that arise because of the trafficking experience can also satisfy this requirement, such as community and family ostracism, social exclusion, re-traumatisation or

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<sup>273</sup> Linda Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. Pub. Int. L.J. 263, 264 (2006) [quoting Andre Sourander, *Behavior Problems and Traumatic Events of Unaccompanied Refugee Minors*, 22 Child Abuse & Neglect 719 (1998)].

<sup>274</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131, 133; Carolyn J. Seugling, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. OF TRANSNAT’L. L. 861, 888 (2004).

<sup>275</sup> 77 CONG. REC. S7019 (2003) (statement of Sen. Feinstein) as cited in Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131, 133.

<sup>276</sup> s208(b)(1) Immigration and Nationality Act; 77 CONG. REC. S7019 (2003) (statement of Sen. Feinstein).

<sup>277</sup> s101(a)(42)(A) Immigration and Nationality Act.

victimization, or other forms of violence.<sup>278</sup> Nevertheless, the USA immigration system has not considered the unique difficulties faced by children to satisfy the legal standards required to gain protected status in the country.<sup>279</sup>

One of these unique difficulties is that a child victim of trafficking has neither the emotional stamina nor the social maturity needed to navigate the complicated procedures of gaining protected status through the immigration system. The USA immigration system does not recognize this difficulty faced by such children as it does not provide government-appointed counsel for these 'unaccompanied minors' seeking asylum. As a result, a child victim of trafficking often would not be able to explain his or her stand in such a manner to satisfy the legal standard. This is exemplified when the asylum applicant has to establish that his or her fear is "well-founded," the asylum applicant must show that his or her fear is both "subjectively genuine" and "objectively reasonable."<sup>280</sup> It is highly improbable for a child to be able to satisfy the court that his or her fear is "well-founded" without the guidance and help of a legal counsel as the vulnerability, heightened sensitivity and dependence of a child means that what may amount to persecution for a child may only be considered harassment or discrimination for an adult.

Thus the USA immigration system has not appropriately implemented the 'best interests of the child' principle as it does not consider the unique difficulties faced by child victims of trafficking during the procedures to gain protected status. On the other hand, the USA does provide a unique relief for unaccompanied or separated children in the form of the special immigrant juvenile status (SIJS). This type of relief might suit child victims of trafficking, as the applications are determined through a 'best interests of the child' collaborative approach by child welfare experts with special expertise in issues facing children and immigration officials.<sup>281</sup> However, to be eligible, the applicant must not only be declared a dependent of a USA juvenile court and have been determined by judicial or administrative proceedings that it is not in his or her best interests

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<sup>278</sup> UNHCR, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, P 8, U.N. Doc. HCR/GIP/06/07 (Apr. 7, 2006).

<sup>279</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131, 139.

<sup>280</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children's Asylum Claims (1998) at 19 <[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>281</sup> s101(a)(27)(J) Immigration and Nationality Act.

to be returned to his or her country of nationality or country of last habitual residence, but the applicant must also be deemed eligible and continue to be eligible for long-term foster care.<sup>282</sup>

Whether or not a child victim of trafficking is eligible for foster care depends highly on the type of trafficking experienced and the success of the rehabilitation process. Therefore, the factors involved in proving eligibility for SIJS are not ideal to get the needed immediate protection for child trafficking victims.

In an attempt to address all these problems, Senator Dianne Feinstein introduced the Unaccompanied Alien Child Protection Act (UACPA). The UACPA is built upon the INS Guidelines and the 'best interests of the child' principle. It provides for the appointment of a legal counsel for unaccompanied minors and establishes a guardian ad litem pilot program. The guardian ad litem's duty would be to "take reasonable steps to ensure that the best interests of the child are promoted" in immigration proceedings. The UACPA also makes training of immigration officials and personnel in children's special needs and circumstances mandatory. In addition, the UACPA calls for the Department of Justice to adopt the INS guidelines in its handling of children's asylum claims.<sup>283</sup>

This would include special procedural protections to create a "child-friendly asylum interview environment" and incorporating interviewing techniques that "seek to ensure that the applicant feels comfortable and free to discuss the claim."<sup>284</sup> Judges handling children asylum claims have to recognize that children "may not present their cases in the same way as adults" with the same degree of accuracy and detail.<sup>285</sup> The INS Guidelines also call for a liberal "benefit of the doubt" given to children's testimonies when assessing a child's alleged fear of persecution.<sup>286</sup>

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<sup>282</sup> Immigration and Nationality Act s101(a)(27)(J)

<sup>283</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131 at 157-158.

<sup>284</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children's Asylum Claims (1998) at 5 <[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>285</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children's Asylum Claims (1998) at 13 <[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>286</sup> Memorandum from Jeff Weiss, Acting Direct. of Int'l Affairs, to Asylum Officers, Immigration Officers, and Headquarters Coordinators, INS Guidelines For Children's Asylum Claims (1998) at 26

Therefore if the UACPA is passed and subsequently enacted, the 'best interests of the child' principle is better implemented in the USA immigration system as it guarantees more respect and procedural protection in immigration proceedings for child trafficking victims seeking asylum. However, although receiving great support from American and international human rights and child advocacy groups, this bill has yet to become law. It has been introduced nine times by Senator Feinstein since 2001 but has only passed the senate so far.<sup>287</sup>

In sum, the fact that the 'best interests of the child' principle has not been adequately defined for national implementation and not made mandatory for application has resulted in the almost non-existent incorporation of this principle into the USA immigration system. The USA's INS Guidelines even explicitly disregarded this principle pertaining to children satisfying the legal standard, designed for adults, in asylum claims. This disregard of the 'best interests of the child' principle in national immigration systems such as observed in the USA is detrimental towards providing effective protection and preventing further exploitation of child trafficking victims.

In addition to the discussion above on the effects of the various weaknesses of the international law framework pertaining to child trafficking, yet another weakness in national implementation is that the key obligation of States to cooperate and communicate towards the effective eradication of child trafficking; established by Articles 9, 10 and 11 of the Trafficking Protocol; is entrenched in discretionary language.

#### **4.3 Articles 9, 10 and 11 of the Trafficking Protocol: Cooperation and Communication**

Cooperation and communication between relevant organizations and individual States is necessary to enable the establishment of effective measures against child trafficking through the sharing of information, technology and experiences. Thus, a major weakness of Articles 9, 10 and 11 of the Trafficking Protocol, which call for cooperation and communication towards the eradication of child trafficking, is that they are couched in discretionary language.

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<[http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines\\_weiss121098.pdf](http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/ChildrensGuidelines_weiss121098.pdf)> accessed at 21 October 2011.

<sup>287</sup> Joyce Koo Dalrymple, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 Boston College Third World Law Journal 131 at 153.

Article 9 states that the implementation of measures for the prevention of trafficking of children “shall, as appropriate,” be carried out in “cooperation with non-governmental organizations, other relevant organizations and other elements of civil society”.<sup>288</sup> The prevention measures recommended include “research, information and mass media campaigns,” “social and economic initiatives” and “educational, social or cultural measures.”<sup>289</sup> As clearly stated in this provision, non-governmental organizations (NGOs) are amongst those who play crucial roles in the implementation of these measures. However, because Article 9 is couched in discretionary language, sometimes NGOs do not receive the adequate cooperation and support from governments such as in Thailand and Cambodia, effectively diminishing the efforts of NGOs in providing the necessary anti-child trafficking measures.

In addition, Articles 10 and 11 state that the cooperation of State Parties to exchange information and training with regards to “law enforcement, immigration or other relevant authorities” “shall” be carried out “as appropriate”<sup>290</sup> and that the “strengthening (of) cooperation among border control agencies by...establishing and maintaining direct channels of communication” “shall” be considered.<sup>291</sup> Again couched in discretionary language, individual States have the option to disregard the application of cooperation and communication in relation to their border control agencies. A comparative study between Australia and Thailand will show the benefits of cooperation and communication towards establishing effective border control measures against child trafficking. Accordingly, a failure to give full effect to this obligation to cooperate and communicate amongst border control agencies would result in a weak global effort against child trafficking.

#### **4.3.1 Relationship with NGOs: Thailand and Cambodia**

NGOs play a vital role in the provision of education, raising awareness and funds, promoting anti-child trafficking measures, and facilitating cooperation and communication among other organizations. They give extra support to governments, serving as a link between policy makers

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<sup>288</sup> Articles 6 and 9 of the Trafficking Protocol.

<sup>289</sup> Article 9 of the Trafficking Protocol.

<sup>290</sup> Article 10 of the Trafficking Protocol.

<sup>291</sup> Article 11 of the Trafficking Protocol.

and society, reaching out directly to children vulnerable to trafficking and raising awareness in communities with a high incidence of trafficking.<sup>292</sup> Therefore, it is essential that NGOs receive the cooperation needed through the adequate provision of support. However, the discretion given to States in relation to cooperation with NGOs has resulted in inadequate governmental support, such as in Thailand, and in some circumstances, NGOs even face restrictions and inappropriate interventions, such as in Cambodia.

The Thai Government has shown its support for NGOs through its inclusion of NGOs in establishing community-based prevention measures through its National Policy and Plan against human trafficking and supporting the implementation of NGO-run awareness raising campaigns.<sup>293</sup> However, these measures have a general focus on human trafficking with limited attention on children, resulting in a limited understanding and awareness about child trafficking. Therefore NGOs are the ones sustaining the safety net of vulnerable children by implementing community-based anti-child trafficking measures but have not received the adequate government support needed to truly make their efforts effective.

For instance, the education for children at schools on child trafficking, child rights, HIV/AIDS, and other related social issues directly concerning children in Thailand are largely maintained by NGOs.<sup>294</sup> This education has not been institutionalized through a state policy even though it is necessary to protect children from trafficking. This means that there is no compulsory education on these subjects, making the provision of this education dependent on individual schools and teachers' interest, and has also led to the inadequate training of the teachers.<sup>295</sup>

NGO-run shelters for human trafficking victims also provide a higher level of care to child victims as compared to Government-run shelters. For instance, Government shelters do not separate child victims of trafficking from adult victims to enable these children to receive the adequate and

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<sup>292</sup> Y. Badikova, NGOs play important role in field of combating human trafficking, 22 February 2010 <<http://www.inform.kz/eng/article/2241071>> accessed 24 July 2012.

<sup>293</sup> Thailand Country Progress Card, ECPAT at 8-9 <[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.

<sup>294</sup> Thailand Country Progress Card, ECPAT at 10 <[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.

<sup>295</sup> Thailand Country Progress Card, ECPAT at 10 <[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.



appropriate specialized care and support services needed for successful rehabilitation.<sup>296</sup> Also, the medical and psychological counseling services that are provided by Government shelters are too limited to address the special needs of child victims and are not delivered by adequately trained and experienced personnel.<sup>297</sup>

On the other hand, there are NGO-run shelters which cater more specifically to the needs of trafficked children such as Bann Poomvet, the only reception home for boys in Thailand,<sup>298</sup> and the permanent shelters run by DEPDC, a non-profit community based NGO working in Thailand to prevent child trafficking.<sup>299</sup> Accommodation, medical and psychological services, free informal education and life skills are provided for these children in their native tongue, as well as language education to help them adjust to the formal education provided in Thailand.<sup>300</sup> However, these shelters and other anti-child trafficking measures undertaken by these NGOs, such as awareness campaigns and research, are mostly funded by foreign institutions and implemented in conjunction with international organizations.<sup>301</sup> There is inadequate support from the government to increase the provision of these necessary services to victims of child trafficking.<sup>302</sup>

This is not a situation unique to Thailand. NGOs in Cambodia also face a lack of government support, coupled with restrictions and inappropriate interventions. Shelters for victims are run by NGOs but with no further assistance provided to these victims by the government.<sup>303</sup> Reports made by NGOs of the recruitment, detention and deployment of children by labour recruitment

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<sup>296</sup> Thailand Country Progress Card, ECPAT at 13

<[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.

<sup>297</sup> Thailand Country Progress Card, ECPAT at 13

<[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.

<sup>298</sup> Heamakarn Sricharatchanya, The road home for trafficked children in Thailand, Bangkok Post 24 May 2011, UNICEF <[http://www.unicef.org/eapro/media\\_16046.html](http://www.unicef.org/eapro/media_16046.html)> accessed at 27 October 2011.

<sup>299</sup> DEPDC <<http://www.endslaverynow.com/?goto=detail&section=ngo&ngo=8>> accessed at 27 October 2011.

<sup>300</sup> Heamakarn Sricharatchanya, The road home for trafficked children in Thailand, Bangkok Post 24 May 2011, UNICEF <[http://www.unicef.org/eapro/media\\_16046.html](http://www.unicef.org/eapro/media_16046.html)> accessed at 27 October 2011; DEPDC <<http://www.endslaverynow.com/?goto=detail&section=ngo&ngo=8>> accessed at 27 October 2011.

<sup>301</sup> Gunilla Riska, NGOs in the GMS, Involvement Related to Poverty Alleviation and Watershed Management, Thailand

<[http://www.mekonginfo.org/mrc\\_en/doclib.nsf/0/CF110B5966B1F122C725682D001049F7/\\$FILE/FULLTEXT.html#part4](http://www.mekonginfo.org/mrc_en/doclib.nsf/0/CF110B5966B1F122C725682D001049F7/$FILE/FULLTEXT.html#part4)> accessed at 27 October 2011.

<sup>302</sup> Thailand Country Progress Card, ECPAT at 8-14

<[http://www.ecpat.net/TBS/PDF/2010\\_Thailand\\_Progress\\_Card.pdf](http://www.ecpat.net/TBS/PDF/2010_Thailand_Progress_Card.pdf)> accessed at 26 October 2011.

<sup>303</sup> United States Department of State, *2011 Trafficking in Persons Report - Cambodia*, 27 June 2011 <<http://www.unhcr.org/refworld/docid/4e12ee8e0.html>> accessed 26 October 2011.

agencies suspected of labour trafficking are reportedly ignored and not acted upon. In addition, NGOs have reported that the government limited their involvement in consultations regarding a sub-decree of regulations on international labor recruiters to prevent abuse by recruitment agencies, while allowing substantial input from the representative of such agencies intended for regulation.<sup>304</sup> Also, information leaks from law enforcement authorities interfere with the investigations and rescues of trafficked children planned by NGOs.<sup>305</sup>

While NGOs are trying their best to fill the gaps in the governmental implementation of anti-child trafficking measures, they do not receive the adequate support and cooperation needed. The discretionary language of the key obligation with regards to cooperation with NGOs is the cause of this. The allowance for the option to disregard a vital element to establishing effective national efforts against child trafficking is only detrimental to the victims themselves. Unfortunately, this discretion is not only given to States in conjunction with cooperation with NGOs but also in relation to border control agencies.

#### **4.3.2 Border Control Agencies: Australia and Thailand**

The discretionary obligations regarding cooperation and communication between border control agencies<sup>306</sup> enable States to disregard the benefits that such relationships can offer. Individual States with less efficient border control systems will not benefit from the information and knowledge that other States could offer to improve the prevention and detection of child trafficking. To demonstrate the potential benefits of a fully cooperative relationship between border control agencies, a comparative study between Australia and Thailand will show how different States can help one another.

Australia has one of the most comprehensive and technologically sophisticated border security systems in the world, coupled with the knowledge and experience in detecting fraudulent passports and/or travel documents and identifying circumstances which are likely to be or are

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<sup>304</sup> United States Department of State, *2011 Trafficking in Persons Report - Cambodia*, 27 June 2011 <<http://www.unhcr.org/refworld/docid/4e12ee8e0.html>> accessed 26 October 2011.

<sup>305</sup> United States Department of State, *2011 Trafficking in Persons Report - Cambodia*, 27 June 2011 <<http://www.unhcr.org/refworld/docid/4e12ee8e0.html>> accessed 26 October 2011.

<sup>306</sup> Article 10 and 11 of the Trafficking Protocol.

related to child trafficking. Its border management system is based on four 'layers': the universal visa system with immigration alert checking; the airline liaison officers (ALOs) network; the Advance Passenger Processing (APP) system which operates at check-in overseas; and the processing at Australian airports and seaports on arrival.<sup>307</sup> In contrast, Thailand has no universal visa system and has a rather lax approach to border security, contributing to the greater incidence of transnational child trafficking in Thailand as compared to Australia.

The Australian universal visa system requires all persons entering Australia to apply for a visa or a visa equivalent with conditions appropriate to their stay. When an application for a visa is submitted, there is an immigration alert check against the Movement Alert List (MAL) prior to the issuing of the visa.<sup>308</sup> The MAL is a database essentially operating as a watch list of people and travel documents of concern. It is contributed to by security and law enforcement agencies as well as other Commonwealth agencies, and includes details of criminals, people who may pose a security risk and people barred from entering Australia for immigration breaches and health matters. It also includes details of lost, stolen and fraudulent travel documents.<sup>309</sup> This check against the MAL is not only done during the application of the visa but also when travelers check-in at overseas ports through the APP system and when they arrive in Australia.<sup>310</sup> Australia further facilitates this dedication by requiring everyone entering Australia, including children, to have their own passports or government certified travel documents.<sup>311</sup>

In contrast to Australia, Thailand has no universal visa system. Travelers from Cambodia, Myanmar and Laos who hold Diplomatic and Official passports are allowed 30 days of entry and

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<sup>307</sup> Australian Immigration Fact Sheet 70, Managing the Border, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/media/fact-sheets/70border.htm>> accessed at 16 May 2011.

<sup>308</sup> Australian Immigration Fact Sheet 70, Managing the Border, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/media/fact-sheets/70border.htm>> accessed at 16 May 2011.

<sup>309</sup> Australian Immigration Fact Sheet 70, Managing the Border, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/media/fact-sheets/70border.htm>> accessed at 16 May 2011.

<sup>310</sup> Australian Immigration Fact Sheet 70, Managing the Border, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/media/fact-sheets/70border.htm>> accessed at 16 May 2011.

<sup>311</sup> Australia's Entry Requirements, A Guide for the Travel Industry containing information on Australia's travel regulations, procedures and carrier responsibilities, October 2008, Department of Immigration and Citizenship at 5-14 <[http://www.immi.gov.au/media/publications/visa-entry/\\_pdf/Aus\\_Entry\\_Req\\_full\\_manual.pdf](http://www.immi.gov.au/media/publications/visa-entry/_pdf/Aus_Entry_Req_full_manual.pdf)> accessed at 27 October 2011.

stay without a visa and travelers from Vietnam are allowed 30 days for tourism without a visa.<sup>312</sup> In addition, Section 13 of the Immigration Act 2522 exempts a citizen of a country, which has its boundaries adjacent to Thailand, who is making a temporary journey across the border from the requirement to have a passport or similar travel documents.<sup>313</sup> Considering that Cambodia, Myanmar and Laos are adjacent to Thailand and that the highest numbers of trafficked children in Thailand originate from those countries, this seems to be a major weakness in Thailand's border security system. Vietnam is not adjacent to Thailand and thus its citizens do not get the same exemption but as pointed out above, the citizens of Vietnam are allowed to enter for 30 days without a visa. This makes it easier for child traffickers to bypass Thailand's border security. Moreover, there is no requirement for unaccompanied children or children travelling without their parents to have their own passports or government certified travel documents issued with permission from their parents.

To further complicate matters, birth registration of a child in these countries is not always made, especially for those from a low socio-economic background and in rural areas.<sup>314</sup> Not only does this make it difficult to authenticate the age of the child travelling, thereby increasing the vulnerability of the child to trafficking, it also puts the child at risk where he or she does not have the guaranteed protection of a specific national jurisdiction.<sup>315</sup> This means that if the child is displaced by trafficking, the statelessness of the child would expose him or her to discrimination, neglect and exploitation in addition to having no proper shelter, being highly traumatized and often separated from his or her family.<sup>316</sup>

However, Thailand does have a redeeming feature in its system called P.BIG which records travelers' arrival and departure information, keeps a list of suspected individuals for comparison, and has a passport checking system linked around the world.<sup>317</sup> In addition, there are two

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<sup>312</sup> Travel to Thailand, Immigration Bureau, Thailand

<<http://www.immigration.go.th/nov2004/en/base.php?page=voa>> accessed at 16 May 2011.

<sup>313</sup> Section 13 of the Immigration Act, B.E. 2522, Immigration Bureau, Thailand

<<http://www.immigration.go.th/nov2004/en/base.php?page=act>> accessed at 16 May 2011.

<sup>314</sup> Birth Registration, Right From the Very Start, UNICEF Innocenti Digest, March 2002 at ? .

<sup>315</sup> Birth Registration, Right From the Very Start, UNICEF Innocenti Digest, March 2002 at 11.

<sup>316</sup> Birth Registration, Right From the Very Start, UNICEF Innocenti Digest, March 2002 at 11.

<sup>317</sup> Nuppol Suvansombut, New Computer System to Boost Border Security in the South, National News Bureau of Thailand, 22 April 2011 <<http://thainews.prd.go.th/en/news.php?id=255404220017>> accessed at 17 May 2011.

Transnational Crime Data Centers (TNCDC) in Thailand; the newest one just opened in Pattaya in May 2010.<sup>318</sup> The TNCDC in Pattaya has recently installed a new computer system called 'Polis' that combines data from foreign agencies such as the United States Federal Bureau of Investigation (FBI), Interpol, Bangkok-based embassies and Thai Courts.<sup>319</sup> The data is available to the officers at TNCDC and includes photos, descriptions, known associates and habits of alleged criminals.<sup>320</sup> Police General Wuthi Puawes, the head of the Thailand immigration police and the Security Advisor, Special Affairs Department of the Royal Thai Police has said that, "[a]fter Pattaya we will also open other TNCDC's in other provinces such as Phuket, Chiang Mai and Samui."<sup>321</sup>

Therefore it seems that the Immigration Bureau in Thailand has made and is making efforts towards improving its border security through its P.BIG and TNCDC, elements similar to those in place in the Australian border security system. However, these efforts have only been recently implemented while Australia's border security system has been in place for many years. If there were an earlier exchange of information, experience and technology between the border control agencies of these two countries, Thailand could have established a more efficient border security system by now. Furthermore, Australia is better equipped than Thailand with trained specialized personnel in their border security system to target child trafficking, placing Australia in a better position to prevent and detect child trafficking. Therefore, a fully cooperative and communicative relationship between Thailand's and Australia's border control agencies will further anti-child trafficking efforts. This is because the global element in the features of the Australian border security system would assist the Thailand border control agencies to increase the effectiveness of their system and enhance the prevention and detection rates of child trafficking.

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<sup>318</sup> Visith Pinpawong, Transnational Crime Data Center Officially Opens in Pattaya, Pattaya Times, 12 August 2010 <<http://pattaya-times.com/a6161-transnational-crime-data-center-officially-opens-in-pattaya>> accessed at 17 May 2011.

<sup>319</sup> Visith Pinpawong, Transnational Crime Data Center Officially Opens in Pattaya, Pattaya Times, 12 August 2010 <<http://pattaya-times.com/a6161-transnational-crime-data-center-officially-opens-in-pattaya>> accessed at 17 May 2011.

<sup>320</sup> Visith Pinpawong, Transnational Crime Data Center Officially Opens in Pattaya, Pattaya Times, 12 August 2010 <<http://pattaya-times.com/a6161-transnational-crime-data-center-officially-opens-in-pattaya>> accessed at 17 May 2011.

<sup>321</sup> Visith Pinpawong, Transnational Crime Data Center Officially Opens in Pattaya, Pattaya Times, 12 August 2010 <<http://pattaya-times.com/a6161-transnational-crime-data-center-officially-opens-in-pattaya>> accessed at 17 May 2011.

For instance, the Australian ALOs network is essentially a number of immigration officers operating at some overseas airports which provide direct travel to Australia. The ALOs work closely with airlines, immigration and airport staff to facilitate the travel of genuine passengers and prevent potentially inadmissible passengers from travelling to Australia.<sup>322</sup> Being specialist document examiners, they assist airline and airport staff in checking for irregularities in travel documents and they also provide training on Australia's entry requirements to host nation immigration authorities, airline and airport security staff.<sup>323</sup> As part of the international cooperation to combat people smuggling and irregular migration, Australian ALOs and their counterparts from other Governments participate in short-duration multi-national exercises to help at select airports overseas with the aim to stop passengers with irregularities in their travel documents.

Also, the Department of Immigration and Citizenship (DIAC) has an Intelligence Network dedicated to combating people smuggling, fraud and unauthorized arrivals in Australia, types of activity which include child trafficking.<sup>324</sup> This network consists of National Intelligence Officers and Overseas Compliance Officers. Their role is to collect, disseminate and report information and intelligence relating to people smuggling, trafficking, irregular migration, immigration fraud and malpractice. The 18 National Intelligence Officers are deployed at key Australian State and Territory airports and seaports to work closely with other Australian government agencies on a regular basis. There are over 30 Compliance Officers at key overseas posts who also work closely with local police and immigration officials.<sup>325</sup> The data collected is maintained in DIAC's Global Intelligence database, IMtel. IMtel provides DIAC officers, both in Australia and overseas, real-

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<sup>322</sup> Combating People Smuggling and Unauthorised Arrivals – Irregular Entry Prevention – Border Security, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>> accessed at 16 May 2011.

<sup>323</sup> Combating People Smuggling and Unauthorised Arrivals – Irregular Entry Prevention – Border Security, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>> accessed at 16 May 2011.

<sup>324</sup> Combating People Smuggling and Unauthorised Arrivals – Irregular Entry Prevention – Border Security, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>> accessed at 16 May 2011.

<sup>325</sup> Combating People Smuggling and Unauthorised Arrivals – Irregular Entry Prevention – Border Security, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>> accessed at 16 May 2011.

time access to information and intelligence collected globally and the network activities are supported by analysts in the Canberra-based Intelligence Analysis Section.<sup>326</sup>

In sum, the benefits of establishing a relationship of cooperation and communication between border control agencies of different States are many, as shown above in the comparative study between Australia and Thailand. Moreover, if such relationships are established worldwide, it would strengthen the global effort to prevent and detect child trafficking. Unfortunately, the obligations providing for the cooperation and communication between border control agencies to prevent and detect child trafficking are entrenched in discretionary language, thus lacking the necessary force to require States to take action.

#### **4.4 Conclusion**

The case studies of Sierra Leone, Australia, USA, Thailand and Cambodia demonstrate some of the problems of national implementation that occur due to the weaknesses of the international obligations pertaining to child trafficking.

First, the inadequacies of the current definition of child trafficking in the Trafficking Protocol affect the national implementation of Article 5 of the Trafficking Protocol which calls for the criminalization of child trafficking. The limited scope of the current Trafficking Protocol definition to transnational trafficking by organized crime groups has resulted in a failure to criminalize the internal trafficking of children in Sierra Leone. In addition, the neutrality of the current definition towards prostitution has resulted in the failure of Sierra Leone to explicitly prohibit child prostitution and caused inconsistent state laws within one nation regarding prostitution and age of consent, such as in Australia. Moreover, there are inconsistent laws between various individual States regarding penalties imposed on the perpetrators of child trafficking. These failures to implement appropriate laws criminalizing child trafficking and child prostitution have diminished the effectiveness of efforts to prosecute and punish the perpetrators of child trafficking.

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<sup>326</sup> Combating People Smuggling and Unauthorised Arrivals – Irregular Entry Prevention – Border Security, Department of Immigration and Citizenship, Australian Government <<http://www.immi.gov.au/managing-australias-borders/border-security/irregular-entry/combat.htm>> accessed at 16 May 2011.

Second, the case study of the USA immigration system demonstrates that the inadequate definition of idealistic principles which have also not been made mandatory for application, such as the 'best interests of the child' principle encapsulated in Article 3 of the CRC, and resulted in an almost non-existent incorporation of this principle into the USA immigration system. In fact, the USA's INS Guidelines have even explicitly disregarded this principle pertaining to children satisfying the legal standard in asylum claims, originally designed for adults. Notably, the idea of incorporating this principle into the USA immigration system has been introduced many times but has yet to be realized into law. This disregard of the 'best interests of the child' principle in national immigration systems such as in the USA diminishes the provision of effective protection and prevention of further exploitation of child trafficking victims.

Lastly, the comparative studies of Thailand, Cambodia and Australia demonstrate the negative effects of having key obligations entrenched in discretionary language, such as the obligation to cooperate with NGOs and amongst border control agencies towards the eradication of child trafficking. For instance, NGOs in Thailand and Cambodia do not receive adequate support and cooperation in the implementation of necessary anti-child trafficking measures. Also, the benefits of a fully cooperative relationship between border control agencies are demonstrated by the comparative study between Australia and Thailand but the discretionary obligations pertaining to the establishment of such relationships have allowed States to disregard their implementation. Consequently, these key obligations pertaining to cooperation, established to promote a united global effort against child trafficking through national implementation, do not fulfill their purpose because of their discretionary nature.

Therefore, these case studies show that there is a need for improvement of the international law addressing child trafficking. Without such improvement, there would be increasing detrimental effects on victims of child trafficking as the phenomenon continue to grow in number and intensity. Chapter 6 will discuss these improvements in further detail.



# Chapter 5

## Compliance with International Obligations

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Like all forms of law, the existence of international law is futile without a solid structure for monitoring and enforcing compliance. This is especially true in relation to the international law addressing child trafficking because through regular monitoring and encouragement, pressure will increase on States to implement obligations couched in discretionary language. Also, mechanisms such as the Special Rapporteur on Trafficking in Persons, Especially Women and Children can assist with compiling and researching the appropriate and most successful anti-child trafficking methods. Moreover, these mechanisms can facilitate the realization of idealistic principles of the international law in national law. For instance, the United Nations High Commissioner for Refugees helps define the 'best interests of the child' principle, encapsulated in Article 3 of the CRC, for application into national immigration systems and rehabilitation services for victims of child trafficking. In sum, strong mechanisms set up to monitor and enforce these international obligations will help fill in the gaps and remedy weaknesses in the international law addressing child trafficking.

Unfortunately, the current international enforcement system is insufficient to ensure that States implement their international obligations effectively. The key enforcement mechanisms which will be discussed in this chapter are the Special Rapporteur on Trafficking in Persons, Especially Women and Children (SRT), the Committee on the Rights of the Child (CRC Committee), the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime (Conference of the Parties), and the United Nations High Commissioner for Refugees (UNHCR).

First, the existing enforcement system involves unnecessary duplication of work which gives rise to the problem where none of the mechanisms actually spearhead the efforts in ensuring successful anti-child trafficking measures. There is also a lack of focus on child trafficking as none

of the enforcement mechanisms are specifically concerned with child trafficking and some treaties relevant to child trafficking have not established enforcement mechanisms of their own. In addition, each of these enforcement mechanisms has a limited focus; they are concerned with enforcing only certain areas of international law. For instance, the SRT is primarily concerned with national implementation of human rights law, the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime is concerned with national implementation of international obligations relating to criminal justice, and the UNHCR is primarily concerned with ensuring the protection of refugees. As a result, there is no holistic approach towards enforcing compliance of States with their international obligations pertaining to child trafficking.

Another reason why the current enforcement system is insufficient is that its mechanisms have limited powers. For instance, the effectiveness and efficiency of key enforcement mechanisms such as the SRT and the UNHCR are limited by their dependency on State cooperation for the fulfillment of their purposes. This dependency is a limitation because State cooperation with these mechanisms is not based on obligations. Additionally, the powers of key mechanisms, such as the SRT, the Conference of the Parties to the United Nations Convention Against Transnational Organized Crime and the CRC Committee, are also limited in that they are not able to actually enforce any international obligations by compelling States to answer for any allegations or proven breaches; these mechanisms only monitor progress of national implementation and make recommendations.

Moreover, there is a limited accountability of individual States to some of the key mechanisms in this enforcement system with regards to their reporting obligations or other international obligations. This lack of accountability means that when States do not comply with their reporting obligations or other international obligations or take the recommendations from these enforcement mechanisms into serious consideration and apply them into national law, there is nothing these enforcement mechanisms can do to compel these States to comply with their obligations.

## **5.1 Patchwork Enforcement System**

The first major weakness of the existing enforcement system is that it is a patchwork system reflecting the patchwork framework of international law addressing child trafficking. Enforcement mechanisms are established to monitor key areas of international law, whether it is human rights,

criminal justice or asylum. However, the system currently established is disorganized and inefficient as there are multiple enforcement mechanisms essentially performing the same tasks, resulting in an unnecessary duplication of work. The fundamental problem with this is that none of these organizations actually assume responsibility in directing the progress of or identifying the key priorities needed for effective and successful anti-child trafficking measures.

As observed, cooperation and communication towards eradicating child trafficking is a vital element of the international law framework addressing child trafficking but it is not addressed in one specific enforcement mechanism; rather it is incorporated into most of the available enforcement mechanisms. For instance, at the Conference of the Parties' first session in Vienna in 2004, it established a programme of work with respect to the Trafficking Protocol that it will review at regular intervals.<sup>327</sup> The purpose of this programme of work is to enhance international cooperation, develop "technical assistance to overcome difficulties in the implementation of the Protocol" and facilitate the "exchange of views and experience regarding the protection of victims and preventive measures".<sup>328</sup> Similarly, the SRT works "to enhance information-sharing and data-collection capacities as a way of promoting cooperation to combat trafficking in persons".<sup>329</sup> Also, the Global Initiative to Fight Human Trafficking (UN.GIFT) was established as a multi-stakeholder<sup>330</sup> initiative in March 2007 to provide global access to expertise, knowledge and innovative partnerships. It has facilitated operational cooperation between individual States in

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<sup>327</sup> Decision 1/5, First session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session1-Decisions.html>> accessed at 23 May 2011.

<sup>328</sup> Decision 1/5, First session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session1-Decisions.html>> accessed at 23 May 2011.

<sup>329</sup> Joy Ngozi Ezeilo, Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly A/HRC/10/16 at 7  
<<http://www2.ohchr.org/english/issues/trafficking/docs/HRC-10-16.pdf>> accessed at 8 November 2011.

<sup>330</sup> UN.GIFT was launched by the International Labour Organization (ILO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the International Organization for Migration (IOM) and the Organization for Security and Cooperation in Europe (OSCE) and funded by a grant of the United Arab Emirates and has since received additional financial support from the Governments of Australia, Austria and Canada, as well as UNICEF, the United Nations Development Fund for Women (UNIFEM), the United Nations Development Programme (UNDP), the United Nations Fund for International Partnerships and public donations. As at June 2010, the Governments of Belgium and Switzerland also contributed to UN.GIFT, to its joint programme in Serbia.

relation to protection and prevention measures by arranging for exchanges of experiences and promising practices. The UN.GIFT has also elaborated upon a project proposal addressing international cooperation which is being reviewed.<sup>331</sup> These mechanisms are all essentially doing the same thing, enforcing the discretionary obligation of States to cooperate and communicate towards eradicating human trafficking.

In the subsequent sessions of the Conference of the Parties in 2005<sup>332</sup>, 2006<sup>333</sup>, 2008<sup>334</sup> and 2010<sup>335</sup>, the few comments made towards addressing international cooperation and communication are general in nature. There are discussions which highlight the need for increased international, national and regional cooperation and communication in respect of combating human trafficking but there is no effort made towards identifying and prioritizing the tasks that must be performed in order to ensure this happening.

The Conference of Parties seems to make an effort to enhance international cooperation and communication but in reality, it is at best, only one of its sub-priorities. On the other hand, the Global Initiative to Fight Human Trafficking (UN.GIFT) does seem to try to identify, encourage and facilitate the necessary measures to enhance cooperation and communication but the fact that it is not established specifically for addressing child trafficking but human trafficking in general, reduces its effectiveness with regards to combating child trafficking. In its 2010 report<sup>336</sup>, any

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<sup>331</sup> Global Initiative to Fight Human Trafficking, Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 18-22 October 2010, Vienna, CTOC/COP/2010/11 at V.4  
<[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_11/CTOC\\_COP\\_2010\\_11\\_E\\_20\\_Aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_11/CTOC_COP_2010_11_E_20_Aug.pdf)> accessed at 1 June 2011.

<sup>332</sup> Second session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 10-21 October 2005, CTOC/COP/2005/8  
<[http://www.unodc.org/pdf/ctoccop\\_2005/V0590521e.pdf](http://www.unodc.org/pdf/ctoccop_2005/V0590521e.pdf)> accessed at 20 January 2012.

<sup>333</sup> Third session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2006/14  
<[http://www.unodc.org/documents/treaties/organized\\_crime/COP3/CTOC\\_COP\\_2006\\_14\\_E\\_20\\_aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP3/CTOC_COP_2006_14_E_20_aug.pdf)> accessed at 20 January 2012.

<sup>334</sup> Fourth session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 8-17 October 2008, CTOC/COP/2008/19  
<[http://www.unodc.org/documents/treaties/organized\\_crime/Final\\_report\\_English.pdf](http://www.unodc.org/documents/treaties/organized_crime/Final_report_English.pdf)> accessed at 20 January 2012.

<sup>335</sup> Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 18-22 October 2010, CTOC/COP/2010/6  
<[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_6/CTOC\\_COP\\_2010\\_6\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_6/CTOC_COP_2010_6_E.pdf)> accessed at 23 May 2011.

<sup>336</sup> Global Initiative to Fight Human Trafficking, Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 18-22 October 2010, Vienna,

mention of children is subordinate to references to women or adults. There is hardly any dedicated attention to addressing child trafficking in particular. This is similar to the SRT's report in 2010<sup>337</sup> on regional and sub-regional cooperation in promoting a human rights-based approach to combating trafficking in persons. The only mention of children in the SRT's conclusions and recommendations in this report is as part of the general trafficking in persons. There is no distinction made as to the particular measures needed for establishing cooperation and communication towards eradicating child trafficking. These examples show that although there are enforcement mechanisms which make an effort to enhance international cooperation and communication, none of them are taking the responsibility to lead the progress of this in relation to child trafficking.

Likewise, the compliance of individual States to protect the human rights of child trafficking victims are not addressed in one specific enforcement mechanism; rather it is addressed by three separate enforcement mechanisms: the CRC Committee; the UNHCR; and the SRT. The CRC Committee was established by Article 43 of the CRC to examine the progress made by State Parties in achieving the realization of the obligations undertaken in the CRC. It is comprised of ten "experts of high moral standing and recognized competence in the field covered by this Convention"<sup>338</sup> elected from a list of persons nominated by State Parties. The UNHCR also applies the CRC by using the rights of children stated in the CRC as guiding principles in its work concerning children.<sup>339</sup> Additionally, the purpose of the SRT is to protect the human rights of the victims of trafficking in persons<sup>340</sup> where the CRC is to be the main reference for the SRT regarding

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CTOC/COP/2010/11 at V.4

<[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_11/CTOC\\_COP\\_2010\\_11\\_E\\_20\\_Aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_11/CTOC_COP_2010_11_E_20_Aug.pdf)> accessed at 20 January 2012.

<sup>337</sup> Joy Ngozi Ezeilo, Trafficking in persons, especially women and children: regional and subregional cooperation in promoting a human rights-based approach to combating trafficking in persons, Human Rights Council, 11 June 2010, A/HRC/14/L.14 <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G10/142/34/PDF/G1014234.pdf?OpenElement>> accessed at 20 January 2012.

<sup>338</sup> Article 43(2) of the CRC.

<sup>339</sup> Refugee Children: Guidelines on Protection and Care, 1994 UNHCR <[http://www.unicef.org/violencestudy/pdf/refugee\\_children\\_guidelines\\_on\\_protection\\_and\\_care.pdf](http://www.unicef.org/violencestudy/pdf/refugee_children_guidelines_on_protection_and_care.pdf)> accessed at 23 May 2011.

<sup>340</sup> Background to the Mandate, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/>> accessed at 8 November 2011.

trafficked children.<sup>341</sup> The SRT is to provide “practical, rights-based approach policy guidance” on the prevention of trafficking and the protection of its victims and to facilitate the “integration of a human rights perspective into national, regional, and international anti-trafficking laws, policies and interventions”.<sup>342</sup> Again, these three enforcement mechanisms may seem to be enforcing the rights established by the CRC for different purposes but in actual fact, all three mechanisms are essentially performing the same tasks yet none are focused upon identifying and ensuring the protection of trafficked children.

In other words, even with all these mechanisms available in this enforcement system, there is no mechanism specifically concerned with child trafficking in relation to key areas of international law, resulting in a lack of focus on child trafficking. For instance, the CRC Committee is not specifically concerned with child trafficking and its related issues, making it hard for the Committee to address child trafficking thoroughly as it has so many other child-related issues to deal with. In making recommendations to State Parties based on their periodic reports, the CRC Committee only dedicates minimal attention to the issue of child trafficking in the midst of addressing all the other issues pertaining to children. In the CRC Committee’s most recent report on its 49<sup>th</sup> session in 2008, there are only a few paragraphs in the entire report which addresses child trafficking.<sup>343</sup> These few paragraphs are cursory and does not address the issue in detail; rendering such recommendations meaningless.

Also, Article 35 of the CRC is especially relevant to the trafficking of children as it calls for the prevention of abduction, sale or traffic in children for any purpose. However, the manner with which this provision is addressed by the CRC Committee suggests that its implementation is only as a matter associated with other issues plaguing children, such as sexual exploitation. An example of this is in the Committee’s concluding observations on India in its 35<sup>th</sup> session in 2004 where it was summed up in one short paragraph; ‘welcom(ing)’ the adoption of plans, studies and projects to collect data and information on both adult and children victims of trafficking and

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<sup>341</sup> International Standards, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights < <http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>342</sup> International Standards, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights < <http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>343</sup> Committee on the Rights of the Child, Report on the forty-ninth session, 25 February 2010, CRC/C/49/3 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/410/05/PDF/G1041005.pdf?OpenElement>> accessed at 20 January 2012.

sexual exploitation and ‘express(ing) concern’ that India’s Immoral Traffic Prevention Act 1986 ‘does not define trafficking and limits its scope to sexual exploitation’, that the number of child victims of sexual exploitation is increasing, and there are ‘insufficient programmes’ for recovery and reintegration of victims.<sup>344</sup> Brief and only superficially addressing the problem of child trafficking in India, the Committee’s observations only reiterate the obvious and thus its recommendations to this effect bear the same quality.

In addition, one of the weaknesses of the SRT - one of the most specified enforcement mechanisms available to monitor the implementation of international obligations related to child trafficking - is that it addresses child trafficking together with the trafficking of adults. Research and observations carried out by the SRT encompass human trafficking in general, trafficking of men, women and children. In a 2010 report by the SRT, the conclusions and recommendations set out at the end of the report do not distinguish between the trafficking in children from adults.<sup>345</sup> The only distinction given to children in this report is in reference to provide “gender and child-sensitive” protection measures, to give “regard to (the safety and security of) children” in all stages of legal proceedings, and include “gender mainstreaming and a child-centred approach” in developing strategies to combat trafficking with the “best interests determination” as a central tool in all considerations of situations involving children.<sup>346</sup> These statements are superficial at best and do not provide sufficient insight into the problem of child trafficking and the necessary in-depth guidance to improve national implementation of anti-child trafficking measures. Therefore although the SRT is an enforcement mechanism established specifically for human trafficking, the lack of distinction given to children results in poor enforcement of international obligations addressing child trafficking.

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<sup>344</sup> Committee on the Rights of the Child, 35<sup>th</sup> Session, Consideration of Reports submitted by State Parties under Article 44 of the Convention, Concluding Observations: India, CRC/C/15/Add.228 at para 74 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/405/52/PDF/G0440552.pdf?OpenElement>> accessed at 8 November 2011.

<sup>345</sup> Joy Ngozi Ezeilo, Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly A/HRC/14/32 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/11/PDF/G1013211.pdf?OpenElement>> accessed at 24 May 2011.

<sup>346</sup> Joy Ngozi Ezeilo, Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Human Rights Council, General Assembly A/HRC/14/32 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/11/PDF/G1013211.pdf?OpenElement>> accessed at 24 May 2011.

Additionally, some of the treaties which are particularly relevant to child trafficking, such as the Trafficking Protocol and the 1951 Refugee Convention, do not have enforcement mechanisms. It is especially alarming that the Trafficking Protocol, the primary anti-trafficking instrument in international law, has no specific enforcement mechanism. It only has the enforcement mechanism established by the United Nations Convention against Transnational Organized Crime.<sup>347</sup> This makes matters worse for issues relevant to the trafficking of children. The way the Trafficking Protocol addresses child trafficking already suggests that child trafficking is to be treated as a sub-issue to the trafficking of adults.<sup>348</sup> Having an enforcement mechanism that oversees not only human trafficking in general, but also people smuggling and other transnational organized crimes, results in child trafficking again being overlooked.

For instance, in both the third and fourth session of the Conference of the Parties in 2006 and 2008, its decisions in relation to trafficking in persons address human trafficking in general, with no distinction made towards the trafficking in children.<sup>349</sup> Decision 4/4 of the fourth session of the Conference established an open-ended interim working group to advise and assist the Conference in the implementation of its mandate regarding the Trafficking Protocol. The Conference also decided that a report should be submitted on the activities of the Working Group on Trafficking in Persons (Working Group) to the Conference.<sup>350</sup>

Thus, pursuant to the fifth session of the Conference, the Working Group prepared a report reviewing the implementation of the Trafficking Protocol. This report was made part of the agenda in the fifth session of the Conference in 2010 and discusses the many issues related to human trafficking, including definition of concepts, prevention and awareness-raising, victim protection and assistance, and international, regional and national cooperation and

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<sup>347</sup> Established by Article 32 of the United Nations Convention against Transnational Organized Crime.

<sup>348</sup> Refer to Chapter 2 and Chapter 3.

<sup>349</sup> Decision 3/3, Third session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/treaties/CTOC/CTOC-COP-session3-decisions.html>> accessed at 23 May 2011; Decision 4/4, Fourth session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/en/treaties/ctoc-cop-session4-decisions.html>> accessed at 23 May 2011.

<sup>350</sup> Decision 4/4, Fourth session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/en/treaties/ctoc-cop-session4-decisions.html>> accessed at 23 May 2011.



coordination.<sup>351</sup> However, the only instance when child trafficking is distinguished from the trafficking in adults is when the report notes that State Parties should consider the “special needs of children”<sup>352</sup> and “ensure that responses to child trafficking at all levels are always based on the best interest of the child.”<sup>353</sup> This hardly addresses issues significant to the trafficking in children as there was no discussion or calls for discussion regarding the “special needs of children” and the meaning of the “best interest of the child”. Therefore it seems that the work of this enforcement mechanism so far in relation to child trafficking is just to echo what has already been stated in the Trafficking Protocol without any further details, clarification or calls for discussion to this end.

Similarly, the 1951 Refugee Convention has no specific enforcement mechanism of its own. The United Nations High Commissioner for Refugees (UNHCR) has, however, adopted the 1951 Refugee Convention as the basic statute guiding its work and thus by default, the Refugee Convention became a vital enforcement mechanism in relation to the provision of asylum for victims of child trafficking. Children make up about half of the population that UNHCR is concerned with<sup>354</sup> but based on an independent review carried out in 2002 on UNHCR’s activities,<sup>355</sup> the UNHCR does not provide sufficient assistance to children. One of the main problems pointed out by this 2002 review is in relation with meeting the rights and protection needs of refugee children, where the issues faced by children are secondary to the issues faced by adults as result of the core of the work done by the UNHCR being geared mainly towards

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<sup>351</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 18-22 October 2010, CTOC/COP/2010/6 at 3-7 <[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_6/CTOC\\_COP\\_2010\\_6\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_6/CTOC_COP_2010_6_E.pdf)> accessed at 23 May 2011.

<sup>352</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 18-22 October 2010, CTOC/COP/2010/6 at 13 <[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_6/CTOC\\_COP\\_2010\\_6\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_6/CTOC_COP_2010_6_E.pdf)> accessed at 23 May 2011.

<sup>353</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: Protocol to Prevent, suppress and Punish Trafficking in Persons, Especially Women and Children, Fifth Session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 18-22 October 2010, CTOC/COP/2010/6 at 4 <[http://www.unodc.org/documents/treaties/organized\\_crime/COP5/CTOC\\_COP\\_2010\\_6/CTOC\\_COP\\_2010\\_6\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_6/CTOC_COP_2010_6_E.pdf)> accessed at 23 May 2011.

<sup>354</sup> Children, UNHCR <<http://www.unhcr.org/pages/49c3646c1e8.html>> accessed 30 May 2011.

<sup>355</sup> Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities, May 2002, UNHCR <<http://www.unhcr.org/3cd6363aa.html>> accessed 23 May 2011

adults.<sup>356</sup> Since this 2002 review, there has not been any other review or follow up done to assess the progress in addressing the issues raised. Consequently, victims of child trafficking are disadvantaged as the UNHCR is acting as the primary enforcement mechanism to bring national laws, policies and practices to comply with international standards in relation to asylum and migration law.<sup>357</sup> It seems that the concerns of the UNHCR are too broad and consequently, child victims of trafficking do not receive the adequate attention needed.

In addition to a patchwork system with a lack of focus on child trafficking, these enforcement mechanisms also have limited focus in that they are concerned with only enforcing certain areas of the international law. For instance, although the SRT has a specific focus on human trafficking, it only focuses on monitoring the human rights aspect of trafficking in persons.<sup>358</sup> Also, the Conference of the Parties is mainly concerned with the establishment and fulfillment of criminal justice. Its primary purpose is to monitor the implementation of the United Nations Convention against Transnational Organized Crime and its Protocols, which are all established with a criminal justice purpose.<sup>359</sup> Similarly, the UNHCR has a limited focus towards the provision of asylum and related assistance for refugees. It was established with a mandate extended “until the refugee problem is solved”.<sup>360</sup>

As a consequence of this patchwork enforcement system there is an absence of a holistic approach towards enforcing compliance of States with their international obligations pertaining to child trafficking. Subsequently, the effectiveness of this enforcement system is diminished as the issues pertaining to implementation of international obligations regarding child trafficking is insufficiently addressed to ensure effective national implementation. Importantly, the current enforcement mechanisms related to child trafficking have limited powers, making these mechanisms inefficient in fulfilling their purposes.

## **5.2 Limited Powers of Key Enforcement Mechanisms**

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<sup>356</sup> Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities, May 2002, UNHCR at V <<http://www.unhcr.org/3cd6363aa.html>> accessed 23 May 2011

<sup>357</sup> Advocacy, UNHCR <<http://www.unhcr.org/pages/49c3646c104.html>> accessed at 23 May 2011.

<sup>358</sup> Introduction, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights < <http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>359</sup> Article 32 of the United Nations Convention against Transnational Organized Crime.

<sup>360</sup> Governance and Organization, UNHCR < <http://www.unhcr.org/pages/49c3646c80.html>> accessed at 23 May 2011.

First, the powers of key mechanisms in this enforcement system are limited by their inability to actually enforce States' international obligations regarding child trafficking. For instance, the SRT is only able to make recommendations and question States regarding allegations of breaches of international obligations and suspicions of child trafficking and exploitation. It does not have the power to compel States to answer for any breaches of their international obligations regarding child trafficking. Similarly, the UNHCR, the Conference of the Parties and the CRC Committee only have the power to monitor progress of national implementation and make recommendations. These enforcement mechanisms have no authority to compel States to answer for any allegations or proven breaches of their international obligations, even the obligation of States to submit reports to some of these mechanisms on the progress of their national implementation, as discussed later on.<sup>361</sup>

Additionally, the powers of some of the key mechanisms in this enforcement system are limited by their dependency on State cooperation to fulfill their mandates. For the purpose of this discussion, focus will be given to two key enforcement mechanisms: the SRT; and the UNHCR. These mechanisms have not been established by any treaty or international instrument where State Parties have an obligation to cooperate with the enforcement mechanisms. The SRT was established by the United Nations Commission on Human Rights and the UNHCR was established by the United Nations General Assembly.

*Special Rapporteur on Trafficking in Persons, Especially Women and Children (SRT)*

The SRT is limited in fulfilling her purposes by her inability to carry out country visits and reviews without State permission and her inability to compel State Governments to respond in a timely manner to its communications. The SRT is mandated by the Human Rights Council's resolution 7/13<sup>362</sup> to:

- (i) analyse the root causes of child exploitation;
- (ii) identify new patterns of such exploitation;
- (iii) identify, promote and facilitate the exchange of best practices on measures to combat such exploitation;

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<sup>361</sup> Refer to 5.3 Limited Accountability of States.

<sup>362</sup> Resolution 7/13, Mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, Human Rights Council, A/HRC/RES/7/13  
<[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_13.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_13.pdf)> accessed at 8 November 2011.

- (iv) promote comprehensive strategies and measures on prevention; and
- (v) make recommendations on the promotion and protection of human rights of actual and potential victims of child exploitation, as well as on aspects related to rehabilitation.<sup>363</sup>

This mandate is to be fulfilled through country visits and communications with States.<sup>364</sup> The SRT undertakes country visits to learn about both the shortcomings and successes in implementation of policies and programmes to combat human trafficking. These visits are beneficial as they enable onsite studies of local situations and thus the SRT is able to formulate country-specific recommendations for improvement in implementation of international obligations in relation child trafficking. In addition, the SRT focuses on specific themes for each country visit, allowing in-depth research and analysis to be carried out.<sup>365</sup>

Communications with State Governments allow the SRT to question State Governments about individual cases and general situations related to its mandate, including allegations received regarding the “sale of children, trafficking of children for sexual exploitation, child pornography and other forms of child sexual exploitation”.<sup>366</sup> Such communications could encourage States to better comply with their international obligations regarding child trafficking as it increases the pressure on States to follow up on such allegations in order to provide the SRT with answers.

However, the fulfillment of the SRT’s mandate depends largely upon the cooperation of States with the SRT in the performance of her mandate. For the SRT to be effective, States have to respond favorably to the SRT’s request for a country visit, provide the SRT with the information

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<sup>363</sup> Resolution 7/13, Mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, Human Rights Council, A/HRC/RES/7/13 at 2  
<[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_13.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_13.pdf)> accessed at 8 November 2011.

<sup>364</sup> Background to the Mandate, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>365</sup> Background to the Mandate, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights <<http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>366</sup> Najat Maalla M’jid, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/16/57/Add.1 at 6 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/09/PDF/G1110709.pdf?OpenElement>> accessed at 8 November 2011.

requested and respond promptly to the SRT's urgent appeals.<sup>367</sup> Unfortunately, States are only encouraged and requested to cooperate with the SRT; their cooperation is not an obligation.<sup>368</sup>

As a result, requests for country visits by the SRT can go unanswered by States. This limitation of the SRT's powers is particularly highlighted when often it is those States which have the highest incidence of child trafficking who do not respond favorably to requests for country visits. States which have a reportedly moderate or minimal incidence of child trafficking, such as Australia, Bosnia- Herzegovina, Egypt, Japan, Argentina and Uruguay, are more likely to allow a country visit by the SRT.<sup>369</sup> For instance, in 2004 the SRT made country visit requests to Cambodia and India but after so many years, these requests have yet to be responded to favorably,<sup>370</sup> even with a repeat request to India in 2010.<sup>371</sup> It is a shame that the SRT is unable to make these country visits without State permission as these two States have a particularly high incidence of child trafficking and therefore would benefit from a country visit and review of the local situation by the SRT.

To provide an example of the benefits the SRT can impart to individual States via country visits, the SRT undertook one such visit from 12 to 17 July 2009 to Japan at the invitation of the Government. The main objective of the visit was to obtain information on the occurrence of human trafficking in Japan and assess the impact of anti-trafficking measures established by the Government and other stakeholders. The SRT focused her attention on Japan's strategies for combating trafficking that rest on the following "5 P's" and "3 R's" – "protection, prosecution, punishment, prevention, promotion (of international cooperation), redress, rehabilitation

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<sup>367</sup> Resolution 7/13, Mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, Human Rights Council, A/HRC/RES/7/13 at 3 and 4  
<[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_13.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_13.pdf)> accessed at 8 November 2011.

<sup>368</sup> Resolution 7/13, Mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography, Human Rights Council, A/HRC/RES/7/13 at 3 and 4  
<[http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_7\\_13.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_13.pdf)> accessed at 8 November 2011.

<sup>369</sup> Country Visits, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights  
<<http://www.ohchr.org/EN/Issues/Trafficking/Pages/visits.aspx>> accessed at 20 January 2012.

<sup>370</sup> Country Visits, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights < <http://www2.ohchr.org/english/>> accessed at 8 November 2011.

<sup>371</sup> Country Visits, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, Office of the United Nations High Commissioner for Human Rights  
<<http://www.ohchr.org/EN/Issues/Trafficking/Pages/visits.aspx>> accessed at 20 January 2012.

(recovery) and reintegration of victims to assume a constructive role in the society.”<sup>372</sup> Although the majority of recorded cases constituted trafficking for sexual exploitation, the SRT also focused on trafficking for labour exploitation as that has not received the adequate attention from the Japanese authorities.<sup>373</sup>

To carry out her duties, the SRT met with government officials, representatives of intergovernmental and civil society organizations, lawyers and victims as well as visits to shelters and a detention centre in Japan.<sup>374</sup> It was found that even though the Government of Japan has taken measures to address human trafficking,<sup>375</sup> there were still many challenges in relation to the protection of trafficking victims and the adoption of a human rights-based approach towards combating human trafficking.

For instance, the SRT found that there was a problem with the identification of victims of trafficking as sexual work is a condition for such identification but labour exploitation is not considered as a basis for identification. This problem in identifying victims of trafficking has led to cases where some victims are misidentified and end up being criminalized.<sup>376</sup> Thus the SRT recommended that clear identification procedures be set out and shared with all relevant parties and specialized training be given to law enforcement officials in this regard.<sup>377</sup>

The SRT was also concerned about the lack of easy access to protection for victims as there was only a general police assistance line which has limited knowledge concerning trafficking and the only language spoken is Japanese. Some private shelters do have hotlines with 24 hour access in

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<sup>372</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 3 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>373</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 4 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>374</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>375</sup> Japan adopted the National Action Plan on Measures to Combat Trafficking in Persons in 2004 and introduced the crime of trafficking into the Penal Code in 2005.

<sup>376</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 46-51 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>377</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 107 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

different languages such as Chinese, Filipino and Thai.<sup>378</sup> Yet the SRT identified a need for increased access for victims and recommended that Japan establish a 24-hour multilingual hotline with staff trained on trafficking with a clear referral mechanism, ensuring timely referral of victims to relevant entities.<sup>379</sup> The SRT also found that there was a lack of specific assistance to victims of trafficking along with the absence of regional and specialized shelters providing the opportunity for such victims to undergo rehabilitation.<sup>380</sup> Thus the SRT recommended to Japan to establish such measures to ensure that there is better protection and assistance given to victims of trafficking.

These are only some of the observations and subsequent recommendations of the SRT in relation to Japan. Even so, it is clear that the SRT is able to identify specific problems in anti-trafficking measures established nationally and give country-specific recommendations to improve those measures. Anti-child trafficking provisions in international law can only provide a certain amount of detail and the SRT helps to elaborate on those details through recommending the most appropriate and successful anti-child trafficking methods for national implementation. Thus, the limited powers of the SRT prevent States such as Cambodia and India from benefiting from the work that the SRT does because these States would first have to grant permission to the SRT to visit and study the local situation in order for the SRT to formulate country-specific recommendations.

In addition, the fulfillment of the SRT's mandate depends upon the cooperation of State Governments to communicate with the SRT. However, as State Governments are not obliged to respond to communications received from the SRT, there is a failure-to-respond rate of up to 52 per cent. From the period of 1 January 2004 – 23 January 2011, the SRT only received 67 responses from the 139 communications she sent to various State Governments, many of which

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<sup>378</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 56 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>379</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 109 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

<sup>380</sup> Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Mission to Japan, A/HRC/14/32/Add.4 at 108 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/88/PDF/G1013288.pdf?OpenElement>> accessed at 1 June 2011.

were late responses;<sup>381</sup> proof that there is also a failure to respond in a timely manner, even to urgent appeals from the SRT. For instance, an urgent appeal was sent to China on 10<sup>th</sup> June 2004 concerning a four year old girl at risk of torture, rape and trafficking but to date the SRT has not received any reply.<sup>382</sup> Similarly, an urgent appeal was sent to Mexico on the 30<sup>th</sup> September 2009 regarding suspicions of trafficking and sale of certain children of Mexican nationality who were missing from Mexican care institutions run by a Christian organization called “Iglesia Restaurada Cristiana”. As of 23 January 2011, the Government of Mexico had still failed to reply to the SRT.<sup>383</sup> Therefore, a low response rate from States and their failure to respond in a timely manner, especially with regards to urgent appeals, together with the SRT’s inability to make country visits without State permission, hinder the SRT in the effective fulfillment of her mandate.

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<sup>381</sup> Data compiled from Juan Miguel Petit, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications sent to Governments and replies received, Economic and Social Council, E/CN.4/2005/78/Add.3 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/127/92/PDF/G0512792.pdf?OpenElement>> accessed at 9 November 2011; Juan Miguel Petit, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Economic and Social Council, E/CN.4/2006/67/Add.1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/121/93/PDF/G0612193.pdf?OpenElement>> accessed at 9 November 2011; Juan Miguel Petit, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/4/31/Add.1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/119/21/PDF/G0711921.pdf?OpenElement>> accessed at 9 November 2011; Juan Miguel Petit, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/7/8/Add.1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/113/77/PDF/G0811377.pdf?OpenElement>> accessed at 9 November 2011; Najat Maalla M’jid, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/12/23/Add.3 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/09/PDF/G1110709.pdf?OpenElement>> accessed at 9 November 2011; Najat Maalla M’jid, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/16/57/Add.1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/09/PDF/G1110709.pdf?OpenElement>> accessed at 8 November 2011; Najat Maalla M’jid, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Corrigendum, Human Rights Council, A/HRC/16/57/Add.1/Corr.1 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/09/PDF/G1110709.pdf?OpenElement>> accessed at 9 November 2011

<sup>382</sup> Juan Miguel Petit, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications sent to Governments and replies received, Economic and Social Council, E/CN.4/2005/78/Add.3 at 29-32 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/127/92/PDF/G0512792.pdf?OpenElement>> accessed at 9 November 2011

<sup>383</sup> Najat Maalla M’jid, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography, Addendum, Communications to and from Governments, Human Rights Council, A/HRC/16/57/Add.1 at 49-62 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/107/09/PDF/G1110709.pdf?OpenElement>> accessed at 8 November 2011



*United Nations High Commissioner for Refugees (UNHCR)*

Similar to the SRT, States are not obliged to cooperate with the UNHCR even though the fulfillment of the UNHCR's mandate depends highly upon State cooperation. The UNHCR is mandated by the United Nations General Assembly to "lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide".<sup>384</sup> Its primary purpose is to "safeguard the rights and well-being of refugees" by ensuring that everyone, including victims of child trafficking, have "the right to seek asylum and find safe refuge in another State."<sup>385</sup> The activities of the UNHCR include providing assistance to refugees in the form of basic necessities, assistance and advice on asylum applications, education, counseling, information dissemination, advocacy, monitoring and negotiation.<sup>386</sup>

The UNHCR also plays an important role in helping to realize idealistic principles in international law which are otherwise inapt for effective national implementation. For instance, the UNHCR recognized the difficulty of applying the "best interests of the child" principle into national asylum systems<sup>387</sup> and thus produced the "Guidelines on Determining the Best Interests of the Child"<sup>388</sup> in May 2008. The UNHCR guidelines further defines the principle by including a variety of factors determining the "well-being" of a child, such as "age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences,"<sup>389</sup> yet still maintaining flexibility by acknowledging that national law and domestic jurisprudence may provide more specific guidance on this matter.<sup>390</sup>

This publication also offers guidance on practical application of this principle. It recommends comprehensive child protection systems which give due attention to each child's specific situation and the particular risks that they face. Recommended key elements in these protection systems include "measures to identify unaccompanied and separated children, child-sensitive registration mechanisms, appointment of a guardian, provision of temporary care and monitoring, refugee

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<sup>384</sup> What We Do, UNHCR <<http://www.unhcr.org/pages/49c3646cbf.html>> accessed 10 November 2011.

<sup>385</sup> What We Do, UNHCR <<http://www.unhcr.org/pages/49c3646cbf.html>> accessed 10 November 2011.

<sup>386</sup> What We Do, UNHCR <<http://www.unhcr.org/pages/49c3646cbf.html>> accessed 10 November 2011.

<sup>387</sup> Refer to Chapter 4.

<sup>388</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

<sup>389</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR at 1.1 <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

<sup>390</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR at 1.2 <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

status determination, individual documentation, tracing, verification of family relationship, family reunification, identification and implementation of durable solutions.”<sup>391</sup>

It also recommends secure documentation of the implementation and monitoring of care arrangements and to establish an individual case file for every child in question, especially for the purposes of a “best interests determination.” A “best interests determination” is a formal process to determine the best interests of a child in decisions which require strict procedural safeguards. Such decisions include the identification of durable solutions for unaccompanied and separated refugee children, the determination of temporary care arrangements in exceptional circumstances, and the possible separation of a child from his or her parents against their will.<sup>392</sup> It calls for the involvement of relevant experts and for adequate child participation without discrimination, giving due weight to the views of the child in accordance with age and maturity of the child. Comprehensive detailed guidance is also provided on the relevant factors to be balanced, including the safety of the child, the rights of others such as parents or other family members, the importance of family and close relationships and the development needs of the child.<sup>393</sup>

In addition to helping the realization of idealistic principles, the UNHCR also has an Evaluation and Policy Analysis Unit (EPAU) which is committed to the examination and assessment of UNHCR policies, programmes, projects and practices; promotes research on related issues; and encourages an active exchange of ideas and information between humanitarian practitioners, policymakers and the research community.<sup>394</sup> The EPAU is important in that it reviews the work of the UNHCR and identifies the weaknesses and gaps that need to be addressed, such as the worldwide review of UNHCR’s efforts to protect refugee children undertaken by a team of international experts.<sup>395</sup>

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<sup>391</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR at 2 <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

<sup>392</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR at 3.4 <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

<sup>393</sup> Guidelines on Determining the Best Interests of the Child, May 2008, UNHCR at Chapter 3 <<http://www.unhcr.org/4566b16b2.html>> accessed at 31 May 2011.

<sup>394</sup> Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities, May 2002, UNHCR <<http://www.unhcr.org/3cd6363aa.html>> accessed 23 May 2011.

<sup>395</sup> Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities, May 2002, UNHCR <<http://www.unhcr.org/3cd6363aa.html>> accessed 23 May 2011

However, the fact that States are not obliged to cooperate with the UNHCR diminishes the effectiveness of the UNHCR's activities in the fulfillment of its mandate and the role it plays in the realization of idealistic principles otherwise inapt for national implementation. The effect of the States' ability to disregard the works of the UNHCR is reflected in the findings of the UNHCR's EPAU noting that their earlier recommendations of the 1997 children's evaluation and the 1999 compliance review of UNHCR's policy priorities have not been followed up.<sup>396</sup>

Therefore, the powers of key enforcement mechanisms in relation to child trafficking, such as the SRT and the UNHCR, are limited by their dependency on States' cooperation for the fulfillment of their mandates. If States do not cooperate to provide visitation rights or the necessary response to communications and recommendations, there is nothing that the SRT or the UNHCR can do. Also, the powers of key mechanisms in this enforcement system, such as the SRT, the Conference of the Parties and the CRC Committee, are limited in that they are only able to monitor progress of national implementation and make recommendations. These mechanisms are unable to compel States to answer for any allegations or proven breaches of international obligations. These limited powers of the key mechanisms in this enforcement system impede their efficiency and effectiveness. Moreover, aggravating this situation is the fact that States have a limited accountability to enforcement mechanisms, another major hindrance to the effectiveness of the enforcement system regarding child trafficking.

### **5.3 Limited Accountability of States**

Even when individual States have an obligation to submit periodic reports to key enforcement mechanisms, such as the Conference of the Parties and the CRC Committee, on the progress of national implementation of their international obligations, these mechanisms still face the problem of being disregarded by these individual States. The reviews of national implementation of international obligations carried out by enforcement mechanisms such as the Conference of the Parties and the CRC Committee are based on information supplied by the individual States. This means that these necessary reviews can only be carried out if individual States comply with their obligations to provide such information.

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<sup>396</sup> Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR's activities, May 2002, UNHCR at V <<http://www.unhcr.org/3cd6363aa.html>> accessed 23 May 2011

For instance, the purposes of the Conference of the Parties include producing an analytical report<sup>397</sup> through “reviewing periodically the implementation of this Convention” and “making recommendations to improve this Convention (and its Protocols) and its implementation.”<sup>398</sup> These recommendations, however, can only be made when State Parties comply with their obligation to provide information on their “programmes, plans and practices, as well as legislative and administrative measures,”<sup>399</sup> along with the necessary knowledge of implementation measures and difficulties encountered.<sup>400</sup>

However, in the first reporting cycle of the Conference of the Parties, with a deadline of 29<sup>th</sup> July 2005, 51 per cent of State Parties did not comply with their obligation to provide reports on the implementation of the Convention and the Trafficking Protocol.<sup>401</sup> Eight per cent of those States that did provide reports only did so after the closure of the reporting cycle.<sup>402</sup> Additionally, only 47 per cent of State Parties to the Convention and 43 per cent of State Parties to the Trafficking Protocol provided responses although many failed to meet the initial deadlines.<sup>403</sup> This non-compliance is especially significant when it involves States which reportedly have some of the

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<sup>397</sup> Decision 1/5, First session of the Conference of Parties to the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime  
<<http://www.unodc.org/unodc/en/treaties/CTOC/CTOC-COP-session1-Decisions.html>> accessed at 23 May 2011.

<sup>398</sup> Article 32(3) of the United Nations Convention against Transnational Organized Crime.

<sup>399</sup> Article 32(5) of the UN Convention against Transnational Organized Crime, Article 1(2) of the Trafficking Protocol

<sup>400</sup> Article 32(4) of the UN Convention against Transnational Organized Crime, Article 1(2) of the Trafficking Protocol

<sup>401</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime, Third session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2005/2/Rev.1  
<[http://www.unodc.org/documents/treaties/organized\\_crime/COP3/CTOC\\_COP\\_2005\\_2\\_Rev\\_1\\_E\\_20\\_aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP3/CTOC_COP_2005_2_Rev_1_E_20_aug.pdf)> accessed at 25 May 2011.

<sup>402</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime, Third session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2005/2/Rev.1  
<[http://www.unodc.org/documents/treaties/organized\\_crime/COP3/CTOC\\_COP\\_2005\\_2\\_Rev\\_1\\_E\\_20\\_aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP3/CTOC_COP_2005_2_Rev_1_E_20_aug.pdf)> accessed at 9 November 2011.

<sup>403</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, Third session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2006/CRP.1 < [http://www.unodc.org/pdf/ctoccop\\_2006/V0656370e.pdf](http://www.unodc.org/pdf/ctoccop_2006/V0656370e.pdf)> accessed at 25 May 2011.

highest incidences of child trafficking, such as Thailand,<sup>404</sup> India and Vietnam,<sup>405</sup> because, the Conference of the Parties is unable to undertake comprehensive or complete analysis in order to assist these States with their implementation of international obligations. Thus, failures of individual States to not only respond but to respond in a timely manner depreciates the effectiveness of the Conference of the Parties in providing useful advice and recommendations to improve national implementation.

Likewise, the fulfillment of the CRC Committee's purpose, which is to examine the progress made by State Parties in achieving the realization of the obligations undertaken in the CRC, is highly dependent on the compliance of States with their obligation to submit reports to the CRC Committee on the "measures they have adopted which give effect" to the CRC.<sup>406</sup> Under Article 44 of the CRC, these reports are to be submitted within two years of the entry into force of the CRC for the State Party concerned and every five years thereafter. These reports are to indicate "factors and difficulties" affecting the realization of obligations under the CRC and "contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned".<sup>407</sup>

Although under the CRC, the submission of timely reports is an obligation of State Parties, the fact remains that if reports are overdue, the CRC Committee cannot compel States to comply with their reporting obligation. The CRC Committee can only issue "regular reminders" to States.<sup>408</sup> This can result in late reports from States which have a high incidence of child trafficking, such as Cambodia and Thailand. Cambodia submitted a report in 2010 which combined two periodic

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<sup>404</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, Third session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2006/CRP.1 at 9 <[http://www.unodc.org/pdf/ctoccop\\_2006/V0656370e.pdf](http://www.unodc.org/pdf/ctoccop_2006/V0656370e.pdf)> accessed at 20 January 2012.

<sup>405</sup> Review of the implementation of the United Nations Convention against Transnational Organized Crime, Third session of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Vienna, 9-18 October 2006, CTOC/COP/2005/2/Rev.1 at Annex <[http://www.unodc.org/documents/treaties/organized\\_crime/COP3/CTOC\\_COP\\_2005\\_2\\_Rev\\_1\\_E\\_20\\_aug.pdf](http://www.unodc.org/documents/treaties/organized_crime/COP3/CTOC_COP_2005_2_Rev_1_E_20_aug.pdf)> accessed at 20 January 2012.

<sup>406</sup> Article 44(1) of the CRC.

<sup>407</sup> Article 44(2) of the CRC.

<sup>408</sup> Committee on the Rights of the Child, Seventh Session, Overview of the Reporting Procedures, CRC/C/33 at 30 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/195/85/PDF/G9419585.pdf?OpenElement>> accessed at 10 November 2011.

cycles from 2000 to 2007<sup>409</sup> and Thailand submitted a report in 2010 which combined two periodic cycles from 2004-2009.<sup>410</sup> Consequently, the CRC Committee is unable to assist these States in the successful implementation of anti-child trafficking measures within those years in which they have failed to submit their periodic reports in a timely manner.

Furthermore, if there is a case of “persistent non-reporting by a State party,” all the CRC Committee can do is to consider the situation of the particular State on whatever information that it does have in the absence of a report after notifying that State on its decision to do so.<sup>411</sup> Notably, there does not seem to be a State as yet where there has been persistent non-reporting to the point where the CRC Committee has resorted to consider the situation of the State in absence of a report. Even so, the observations of the CRC Committee in this type of situation, if it does happen, would not be as accurate or beneficial as it would be if it had firsthand information on the types of factors and difficulties faced by the State in its national implementation.

Besides the limited accountability of States with regards to their reporting obligations to enforcement mechanisms such as the Conference of the Parties and the CRC Committee, the breaches of States of their international obligations are also not addressed in key international instruments regarding child trafficking. For instance, there are no provisions in the United Nations Convention against Transnational Organized Crime, the Trafficking Protocol or the CRC that address a State’s breach of compliance with its international obligations, including its reporting obligations. Notably, there are some provisions regarding the management of disputes between State Parties in relation to national implementation of international obligations including Article 35 of the United Nations Convention against Transnational Organized Crime and Article 15 of the Trafficking Protocol. Even so, these provisions are weak as there are also clauses which allow State Parties to choose to be exempted from resolving such disputes, such as Article 35(3) of the United Nations Convention against Transnational Organized Crime and Article 15(3) of the Trafficking Protocol.

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<sup>409</sup> Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under article 44 of the Convention, Cambodia, CRC/C/KHM/2-3 <[http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.KHM.2-3\\_en.pdf](http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.KHM.2-3_en.pdf)> accessed at 20 January 2012.

<sup>410</sup> Committee on the Rights of the Child, Consideration of the reports submitted by States Parties under article 44 of the Convention, Thailand, CRC/C/THA/3-4 <<http://www2.ohchr.org/english/bodies/crc/crcs59.htm>> accessed at 20 January 2012.

<sup>411</sup> Committee on the Rights of the Child, Seventh Session, Overview of the Reporting Procedures, CRC/C/33 at 32 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G94/195/85/PDF/G9419585.pdf?OpenElement>> accessed at 10 November 2011.

Therefore, it is clear that States are not required to answer for breaches of international obligations or their disregard of recommendations made by enforcement mechanisms regarding their national implementation of international obligations. As a result of this limited accountability of individual States to their international obligations, including their reporting obligations, the enforcement system is weakened.

## **5.5 Conclusion**

In sum, the enforcement system is not strong enough to put sufficient pressure on individual States to effectively implement international obligations in relation to child trafficking. The information gathered through monitoring and analyzing implementation of international obligations does assist in filling in the gaps in the patchwork framework of international law concerning child trafficking by helping in the realization of idealistic principles, facilitating compliance with discretionary obligations and researching successful anti-trafficking methods. Encouraging the Governments of individual States and civil society to actively participate in being responsible for the advancement of effective anti-trafficking measures in their own country is also a vital element of the existing enforcement system.

The existing enforcement system is a patchwork system which results in an unnecessary duplication of work, a lack of focus on child trafficking and an absence of a holistic approach towards child trafficking. It does not have an enforcement mechanism specifically concerned with child trafficking, resulting in the issues pertaining to the implementation of international obligations regarding child trafficking being insufficiently addressed to ensure effective national implementation. Consequently, the effectiveness of the existing enforcement system is diminished as there is poor enforcement of international obligations addressing child trafficking.

In addition, the limited powers of key enforcement mechanisms impede their efficiency and effectiveness. For instance, even though the fulfillment of the SRT's and UNHCR's mandates depends largely upon State cooperation, it is not an obligation for States to cooperate with these enforcement mechanisms. This limits the ability of the SRT and the UNHCR to effectively perform their tasks and duties to the fulfillment of their mandates. Also, the powers of some of the key mechanisms regarding child trafficking in this enforcement system, such as the SRT, the Conference of the Parties and the CRC Committee, are limited to progress monitoring and making recommendations. These mechanisms do not have the authority to compel States to answer for

any breaches of international obligations, including obligations to submit reports on the progress of their national implementation.

Moreover, the fact that individual States have the ability to disregard the enforcement system if they choose to do so, further limits the effectiveness of the enforcement system. States are not required to answer for their nonconformity with their obligation to submit reports to the Conference of the Parties and the CRC Committee. Also, there are no provisions in key international instruments related to child trafficking, such as the United Nations Convention against Transnational Organized Crime, the Trafficking Protocol and the CRC, addressing States' breaches of international obligations. Even the provisions established for the management of disputes are weak as they allow States to choose to be exempted from resolving such disputes.

All these limitations limit the ability of the enforcement system to actually fill in the gaps and remedy the weaknesses of the patchwork system of international law pertaining to child trafficking. Clearly, the enforcement system relating to child trafficking is insufficient as it is inefficient and ineffective in ensuring that States comply with their international obligations related to child trafficking. Therefore, the weaknesses of this enforcement system need to be remedied. A stronger, more efficient and focused enforcement system pertaining to child trafficking would ensure that international obligations addressing child trafficking will be appropriately implemented into national law.



# Chapter 6

## A New International Law Regime

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*Addressing trafficking in human beings generally will not, however, automatically protect children. The tendency of existing anti-trafficking approaches to focus on specific elements of types of trafficking fails to address child trafficking in the broader context of children's rights, thus leaving many children unprotected...Responses to child trafficking need to go beyond viewing it simply as a sub-issue of trafficking in human beings.*

*Excerpt from 'Conclusions from a Child Rights Based Approach: Children First'  
Child Trafficking in Europe: A Broad Vision to Put Children First  
2008 UNICEF Innocenti Research Centre Publication*

The excerpt above illustrates clearly that the trafficking in children must be dealt with separately from the trafficking in adults for there to be progress in eradication. As the current international law regime conceptualizes trafficking in children as a sub-issue to trafficking in adults, there are many weaknesses and limitations in addressing child trafficking. The previous chapters discussed these weaknesses and limitations in detail, weaknesses and limitations which are found in the current definition of child trafficking as contained in the Trafficking Protocol, and in the patchwork framework of international law and enforcement system established to address child trafficking. This last chapter proposes a possible solution to these weaknesses and limitations through the establishment of a new international law regime specifically focused on child trafficking.

This new international law regime should be set up through a new and independent international agreement, not tethered to any existing treaty; it would not be an addition to the existing patchwork framework of international law but operate as an enhancement of this framework altogether. Thus, this new treaty will not create an additional layer of obligations to those already existing but will prevail to the extent of any inconsistencies with pre-existing obligations. This new treaty will not just be a human rights or a law enforcement instrument but a holistic international law instrument encompassing and addressing all the issues especially pertinent to trafficked

children and children vulnerable to trafficking. This is because efforts against child trafficking do not only involve ensuring criminal justice but must also involve protecting the human rights of such children, providing sanctuary to victims through national asylum systems, enhancing border control, and improving international cooperation and communication.

Therefore, in order to resolve the weaknesses and limitations in the current international law regime addressing child trafficking, this new treaty on child trafficking will contain a new definition of child trafficking, new and improved international obligations addressing the prevention of child trafficking, the protection of victims and the punishment of perpetrators, a financial mechanism to assist developing country States fulfill their obligations and a new enforcement system dedicated to ensuring the appropriate national implementation of these obligations.

In contrast to the all-encompassing Trafficking Protocol definition of human trafficking, the new definition of child trafficking should be a stand-alone definition specifically addressing child trafficking. This would clearly show that the new international law regime does not view child trafficking as a sub-issue to the trafficking in adults but is an issue which requires its own unique solutions. The new definition will resolve the inadequacies of the current definition as it would encompass both the internal and transnational trafficking in children, explicitly prohibit the trafficking in children for the purposes of prostitution and provide better acknowledgement of age-related issues pertinent to victims of child trafficking. All these would assist in ensuring better identification of victims of child trafficking and that they receive the appropriate and adequate protection and assistance. Moreover, the new definition of child trafficking should be adaptable to country-specific child trafficking situations, encouraging national implementation of anti-child trafficking measures to be more targeted in their efforts.

In addition to a new definition of child trafficking, the new treaty should contain new and improved obligations which provide better prevention, protection and punishment measures. First, unlike the Trafficking Protocol, the obligations in the new treaty will prevail over any inconsistencies with other relevant existing treaties to avoid any overlaps or confusion for individual States in the implementation of their obligations and will endeavor to ensure that States take the guidelines in existing soft law instruments into serious consideration. Also, instead of the current discretionary obligations pertaining to international cooperation and communication, there should be new provisions establishing a strong framework of international

collaboration to enhance border control systems and relationships with NGOs, and thus improving anti-child trafficking measures. Moreover, there should be provisions which further define idealistic principles, such as the “best interests of the child” principle<sup>412</sup>, the “non-discrimination” principle<sup>413</sup> and the “respect for the views of the child” principle<sup>414</sup>, for better national implementation especially via legal and administrative procedures, national asylum systems and rehabilitation services. Additionally, this new treaty should contain provisions which provide for more effective punishment measures through new provisions requiring the national criminalization of child trafficking offences committed extraterritorially, the criminalization of the various forms of exploitation of trafficked children, and establishing a standard for penalties to be imposed upon perpetrators of child trafficking. Moreover, this new treaty should establish a financial mechanism to assist developing country States in fulfilling their obligations under this new treaty.

Last but not least, a new enforcement system should be established by this new treaty with an enforcement system specifically focused on ensuring States’ compliance with their obligations. This enforcement system should not only monitor the progress and facilitate the improvement of implementation of these obligations, but also allow certain measures to be taken against States which persistently do not comply with any of their obligations. A strong and regular enforcement system targeted specially at child trafficking is essential to ensure furthering and continuing success in the combat against child trafficking.

## **6.1 A New Definition of Child Trafficking**

The inadequacies of the current definition of child trafficking which is contained in the Trafficking Protocol, as discussed earlier in Chapter 2, necessitates a new definition of child trafficking. Indeed, the reality is that child trafficking is defined as a sub-issue to the trafficking of adults, in the restricted context of transnational organized crime, with the age-related issues pertinent to victims of child trafficking unacknowledged, and the issue of criminalizing child prostitution and related activity unresolved. This has had repercussions in the way the trafficking in children has been dealt with in the international law regime. For instance, anti-child trafficking efforts are not extensive enough to adequately address the issues special to child trafficking because these

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<sup>412</sup> Encapsulated in Article 3 of the CRC.

<sup>413</sup> Encapsulated in Article 2 of the CRC.

<sup>414</sup> Encapsulated in Article 12 of the CRC.

efforts are only established as an addition to efforts against the trafficking in adults. Furthermore, there is a failure to criminalize internal child trafficking and child prostitution as seen in Sierra Leone, and also the occurrence of inconsistent state laws in one nation regarding prostitution and age of consent as seen in Australia, all of which were discussed in Chapter 3. Therefore, the inadequacies of the current definition of child trafficking clearly need to be addressed through a new definition of child trafficking.

It follows that the new definition of child trafficking must not be too narrow or specific in order for it to be effective for national implementation as the situation of child trafficking in each country differs. However, the new definition of child trafficking must also not be too vague as to allow confusion between the trafficking in children and other types of phenomena involving children. For instance, even though the illicit transfer and non-return of children abroad<sup>415</sup> is more clearly directed at situations where the child is abducted by one of his or her parents, there can be confusion as the parent or guardian of the child could be acting as a facilitator of trafficking of that child. Thus the new definition of child trafficking needs to be wide enough to enable successful national implementation and at the same time it must be specific enough to distinguish it from other types of phenomena involving children. Taking this into account, the current definition of child trafficking in the Trafficking Protocol is a good starting point with modifications to resolve the inadequacies of the current definition of child trafficking.

The model for a new definition of child trafficking is:

*‘Trafficking in children’ shall mean the recruitment, transportation, transfer, harbouring, or receipt of a child or children, regardless of reward and whether the movement of the child is international and/or internal, by parents or legal guardians or one or more persons, for the purpose of prostitution or similar activity of a sexual nature and/or other forms of exploitation.*

*Exploitation is to be identified by State Parties in accordance with Article (insert) of this Convention and shall include, at a minimum, child prostitution and any related activity, child marriage, child labour, forced recruitment of children into military service, camel jockeys, the removal of organs, slavery or practices similar to slavery and servitude.*

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<sup>415</sup> Article 11 of the CRC provides that States are to take measures to combat the illicit transfer and non-return of children abroad.

*‘Child’ shall mean any person under eighteen years of age. Any person who was trafficked when he or she was under eighteen years of age shall be considered as a victim of ‘trafficking in children’, regardless of the age of extraction from trafficking.*

The five emphases underlined above in the model of the new definition of child trafficking are each discussed in further detail below, including the reasons for including each of these phrases in the new definition and the results that are believed to follow from this new definition.

#### **6.1.1 Child Trafficking: Not a Sub-Issue to Trafficking in Adults**

The phrase “Trafficking in children” is one of the emphases underlined in this new definition because it shows that this definition is specifically focused on defining and addressing this particular phenomenon. It is exclusive to children and is distinguished from the trafficking in adults. Also, this new definition is not drafted to stand as needing to refer back to the overarching definition of human trafficking as the current definition is in the Trafficking Protocol. Therefore, child trafficking is no longer defined as a sub-issue to the trafficking in adults but as an issue deserving of special attention and unique solutions.

There are benefits of having a definition of child trafficking separate from the definition of the trafficking in adults. For instance, it results in more focus being given to combating child trafficking specifically as a separate definition of child trafficking calls more attention to addressing the phenomenon itself. Individual States are encouraged to implement anti-child trafficking measures as a primary concern rather than as an afterthought or an addition to measures against the trafficking in adults. Consequently, the effectiveness of anti-child trafficking measures implemented would be improved as they would be targeted towards addressing the issues that are special to the phenomenon of child trafficking.

#### **6.1.2 Addressing Internal and Transnational Trafficking in Children**

The second phrase underlined in the model of the new definition of child trafficking, “the movement of the child is international and/or internal, by parents or legal guardians or one or more persons,” is a response to the restricted context of the current definition of child trafficking to transnational organized crime. As discussed in Chapter 2, the internal trafficking of children is an increasing problem due to its lower risks and costs as compared to the transnational trafficking of children. Unfortunately, the failure to acknowledge internal trafficking in children in the

current definition of child trafficking in the Trafficking Protocol can result in a failure to criminalize and address internal trafficking in children nationally, such as in Sierra Leone. The situation in this country also demonstrates that there can be confusion as to what constitutes trafficking in children, especially the internal trafficking in children.

Thus the new definition of child trafficking needs to clearly illustrate that the movement of children is not confined to movement that is only international but incorporates both international and internal movement. Also, the new definition of child trafficking needs to acknowledge that the traffickers are not only strangers and/or associates of traffickers, but can also be family members or legal guardians, ranging from just one person to an organized crime group. Factoring all this into the international definition of child trafficking would help in the incorporation of the definition in national laws. Therefore, through the inclusion of this particular phrase, the new definition of child trafficking satisfies the need for it to be broad enough to include all the people who participate in the trafficking in children, both transnational and internal. This allows individual States to better identify circumstances of trafficking in children and ensures that the internal trafficking in children does not fail to be criminalized and addressed accordingly.

#### **6.1.3 Explicitly Prohibiting Trafficking for Child Prostitution and Related Activity**

In addition, the new definition of child trafficking explicitly prohibits the trafficking in children “for the purpose of prostitution or similar activity of a sexual nature.” This ensures that national laws adopting the new definition would not allow children to engage in prostitution or similar activity under any circumstances and that those victims of child trafficking for the purposes of sexual exploitation are not placed at further risk of being denied their rights to protection and justice. This is because there would be less risk of these victims being identified as criminals and wrongly prosecuted and penalized. As discussed below, the positive effect this prohibition must be considered in conjunction with the new definition’s approach towards the age of child trafficking victims.

#### **6.1.4 Better Acknowledgement of Age-Related Issues**

Through the last underlined phrase, “Any person who was trafficked when he or she was under eighteen years of age shall be considered as a victim of ‘trafficking in children’, regardless of age of extraction from trafficking”, the new definition of child trafficking acknowledges, for both the

purposes of law enforcement and rehabilitation, that victims who are trafficked when they are minors and extracted from the trafficking syndicate at the age of majority will still be considered victims of child trafficking. This is because the abuse took place when they were children and as discussed in Chapter 1, the consequences of trafficking for children differ from that of adult victims.

By explicitly prohibiting child trafficking for the purposes of prostitution and similar activity and identifying the special conditions of the age of its victims, the new definition of child trafficking is better equipped to address the complexity of the phenomenon. Victims would be correctly identified as victims instead of criminals. These victims would get the appropriate assistance they need, traffickers would be appropriately prosecuted for the offense of child trafficking, (which would carry a heavier penalty than an offense of trafficking of adults), and the data gathered, essential for research and furthering success of anti-child trafficking efforts, would be more accurate.

#### **6.1.5 Adaptable to Country-Specific Situations**

The phrase “Exploitation is to be identified by State Parties in accordance with Article (insert) of this Convention” is included as an obligation in this definition to ensure that this definition of child trafficking is adaptable to country-specific child trafficking situations. The phrasing of the current definition of child trafficking in the Trafficking Protocol, where a non-exclusive list of acts constitute “exploitation” is given at the end after the definition, implies that the listed exploitative acts are only meant to function as examples of forms of exploitation and not to oblige individual States to identify or criminalize those forms of exploitation. However, the differences between trafficking in children and trafficking in adults, as discussed in Chapter 1, necessitates that the definition of child trafficking ensures that individual States identify the forms of exploitation children are trafficked for in order for these States to formulate appropriate responses. The words “in accordance with Article (insert) of this Convention” is to provide a timeline for States to carry out this particular obligation by tying this with their reporting obligation, as discussed later on in this chapter as part of the new enforcement system established by a new international agreement.

Notably, it is difficult to identify every single form of exploitation that children are trafficked for. Even so, the fact that there is an obligation for such identification in the new definition of child

trafficking will not only assist States in the appropriate implementation of anti-child trafficking measures but also will assist in the correct identification of victims, situations of child trafficking and the subsequent prosecution and punishment of perpetrators.

In sum, the new definition of child trafficking is not written for the singular purpose of criminal justice, as is the current definition, but it is also written to protect the victims of child trafficking. Also, by adopting a definition of child trafficking separate from the definition of the trafficking in adults, the international community will send a strong message to all those perpetrating the trafficking in children that this phenomenon will no longer be tolerated; perpetrators will be punished and victims will be protected. Additionally, the new definition addresses the complexity of the phenomenon by being adaptable to country-specific situations of child trafficking, thus allowing targeted efforts to be made against each unique type of child trafficking. Therefore, this new definition which was modified accordingly in response to the discussions earlier will serve well in a new international agreement established specifically to address child trafficking and all its related issues. Even so, this new definition is just the first step to combating child trafficking effectively. The new international agreement must also contain provisions which establish stronger prevention, protection and punishment measures than those currently existing.

## **6.2 New and Improved Obligations**

The trafficking in children should no longer be treated as an afterthought to the trafficking in adults, especially in the promotion and providence of prevention and protection measures. Continuing in this manner will have increasing detrimental effects on the victims of child trafficking as the trafficking in children continues to grow in number and intensity. Therefore, the current patchwork system, which forces States to draw from different instruments to establish a regime combating child trafficking, is a weak response to the severity of the phenomenon. This is exemplified in the problems of national implementation of current international obligations addressing child trafficking, discussed in Chapter 4. These problems are not unique to any one individual State. Instead, they reflect the weaknesses of the existing patchwork framework of international law set up to combat child trafficking.

A new holistic international agreement focused specifically on child trafficking will not only send out a strong message to perpetrators that there is a global effort to eradicate the trafficking in children, but will also bring together all the existing patchwork pieces in the current international



law regime combating child trafficking and create a new structure with strengthened, targeted purposes resolving all the existing gaps. Therefore, there must first be an acknowledgement of existing relevant treaties and soft law instruments in order to avoid overlaps, clashes or confusion when individual States attempt to implement their new obligations. This acknowledgement should be in the form of a provision stating that the provisions in this new international agreement shall prevail over any inconsistencies with other prior existing international instruments where it concerns the trafficking in children.<sup>416</sup>

In addition to this acknowledgement and to the establishment of a new definition of child trafficking, there should also be established new and improved provisions or obligations. These new provisions will be discussed in three separate sections: the prevention of child trafficking; the protection of the victims of child trafficking; and the punishment of the perpetrators of child trafficking. It must be noted that these new provisions or obligations are merely a starting point from which this new treaty must be developed and thus this discussion is focused upon the key obligations to be established. To improve the prevention of child trafficking, the establishment of a strong network of international collaboration to enhance border control systems and relationships with non-governmental organizations (NGOs), in replacement of the current discretionary obligations pertaining to international cooperation and communication, is essential. The establishment of provisions which further define current idealistic principles relating to the human rights of children for better national implementation into national asylum systems, rehabilitation and protection services is also necessary. Additionally, this new international agreement must include new provisions for more effective punishment measures through the establishment of a standard for penalties to be imposed upon perpetrators and universal jurisdiction. Lastly, a financial mechanism must be established by this new treaty to assist developing country States in fulfilling their obligations under this new treaty.

### **6.2.1 Prevention of Child Trafficking**

The key provisions that should first be established in this section of the new international agreement are those that provide a strong framework for international collaboration in anti-child trafficking measures, especially in relation to border control, and enhancing cooperative relationships with NGOs. These elements are essential to the success of preventing the increase

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<sup>416</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 3.

and continuance of the trafficking in children. Notably, there are provisions which address cooperation and communication in the current international law regime, but as pointed out in earlier chapters, these provisions are discretionary in nature, resulting in weak national implementation as they lack the force needed to ensure States' compliance. Therefore it is important that the new international agreement establishes strong obligations for international collaborations by the elimination of discretionary language and setting up a framework through its obligations for such collaboration in anti-child trafficking measures on all levels, henceforth referred to as the ICF (Framework of International Collaboration for Anti-Child Trafficking Measures).

Such a framework of international collaboration is not an entirely new concept in international law. Therefore, for the purpose of setting up a workable framework which individual States can adopt or implement, the relevant strengths of two existing models of international cooperation and communication can be adapted into the ICF. These two models are the Model Treaty on Mutual Assistance in Criminal Matters (Model Mutual Assistance Treaty) and the Model Law on Cross-Border Insolvency (Model Insolvency Law). Notably, these models are not an exhaustive list but are nevertheless appropriate for constructing the beginnings of the ICF. These models are chosen as they are both transnational in nature and are drafted specifically for the purpose of encouraging international cooperation and communication.<sup>417</sup>

Among the strengths of the Model Mutual Assistance Treaty and the Model Insolvency Law is that they have adopted "universalism" rather than "territorialism," thereby being flexible enough to be adaptable to national circumstances in individual States.<sup>418</sup> In other words, the provisions in these two models can vary and be "acceptable to States with different legal, social and economic systems."<sup>419</sup> This type of flexibility is a crucial element that the ICF needs to have. The difference between the ICF and these two models, however, is that the ICF should not be drafted with adaptable provisions. Instead, the ICF should simply provide a preliminary list of matters to be identified and established according to the national circumstances of individual States. This is

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<sup>417</sup> *Mutual assistance and international cooperation in criminal matters*, Economic and Social Council Resolution 1998/15, 28 July 1998; Jay L. Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713 (2005) at 719.

<sup>418</sup> Jay L. Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713 (2005) at 716.

<sup>419</sup> Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/Res/52/158 (Jan. 30, 1998) at 1; United Nations Commission on International Trade Law, *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, 12 Tul. J. Int'l & Comp. L. 361 (2004) at 368.

because it is near impossible to draft provisions for the ICF which would effectively address the issues of each and every individual State. Also, such a list, instead of adaptable provisions, enables individual States to establish relationships of international collaboration with each other suitable to their own national circumstances and the existing relationships between those countries.

Therefore, the ICF should begin with an obligation for individual States to identify areas in which international collaboration is necessary while stipulating areas which must be included at a minimum. For instance, border control should be a part of this non-exhaustive list as greater international cooperation and communication in this area would increase the success of preventing child trafficking. One type of information that could be shared among individual States is the methods used in identifying previously convicted sex offenders and those travelling to engage in suspicious activities such as sex tourism. The United States has had some success in this area through the USA Operation Predator 2003 which has made 67 arrests of suspected child sex tourists, 47 of those convicted and others still being prosecuted, since 2003.<sup>420</sup>

Also, criminal matters should be another area included in this non-exhaustive list. The Model Insolvency Law provides direction to local courts to coordinate and cooperate with foreign courts.<sup>421</sup> There is no reason why this element cannot be included in the ICF to enable greater effectiveness in the criminal justice process. Additionally, the Model Mutual Assistance Treaty provides for the use of modern technology and the exchanges of relevant personnel for the purpose of sharing information, specialized training and criminal justice procedures.<sup>422</sup> The ICF should incorporate this element of sharing of information, experiences and research and the exchange of personnel for training, as this would assist individual States, especially developing countries, to determine out what sort of institutions, actions, programs and other measures will have a positive impact on preventing child trafficking. Thus, by identifying areas in which States are to establish international collaboration, more specific relationships of cooperation, exchanges of information, training and research can be conducted and consequently, increase the effectiveness of preventing child trafficking.

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<sup>420</sup> Fact Sheet: Operation Predator – Targeting child exploitation and sexual crimes, U.S. Immigration and Customs Enforcement (November 19, 2008) < <http://www.ice.gov/news/library/factsheets/predator.htm> > accessed at 7 July 2011.

<sup>421</sup> Article 25 of the Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/Res/52/158 (Jan. 30, 1998)

<sup>422</sup> *Mutual assistance and international cooperation in criminal matters*, Economic and Social Council Resolution 1998/15, 28 July 1998

In addition, other relevant strengths of the Model Mutual Assistance Treaty and the Model Insolvency Law should be incorporated into the ICF. For instance, the Model Mutual Assistance Treaty recognizes relationships of cooperation and communication already existing between individual States and explicitly does not hinder those relationships.<sup>423</sup> It also calls for individual States to establish or designate a national central authority to be responsible for the processing of requests from other States for assistance.<sup>424</sup> Additionally, it calls for regular reviews to be made in order to improve mutual assistance agreements and legislation. The ICF should incorporate the obligation for States to establish or designate a national central authority for the purpose of encouraging and monitoring the progress of international collaboration. However, this new international agreement should go one step further by specifying the activities of the national central authority<sup>425</sup> which is to not only facilitate international collaboration but also to function as part of the enforcement system created by the new international agreement.

The ICF should ensure that NGOs receive the adequate cooperation and support from the governments of individual States. This is because NGOs play an indispensable role in society, serving as a link between the government and the local community, reaching parts of society that may otherwise be neglected. Also, they have an altogether different perspective, and are able to provide valuable insight into improving anti-child trafficking measures. Therefore, NGOs should be given an explicit position in this new international law regime through the ICF. Notably, there might be concerns where certain NGOs may be less trustworthy to a particular State or States. Such concerns can be laid to rest by applying an obligation to cooperate with NGOs only to certain NGOs identified by the enforcement mechanism of this new international agreement, the Committee against Trafficking in Children,<sup>426</sup> while taking the suggestions of individual States where applicable. There should also be a provision specifying the functions which these NGOs are to undertake, such as:

- (i) Sending representatives to attend and participate in the regular meetings of the Committee against Trafficking in Children;

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<sup>423</sup> Article 2 of the Model Treaty on Mutual Assistance in Criminal Matters A/RES/45/117

<sup>424</sup> Article 3 of the Model Treaty on Mutual Assistance in Criminal Matters A/RES/45/117

<sup>425</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 19.

<sup>426</sup> Refer to 6.3 New Enforcement System.

- (ii) Carrying out research, with resources allocated by the Committee against Trafficking in Children to pursue research into the different types of trafficking and effective preventive measures at community level; and
- (iii) Submitting reports to the Committee against Trafficking in Children on the progress of national implementation in individual States.

In summary, the elements of the ICF would be incorporated as obligations in the new treaty where:

1. States are to identify areas in which international collaboration is necessary, which are to include at a minimum, border control, criminal matters and the exchange of information, experiences and research.<sup>427</sup>
2. States are to establish or designate a national central authority or authorities, for the purpose of encouraging and monitoring international collaboration in these identified areas.<sup>428</sup>
3. Existing relationships of international cooperation and communication are not affected by the establishment of such national central authorities unless individual States decide otherwise.<sup>429</sup>
4. States are to identify non-governmental organizations as part of their reporting obligations and cooperate with those non-governmental organizations identified by the Committee against Trafficking in Children to perform such functions as designated by the Committee.<sup>430</sup>

These new obligations incorporating the elements of the ICF is neither complete nor sufficiently comprehensive, but it is nevertheless a good start towards the prevention of child trafficking as international collaboration is central to the successful eradication of child trafficking. However, to strengthen this system even further, a timeframe must be established for the national implementation of the ICF. Therefore, the implementation of the ICF and its progress has to be made part of States' reporting obligations. In addition to the establishment of the ICF to further international collaboration for the prevention of child trafficking, the protection of victims of child

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<sup>427</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 4.

<sup>428</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 4.

<sup>429</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 4.

<sup>430</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 5.

trafficking is also important to ensure that the negative effects of trafficking on victims are addressed and that these victims do not suffer further disadvantages during legal and administrative procedures, while seeking asylum, and during the rehabilitation process.

### **6.2.2 Protection of Victims**

In Chapters 3 and 4, the weaknesses of the “best interests of the child” principle, the “non-discrimination” principle and the “respect for the views of the child” principle were discussed. The provisions which encapsulate these principles are essentially undefined for appropriate national implementation, thus making these principles difficult to realize. Therefore, the fundamental provisions that need to be established in this new international agreement for the effective protection of victims through and during legal and administrative procedures, national asylum systems, and rehabilitation services are those that further define these otherwise idealistic human rights principles relating to children for better national implementation.

First, the new international agreement will expressly incorporate these principles under the section which addresses the protection of child trafficking victims by acknowledging their existence in the CRC and the definitions which the CRC provides for each of these principles. It should provide that these principles are to guide the implementation of all anti-child trafficking measures established by the individual States.<sup>431</sup> Then, there should be accompanying provisions which further define these principles for application, especially in national asylum systems, legal and administrative procedures and rehabilitation services. However, these provisions cannot oblige States to implement too specific measures due to the principle of sovereignty and the unique differences in national circumstances. Therefore, these new provisions will instead stipulate the minimum protection measures that States will be obliged to implement and to oblige States to identify other necessary protection measures which are appropriate to their national circumstances.

#### *National Asylum Systems*<sup>432</sup>

Chapter 4 pointed out that national asylum systems, such as that in the United States, have not placed the best interests of the child as a priority, resulting in poor protection of victims of child trafficking. Trafficked children have to navigate a system which is designed primarily for adults

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<sup>431</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 11.

<sup>432</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 12.

and have to satisfy legal standards which are more appropriate to adults rather than to children. For instance, as trafficked children do not expressly fall within the definition of “refugee” in the 1951 Refugee Convention, it is difficult for these children to satisfy the legal standard to attain refugee status. Thus, in the best interests of the child, there should be a provision in the new international agreement which expressly provides that those who satisfy the new definition of child trafficking as victims will automatically fall within the definition of “refugee” as provided in the 1951 Refugee Convention.

An approach which can put all these issues to rest is to oblige States to uphold the best interests of the child by providing immediate sanctuary to victims via their national asylum systems, regardless of the participation of the victims in the criminal justice process. This immediate sanctuary can come in the form of a rebuttable presumption of permanent residency or refugee status for these victims of child trafficking, regardless of whether or not the victim is willing to provide evidence or testify against their traffickers. This option provides victims of child trafficking the sanctuary and safety needed to recover and achieve successful rehabilitation; and perhaps by doing so, they might in the future, be able to support, contribute to or participate in trafficking investigations and prosecutions.

Another method to further protect child trafficking victims is to allow them to apply for refugee status or permanent residency for family members in danger arising from the child trafficking situation. This is quite like the T or U visas in the United States which foreign national children who have been victims of trafficking may qualify for and which allows them to petition for visas on behalf of their parents.<sup>433</sup>

There is no doubt that there are conflicting policy objectives which will provide some hindrance to the rebuttable presumption of refugee or permanent residency status approach. For instance, the best interests of the child principle used in immigration law for admitting children have long been a part of a wider policy debate over refugee admissions.<sup>434</sup> Even though it assists the policy of humanitarian help and relief, there is an increasing public awareness of finite national resources

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<sup>433</sup> Immigration and Nationality Act s101(a)(15)(T), s214(p)

<sup>434</sup> Stephen H. Legomsky, *An Asylum Seeker’s Bill of Rights in a Non-Utopian World*, 14 GEO. IMMIGR. LJ. 619 at 620 (2000).

and unsatisfied domestic needs; thus there is a resistance towards admitting a growing number of refugees.<sup>435</sup>

However, it must be remembered that children are the main concern and that these children are part of the future generation of the world. With appropriate and adequate protection and rehabilitation, these victims of child trafficking will eventually be individuals beneficial to society. The benefits of providing adequate protection to child trafficking victims through national asylum systems must possibly outweigh the drawbacks of admitting a growing number of refugees. Providing immediate sanctuary to victims of child trafficking through a rebuttable presumption of refugee or permanent residency status or other similar forms would show that there is a realization of the “best interests of the child” principle in national asylum systems.

#### *Legal and Administrative Procedures*<sup>436</sup>

Additionally, in any legal and administrative procedures involving child victims of trafficking, respect for the views of the child must be strongly upheld as it not only is one of the essential human rights principles concerning children, but to do so is also in the best interests of the child. As pointed out in Chapter 3, the difficulties in the realization of the principle of “respect for the views of the child” is that there is a lack of an obligation to provide assistance to these children in forming their views and a lack of a procedural safeguards to ensure that these views are not only listened to but also taken seriously. Therefore, this new international agreement should stipulate certain measures that must be implemented in the furtherance of this principle, especially during legal and administrative procedures.

For instance, States should be obliged to provide guardians for child victims of trafficking, trained personnel who are experienced in handling matters special to trafficked children. In addition to ensuring that these children receive the appropriate care and protection needed for successful rehabilitation, these guardians could assist these children in all legal and administrative procedures, ensuring that their views and opinions are heard and taken seriously in judicial and administrative proceedings. In order to provide a guideline for the implementation of these measures, States should be obliged to consider soft law instruments which provide guidance in

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<sup>435</sup> Stephen H. Legomsky, the New Techniques for Managing High-Volume Asylum Systems, in IMMIGRATION CONTROLS: THE SEARCH FOR WORKABLE POLICIES IN GERMANY & THE UNITED STATES 117 (Kay Hailbronner et.al.eds., 1998)

<sup>436</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 13.



these matters, such as the 2006 UNICEF Guidelines on the Protection of Child Victims of Trafficking, and provide evidence of implementation of such consideration as part of their reporting obligations.<sup>437</sup> This ensures that States will not just pay “lip service” to such important human rights principles concerning children and soft law instruments. These new provisions in a new international agreement will help ensure the realization of the “respect for the views of the child” principle into national law regarding child trafficking.

#### *Rehabilitation Services*<sup>438</sup>

In the best interests of the trafficked child, the principle of “non-discrimination” must be reflected in any services relating to the rehabilitation of victims of child trafficking. Accordingly, the realization of this principle would entail that all victims of child trafficking have easy access to assistance and protection through rehabilitation services, regardless of age, gender, nationality, social and ethnic origin and other statuses. However, this also means that the special needs and interests of the different categories of victims of child trafficking must be met. For instance, the level of education necessary for younger children would be different from that needed by older children who would most likely benefit more from vocational training instead of only basic language education. Also, the medical and counseling services and shelters provided for these children need to be age, gender and trafficking experience appropriate as well. Therefore, in addition to stipulating the minimal measures that States are to implement for the effective rehabilitation of victims, a new international agreement should also oblige States to identify the special needs of victims of child trafficking according to their national circumstances and then to implement measures to fulfill those needs.

To remedy the inadequate definition of the provision which encapsulates this principle, Article 2 of the CRC, this new international agreement should adopt the definition of “discrimination” as provided by the Human Rights Committee in its General Comment No. 18. This definition provides that “any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all person, on an equal footing, of all rights and freedoms.” By including this definition in the new international agreement, the principle of non-

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<sup>437</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 11(2).

<sup>438</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 14.

discrimination would be sufficiently defined in a hard law international instrument. Also, the lack of a method to identify the existence of discrimination in Article 2 of the CRC should be remedied in a new international agreement by obliging States to collect “disaggregated data” by age, gender, region, rural or urban area, social and ethnic origin to assist in judging whether discrimination exists; as recommended by the Committee on the Rights of the Child. This particular obligation is best executed periodically and regularly, as part of the reporting obligation of States under this new international agreement, in order to ensure that the implementation of anti-child trafficking measures are appropriate to national circumstances.

The provisions established in this section of a new international agreement are only the beginnings of adequately addressing the issue of protection of victims of child trafficking. Yet, these proposed provisions are much stronger than those currently existing as they provide better definition of human rights principles for more effective national implementation, stipulate specified measures for States to implement at a minimum for easier realization of those principles and ensure that States use the information already existing in soft law instruments to improve their efforts. However, the establishment of these provisions together with the ICF still does not reflect a holistic approach against child trafficking without the establishment of provisions to ensure that perpetrators are effectively punished.

### **6.2.3 Punishment of Perpetrators**

As discussed in Chapter 3, one of the gaps in the current international law regime is a failure to nationally criminalize child trafficking offences which were committed extraterritorially. This means that there is no requirement for States to exercise criminal jurisdiction on non-nationals who have allegedly committed child trafficking offences abroad. This hinders the effectiveness of punishment measures and ultimately the prevention of child trafficking as perpetrators can simply move to another country to avoid being convicted for their offences. Therefore, the new international agreement will establish as one of its provisions that any State or every State is permitted to criminalize child trafficking regardless of any nexus the State may have with the offence, the offender or the victims, and shall bring such persons alleged to have committed child trafficking, regardless of their nationality, before its own courts.<sup>439</sup> For the sake of practicality, a territorial precondition will be incorporated, which requires the presence of the accused on the

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<sup>439</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 15(3).

territory of the prosecuting State before criminal jurisdiction can be exercised.<sup>440</sup> These new provisions would ensure that perpetrators can no longer avoid taking responsibility for their crimes simply by moving to a different country.

As observed, the current definition of child trafficking does not obligate States to criminalize the various forms of exploitation of trafficked children. Instead, the criminalization of the various forms of exploitation of trafficked children is dealt with in various treaties such as the OPSC, the OPAC and the ILO C182, as discussed in Chapter 3. In order to eliminate the necessity to source obligations from the provision of such measures from separate international instruments, the new international agreement will obligate States to criminalize the forms of exploitation of trafficked children in accordance with their earlier obligation, established in the new definition of child trafficking, to identify such forms of exploitation.<sup>441</sup> This would effectively ensure that the persons who create the demand for trafficked children will also be punished.

Chapter 4 pointed out another difficulty hindering the effective punishment of perpetrators of child trafficking, which is the fact that different States impose punishment of varying degrees of severity, ranging from just three years imprisonment with a monetary fine, to the death penalty. There is also no standardization of the age of victims for the purpose of determining the penalties to be imposed. These inconsistencies result in ineffective punishment measures as some judges and juries are reluctant to convict when the penalty is too severe and where the penalties are not severe enough, they fail to serve as a deterrent for these perpetrators. Consequently, these circumstances also reflect a disunited approach towards the punishment of perpetrators.

Therefore, the new international agreement should establish a provision stipulating a range of penalties to be imposed upon perpetrators based on the degree of involvement and the age of victims.<sup>442</sup> This not only provides a guideline for States regarding the appropriate severity of punishment and helps to standardize the penalties which national laws impose but it also produces a united global approach towards punishing and deterring perpetrators. This results in more effective punishment measures and ultimately the better prevention of child trafficking.

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<sup>440</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 15(4).

<sup>441</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 15(1).

<sup>442</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 16.

#### **6.2.4 Financial Mechanism: Fund against Child Trafficking<sup>443</sup>**

The new definition of child trafficking and the new provisions in the new treaty should increase the effectiveness of prevention, protection and punishment measures and thus, the success of eradicating child trafficking from society. However, the implementation of new anti-child trafficking measures may be onerous to developing country States as these measures will require funding and technology that may not be readily available to these States. This is a critical issue because often it is the developing country States which have the highest reported incidence of child trafficking, such as Thailand and India, and these States are the most in need of implementing effective and successful anti-child trafficking measures. Thus this new treaty should establish a financial mechanism, the Fund against Child Trafficking (hereinafter known as FaCT), to assist developing country States fulfill their obligations under this new treaty through appropriate funding and transfer of technology.

FaCT will function under the guidance of the Committee against Trafficking in Children,<sup>444</sup> which will be responsible for deciding FaCT's policies, programme priorities and eligibility criteria for the appropriation of financial resources and/or transfer of technology. FaCT will have in place, modalities to ensure that the funded projects against child trafficking are in conformity with its policies, programme priorities and eligibility criteria, and modalities by which a particular funding decision may be reconsidered and funding amounts may be reviewed periodically. Also, FaCT will be accountable to the Committee against Trafficking in Children and thus will regularly submit reports to the Committee on its funding operations.

In addition, the Committee against Trafficking in Children will also determine which State Parties are developed country States and which are developing country States, because a key element of FaCT is that developed country State Parties will commit to providing financial and technological assistance to developing country State Parties. This type of assistance is not a novel idea in international law, as the 1998 Kyoto Protocol to the United Nations Framework Convention on Climate Change has already established a similar type of system. This element is essential in FaCT because it is the developed country States who have the financial and technological resources needed by developing country States in order to establish effective anti-child trafficking measures. An alternative to the FaCT will also be provided by the new treaty; State Parties can

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<sup>443</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 21.

<sup>444</sup> The new enforcement mechanism established by this new treaty. Refer to 6.3 of this Chapter.

provide or avail themselves of financial and technological resources through bilateral, regional and other multilateral channels. This would give State Parties more flexibility in determining the allocation of their resources and further encourage international collaboration.

However, all these provisions and financial mechanism will prove ineffectual without a strong enforcement system. Thus, a new enforcement system which is stronger than the one currently existing is needed to ensure the successful implementation of anti-child trafficking measures.

### **6.3 New Enforcement System**

As discussed in Chapter 5, the current enforcement system fails to ensure the effective and successful implementation of anti-child trafficking measures. One of the reasons the current enforcement system is weak is that it is a patchwork system which does not have an enforcement mechanism specifically concerned with the trafficking in children. Also, the existing enforcement mechanisms have limited powers as the fulfillment of their purposes is largely dependent upon States' cooperation but this cooperation is not an obligation. Furthermore, individual States have limited accountability as their compliance with international obligations and recommendations from existing enforcement mechanisms cannot be enforced; the individual States have the option of disregarding recommendations and there is no other form of sanction provided.

Therefore, a new and stronger enforcement system is needed and should be established through this new treaty. This new enforcement system will support the new provisions through the establishment of the Committee against Trafficking in Children<sup>445</sup> (hereinafter known as the Committee) which will be specifically concerned with ensuring the continuing progress and success of the implementation of anti-child trafficking measures. The Committee's purposes<sup>446</sup> will be to review and monitor the implementation of the new treaty, to conduct the necessary research and make recommendations to improve anti-child trafficking measures, and to encourage and promote international collaboration. All these purposes will be accomplished through the function of the Committee<sup>447</sup> as the head of the network of national central authorities; making the Committee the principal institution which national central authorities, established or designated by individual States, will be accountable to.

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<sup>445</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 17.

<sup>446</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 17(2).

<sup>447</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 18.

For instance, as the head of the network of national central authorities, the Committee would be responsible for promoting and fostering relationships of cooperation and communication between national central authorities and monitoring their progress in establishing international collaboration. It would also identify the non-governmental organizations (NGOs), with consideration of recommendations and/or rejections from States Parties. The individual States are to cooperate with these identified NGOs for the fulfillment of their functions as designated by the Committee; these functions discussed earlier.

In addition, as part of the functions of the national central authorities,<sup>448</sup> State Parties will be obliged to submit regular progress reports to the Committee,<sup>449</sup> concerning the implementation of their obligations. These reports will also enable States to fulfill their obligations to identify the forms of exploitation of trafficked children within their territories, identify the areas in which international collaboration is necessary and identify NGOs which they would cooperate with in the implementation of anti-child trafficking measures. The Committee will then have the power to make recommendations based on these progress reports, including referring these States to implement appropriate guidelines from existing soft law instruments in accordance to their national circumstances. In response, State Parties are to submit a report outlining the steps they will be taking or their opinions on such recommendations.<sup>450</sup> This evidence of serious consideration of the Committee's recommendations would increase the accountability of the individual States and further ensure the progress of effective national implementation.

Certain NGOs, as designated by the Committee, will be invited to submit independent reports on the implementation of the new treaty in a certain State or States in areas falling within the scope of their activities.<sup>451</sup> This ensures that a holistic perspective is given to the Committee concerning the national implementation of anti-child trafficking measures in the individual States. Thus, the effectiveness of the new enforcement system will not be limited by a high dependency upon State cooperation and the limited accountability of States as there will be strong provisions stipulating States' reporting obligations and provisions which allow NGOs to submit independent reports.

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<sup>448</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 19.

<sup>449</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 19(2)(iii).

<sup>450</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 18.

<sup>451</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 18(10).

Last but not least, there should be provisions establishing ways to hold these States accountable for non-compliance with any of their obligations in the new treaty. For instance, the Committee will be able, through their regular reports to the United Nations General Assembly, to publicly identify States which persistently do not comply with their obligations.<sup>452</sup> These reports will be made available to the public and consequently increase the pressure on such States to fulfill their obligations. The Committee will also have the power to request such States to answer for their actions or inactions before a panel consisting of experts who understand or have the ability to understand the national circumstances of the particular State in question.<sup>453</sup> The purpose of an inquiry of this nature is to assist States in solving any problems that they might have which causes their non-compliance with obligations. In addition, there will be a provision for dispute management which would allow any State Party to question another State's non-compliance with obligations.<sup>454</sup> Negotiation would be the first option to resolve disputes but if that is not effective, either party to the dispute should be able to bring the issue before a panel consisting of experts relevant to understanding and solving the disputes. If all else fails, the International Court of Justice (ICJ) is still an option for those States who choose to submit to the jurisdiction of the ICJ.<sup>455</sup>

#### **6.4 Conclusion**

In conclusion, the combat against child trafficking will benefit from a new holistic international regime established through a new treaty. The new definition of child trafficking and the prevention, protection and punishment provisions in this new treaty will better assist in the implementation of more effective anti-child trafficking measures. Furthermore, the new enforcement system would ensure the continuing progress and success of national implementation of these anti-child trafficking measures. Therefore, this new regime is not meant to contradict the current regime but rather to improve on it by resolving the existing weaknesses and gaps. It is meant to be complimentary to existing obligations in other treaties as what it does essentially is to provide a better definition of child trafficking, further define existing human rights principles for the purpose of application into anti-child trafficking measures, commit States to established anti-human trafficking measures which are specific to children instead of as an afterthought to adults, and establish an enforcement system dedicated to combating child

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<sup>452</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Articles 18(8) and 18(9).

<sup>453</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 18(7).

<sup>454</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 20.

<sup>455</sup> Refer to Annex 1, Draft Convention against Trafficking in Children, Article 20(2).

trafficking. Accordingly, the new treaty will only prevail over prior existing provisions in the other treaties if there are any inconsistencies.

However, it must be acknowledged that the success of this new treaty depends upon the participation of key States. Amongst these States are those who have amongst the highest reported incidence of child trafficking in their respective region and have not satisfied the minimum standards<sup>456</sup> of implementation of international obligations, such as Thailand, Sierra Leone and Cambodia. These States are the ones who would benefit the most from implementing the new provisions in the new treaty. Additionally, key States are also those who have satisfied the minimum standards of implementation of international obligations and yet still have reported incidences of child trafficking, albeit less than the other States, such as United States of America (USA) and Australia. These States would not only also benefit from implementing the new treaty but as States who have experienced greater success in national implementation, they can assist the other States in improving their anti-child trafficking measures through the exchange of information, research, technology and training through the ICF and also through the FaCT. Moreover, all these States can hold each other accountable for non-compliance with obligations through the new enforcement system.

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<sup>456</sup> According to the United States Trafficking in Persons Report 2011, U.S. Department of State <<http://www.state.gov/g/tip/rls/tiprpt/2011/164228.htm>> accessed at 13 October 2011. The TVPA standards are declared as such in Section 108 of the Trafficking Victims Protection Act 2000:

- (v) To prohibit and punish acts of trafficking,
- (vi) To prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault, for knowing commission of trafficking in some of its most reprehensible forms (trafficking for sexual purposes, trafficking involving rape or kidnapping, or trafficking that causes a death),
- (vii) To prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense's heinous nature, and
- (viii) To make serious and sustained efforts to eliminate trafficking.

United States and Australia are listed as Tier One countries where the "governments fully comply with the TVPA's minimum standards." Cambodia and Sierra Leone are listed as Tier 2 countries where the "governments do not fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards, but are making significant efforts to bring themselves into compliance with those standards". Thailand is listed as a Tier 2 Watch List country which means that it is a "countries whose governments do not fully comply with the Trafficking Victims Protection Act's (TVPA) minimum standards, but are making significant efforts to bring themselves into compliance with those standards" AND:

- a) The **absolute number of victims** of severe forms of trafficking is very significant or is significantly increasing;
- b) There is a **failure to provide evidence of increasing efforts** to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on **commitments by the country to take additional future steps over the next year.**



There is a high likelihood that this new treaty and its provisions will be supported by many, if not all, individual States. This is because other treaties which are concerned with protecting children, such as the CRC, OPAC, OPSC and ILO C182,<sup>457</sup> have shown that there is global support for issues concerning children. Therefore this suggests that this new treaty against child trafficking will receive similar support from the individual States as this new treaty is specifically concerned with eradicating a phenomenon which victimizes children.

Ultimately, it must be noted that the establishment of a new treaty is only the first step in improving the combat against child trafficking. A multidisciplinary approach is needed to further the success and advance the holistic approach against the trafficking in children. There has to be collaboration between disciplines such as criminology, sociology, psychology and many others, in order to understand the complexity of this phenomenon and thus enable us to combat child trafficking in its entirety.

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<sup>457</sup> Refer to Annex 2 Tables 3, 4, 5 and 6.

# Annex 1

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## Draft Convention against Trafficking in Children

### Preamble

*The States Parties to this Convention,*

*Declaring* that effective action to prevent and combat trafficking in children, requires a comprehensive international approach involving the countries of origin, transit and destination that includes measures to prevent such trafficking, to protect the victims of such trafficking and to punish the traffickers,

*Taking into account* the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the trafficking and exploitation of persons, especially women and children, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, supplementing the United Nations Convention against Transnational Organized Crime, there is no international instrument that specifically addresses all aspects of trafficking in children,

*Concerned* that, in the absence of such an instrument, victims of trafficking in children and children who are vulnerable to trafficking are not sufficiently protected,

*Convinced* that this international instrument will help prevent the trafficking in children, punish the perpetrators of trafficking in children, and protect the victims of trafficking in children and children who are vulnerable to trafficking,

*Have agreed as follows:*

### I. General provisions

#### *Article 1. Purpose*

The purposes of this Convention are:

- |     |  |
|-----|--|
| (a) | To prevent and combat trafficking in children;   |
| (b) | To protect and assist the victims of such trafficking, with full respect for their human rights; |
| (c) | To punish perpetrators of the trafficking in children; and                                       |
| (d) | To promote international collaboration among States Parties in order to meet those objectives.   |

## *Article 2. Definitions*

For the purposes of this Convention:

- (a) “Trafficking in children” shall mean the recruitment, transportation, transfer, harbouring, or receipt of a child or children, regardless of reward and whether the movement of the child is international and/or internal, by one or more persons including parents or legal guardians, for the purpose of prostitution or similar activity of a sexual nature and/or other forms of exploitation.
- (b) “Exploitation” is to be identified by State Parties in accordance with article 18 of this Convention and includes, at a minimum, child prostitution and any related activity, child marriage, child labour, forced recruitment of children into military service, camel jockeys, slavery or practices similar to slavery, servitude or the removal of organs;
- (c) Consent of a victim of trafficking in children to the intended exploitation set forth in subparagraph (a) of this article is irrelevant;
- (d) “Child” shall mean any person under eighteen years of age. Any person who was trafficked when he or she was under eighteen years of age shall be considered a victim of ‘trafficking in children’ regardless of the age of extraction from trafficking.
- (e) The “Committee” shall mean the Committee against Trafficking in Children established by Article 17 of this Convention.

## *Article 3. Scope*

1. This Convention shall prevail, except as otherwise stated herein, to the extent of any inconsistencies with prior existing international instruments.
2. This Convention shall apply, except as otherwise stated herein, to the prevention of trafficking in children, the protection of victims of trafficking in children, as well as to the investigation and prosecution of the offences established in accordance with Article 15 of this Convention.

## **II. Prevention of trafficking in children**

### *Article 4. International Collaboration for Anti-Child Trafficking Measures*

1. States Parties are to identify areas in which international collaboration is necessary for the purposes of this Convention, which are to include at a minimum, border control, criminal matters and the exchange of information, experiences and research. This list of identified areas is to be included in the States Parties initial reports to the Committee and this list shall be reviewed in subsequent reports to the Committee in accordance with Article 18.

2. States are to establish or designate a national central authority or authorities, according to Article 19, for the purpose of encouraging and monitoring international collaboration in these identified areas.

3. Existing relationships of international cooperation and communication are not affected by the establishment of such national central authorities unless individual States decide otherwise.

*Article 5. Relation with non-governmental organizations*

States Parties are to identify non-governmental organizations in their initial reports to the Committee and review this list of non-governmental organizations in subsequent reports, in accordance with Article 18, and shall cooperate with these non-governmental organizations and those identified by the Committee established by this Convention, to perform such functions as designated by the Committee, to meet the objectives of this Convention as specified in Article 1.

*Article 6. Border control measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties are to strengthen such border controls as necessary to prevent and detect trafficking in children.

2. Each State Party shall adopt legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used in the commission of offences established in accordance with Article 15 of this Convention. Such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

3. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 2 of this article.

4. Each State Party shall take measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Convention.

5. Each State Party shall take measures as may be necessary to ensure the validity and authority of any adult, travelling with a child, over the child.

6. Without prejudice to existing relationships of communication and cooperation, States Parties shall strengthen cooperation amongst border control agencies by establishing and maintaining direct channels of communication.

#### *Article 7. Security and control of documents*

Each State Party shall take such measures as may be necessary:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

#### *Article 8. Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in children.

#### *Article 9. Information exchange and training*

1. Law enforcement, immigration or other relevant authorities of States Parties shall cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

- (a) Whether individuals crossing or attempting to cross an international and/or domestic border with travel or identity documents belonging to other persons or without travel or identity documents are perpetrators or victims of trafficking in children;
- (b) The types of travel or identity document that individuals have used or attempted to use to cross an international and/or domestic border for the purpose of trafficking in children; and
- (c) The means and methods used for the purpose of trafficking in children, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in children. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and age- and gender- sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

*Article 10. Other Anti-Child Trafficking measures*

1. Within two years of the entry into force of the Convention for the State Party concerned, comprehensive policies, programmes and other anti-child trafficking measures to prevent and combat trafficking in children are to be established.

2. Policies, programmes and other anti-child trafficking measures established in accordance with this article shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. States Parties shall undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in children.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate factors that make children vulnerable to trafficking, such as poverty and underdevelopment.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of children, which leads to trafficking.

**III. Protection of victims of trafficking in children**

*Article 11. Essential guiding principles for all anti-child trafficking measures*

1. The best interests of the child principle, the non-discrimination principle, and the respect for the views of the child principle, encapsulated accordingly in articles 3, 2 and 12 of the 1989 Convention on the Rights of the Child, shall be the primary consideration and primary guiding principles in all actions concerning children for the purposes of this Convention, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

2. Each State Party shall, in applying the provisions of the articles under section III concerning the protection of victims of trafficking in children, consider existing international instruments such as the 2006 UNICEF Guidelines on the Protection of Child Victims of Trafficking, and provide evidence of such consideration in accordance with article 18.

*Article 12. Status of victims of trafficking in children in receiving States*

1. Persons who satisfy the requirements in article 2 of this Convention to be identified as victims of trafficking in children will fall within the definition of “refugee” as provided in the 1951 Convention Relating to the Status of Refugees.

2. Each State Party shall uphold the best interests of the child by adopting legislative or other appropriate measures that permit the provision of immediate sanctuary to victims of trafficking in children by allowing them to remain in its territory, temporarily or permanently, in appropriate cases, regardless of the participation of the victims in the criminal justice process. Each State Party shall consider implementing this article through the form of a rebuttable presumption of permanent residency or other similar measures.

3. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

#### *Article 13. Legal and Administrative Procedures*

1. Each State Party shall ensure, for the best interests of the child and for respect for the views of the child, that its domestic legal or administrative system contains measures that provide to victims of trafficking in children, the provision of a guardian to provide:

- (a) Information on relevant court and administrative proceedings;
- (b) Assistance to enable their views and concerns to be presented and considered at all relevant legal and administrative proceedings, including at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

2. Each State Party shall ensure that guardians appointed in accordance with paragraph 1 of this article are trained personnel with experience in matters and issues related to the victims of trafficking in children.

3. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in children, including, inter alia, by making legal and administrative proceedings relating to such trafficking confidential.

4. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in children the possibility of obtaining compensation for damage suffered.

#### *Article 14. Assistance and rehabilitation services*

1. States Parties are to identify and implement, for the best interests the child, the necessary and appropriate rehabilitation and protection measures, including at a minimum the provision of a guardian to assist in legal, administrative and rehabilitation procedures, the provisions of appropriate, safe and secure accommodation, access to food and sanitary water, specialized medical and psychological assistance, provision of education and training opportunities, and a long-term plan for reintegration into society, all of which are to be made readily and easily available to the victims of trafficking in children.

2. Each State Party shall, in applying the provisions of this article, identify and address, the special needs of victims of trafficking in children and, in appropriate cases, cooperate with non-governmental organizations, other relevant organizations and other elements of civil society, in particular, the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in children can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, education and training opportunities.

3. Each State Party shall, in applying the provisions of this article, ensure that there is not any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all victims of trafficking in children, on an equal footing, of all rights and freedoms.

4. Each State Party shall provide for the physical safety of victims of trafficking in children while they are within its territory.

5. Each State Party shall, in accordance with article 18, for the best interests of the child and to ensure non-discrimination of victims of trafficking in children, collect disaggregated data by age, gender, region, rural or urban area, social and ethnic origin to assist in identifying whether discrimination exists.

#### **IV. Punishment of perpetrators of trafficking in children**

##### *Article 15. Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the “trafficking in children” and their “exploitation”, set forth in article 2 of this Convention, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
- (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article;
- (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article; and



(d) Knowingly and intentionally participating in the exploitation of the victims of trafficking in children.

3. Any or every State is permitted to criminalize the trafficking in children and their exploitation regardless of any nexus the State may have with the offence, the offender or the victim, and shall bring such persons, regardless of their nationality, before its own courts.

4. In implementing the provision contained in paragraph 3 of this Article, the physical presence of the accused in the territory of the prosecuting State is required.

5. This Article shall be without prejudice to any criminal jurisdiction exercised in accordance with national law.

#### *Article 16. Standardization of penalties*

1. Each State Party shall adopt such measures as may be necessary to make the offences, established in accordance with article 15 of the Convention, punishable by appropriate penalties that take into account its grave consequences.

2. Each State Party shall, in applying the provisions of this article, establish and impose penalties which include imprisonment for a minimum five years and a maximum of life imprisonment, taking into account the degree of involvement of the offender and the age of the victim or victims.

### **V. Final provisions**

#### *Article 17. Committee against trafficking in children*

1. To ensure the continuing progress and success of States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee against Trafficking in Children, which shall carry out the functions in accordance with Article 18 of this Convention.

2. The purposes of this Committee are:

- (a) To review and monitor States Parties implementation of the provisions in this Convention;
- (b) To conduct or facilitate the necessary research and make recommendations to improve the effectiveness of anti-child trafficking measures; and
- (c) To encourage and promote international collaboration.

3. The Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity,

consideration being given to equitable geographical distribution, as well as to the principal legal systems.

4. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

5. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

6. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

7. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

8. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

9. The Committee shall establish its own rules of procedure.

10. The Committee shall elect its officers for a period of two years.

11. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

12. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

13. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

*Article 18. Functions of the Committee*

1. The Committee's primary role is as the head of the network of national central authorities established or designated by States Parties in accordance with article 19 of this Convention.

2. States Parties undertake to submit to the Committee, through their national central authority or authorities, reports on the measures they have adopted which give effect to the provisions contained herein and on the progress made on the implementation of those provisions:

- (a) Within two years of the entry into force of the Convention for the State Party concerned;
- (b) Thereafter every five years.

3. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

4. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

5. The Committee shall make recommendations to States Parties based on these reports and may request from States Parties further information relevant to the implementation of the Convention.

6. Each State Party undertake to respond to these recommendations within one year by submitting another report which shall include an outline of the actions or measures that will be adopted in consideration of such recommendations.

7. The Committee may request States Parties to send a representative or representatives to meet with a panel consisting of experts who understand or have the ability to understand the national circumstances of the particular State in question. The purpose of an enquiry of this

nature is to assist States in solving any problems that they might have which causes difficulties with the implementation of the provisions in this Convention.

8. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities, and make these reports widely available to the public.

9. States Parties shall make their reports and the Committee's reports to the General Assembly widely available to the public in their own countries.

10. The Committee shall identify, with consideration towards recommendations and/or rejections from the States Parties, appropriate non-governmental organizations, specialized agencies and other competent bodies, to carry out one, some or all of such functions as provided:

- (a) Submit reports on the implementation of the Convention in a nominated State or States in areas falling within the scope of their activities;
- (b) Provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates; and
- (c) Cooperate with States Parties to undertake research on specific issues relating to trafficking in children, as recommended by the Committee.

#### *Article 19. National central authority*

1. In order to foster the effective implementation of the Convention and to encourage international collaboration in areas identified in accordance with article 4 of this Convention, States Parties are to establish or designate a national central authority or authorities, not later than one year following the entry into force of this Convention for the State Party concerned.

2. The functions of the national central authority or authorities shall include, at a minimum:

- (i) To cooperate with other national central authorities to establish a network of international collaboration through bilateral, multilateral, regional or worldwide agreements;
- (ii) To identify the specifics of such agreements, such as the exchange of relevant personnel for specialized training purposes and the use of technology to disseminate information or research;
- (iii) To cooperate with the Committee in order to meet the objectives of this Convention, including submitting reports in accordance with Article 18 of this Convention; and
- (iv) To consider the existing regional and international instruments concerning trafficking in children, in particular those provided by UNICEF, and including the results of such consideration into reports to the Committee made in accordance with Article 18 of this Convention.

#### *Article 20. Settlement of disputes*

1. States Parties shall endeavor to settle disputes concerning the interpretation or application of this Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties, if they choose to do so, may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

#### *Article 21. Financial Mechanism: Fund against Child Trafficking*

1. A financial mechanism, the Fund against Child Trafficking, for the provision of financial and technological resources on a grant or concessional basis, is hereby established and defined. It shall establish its own Committee which shall function under the guidance of and be accountable to the Committee, which shall decide on its policies, programme priorities and eligibility criteria related to this Convention.
2. The financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance.
3. The Committee against Trafficking in Children and the Fund against Child Trafficking shall agree upon arrangements to give effect to the above paragraphs, which shall include the following:
  - (a) Modalities to ensure that the funded projects against child trafficking are in conformity with the policies, programme priorities and eligibility criteria established by the Committee against Trafficking in Children;
  - (b) Modalities by which a particular funding decision may be reconsidered in light of these policies, programme priorities and eligibility criteria;
  - (c) Provision by the Fund against Child Trafficking of regular reports to the Committee against Trafficking in Children on its funding operations, which is consistent with the requirement for accountability set out in paragraph 1 above;
  - (d) Determination in a predictable and identifiable manner of the amount of funding necessary and available for the implementation of this Convention and the conditions under which that amount shall be periodically reviewed; and
  - (e) Determination of which Parties are developed country Parties, developed Parties and developing country Parties.

4. The Committee against Trafficking in Children shall make arrangements to implement the above-mentioned provisions not later than one year after entry into force of this Convention. Within four years thereafter, the Committee against Trafficking in Children shall review the financial mechanism and take appropriate measures.

5. To give effect to this Article and in the context of the implementation of this Convention, especially Articles 10 and 14 of this Convention, the developed country Parties and other developed Parties shall:

- (a) Provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties, in advancing the implementation this Convention; and
- (b) Also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of advancing the implementation of this Convention.

The implementation of these existing commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among developed country Parties.

6. The developed country Parties and other developed Parties may also provide, and developing country Parties avail themselves of, financial and technological resources for the implementation of this Convention, through bilateral, regional and other multilateral channels.

#### *Article 22. Non-discrimination clause*

1. The measures set forth in this Convention shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

#### *Article 23. Signature, ratification, acceptance, approval and accession*

1. This Convention shall be open to all States for signature from (insert date) until (insert date) in (insert place) and thereafter at (insert place) until (insert date).

2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this Article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument

of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

#### *Article 24. Entry into force*

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the (insert number) instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the fortieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is the later.

#### *Article 25. Amendment*

1. After the expiry of five years from the entry into force of this Convention, a State Party to the Convention may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Committee against Trafficking in Children for the purpose of considering and deciding on the proposal. The States Parties to this Convention shall make every effort to achieve consensus on each amendment at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Convention present and voting at the meeting of States Parties convened by the Secretary-General at United Nations Headquarters.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this Article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this Article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.



# Annex 2

**Table 1: Patchwork Framework of International Law pertaining to Child Trafficking**

Area of International Law	Relevant International Instruments
<b><i>Human Rights of Children</i></b>	<ul style="list-style-type: none"> <li>• Convention on the Rights of the Child 1989 (CRC)</li> <li>• Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC)</li> <li>• Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000 (OPAC)</li> <li>• African Charter on the Rights and Welfare of the Child 1990 (ACRC)</li> <li>• European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)</li> <li>• UNICEF Guidelines on the Protection of Child Victims of Trafficking (2006)</li> <li>• UNICEF Child Trafficking in Europe: A Broad Vision to Put Children First (2008)</li> <li>• UNICEF Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe (2006)</li> </ul>
<b><i>Criminal Justice</i></b>	<ul style="list-style-type: none"> <li>• Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) [Trafficking Protocol], supplementing the United Nations Convention on Transnational Organized Crime</li> <li>• Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC)</li> <li>• Optional Protocol to the CRC on the Involvement of Children in Armed Conflict 2000 (OPAC)</li> <li>• International Labour Organization C182 Worst Forms of Child Labour Convention 1999 (ILO C182)</li> <li>• R190 Worst Forms of Child Labour Recommendation 1999 (R190)</li> </ul>
<b><i>Asylum</i></b>	<ul style="list-style-type: none"> <li>• Convention Relating to the Status of Refugees 1951 (1951 Refugee Convention)</li> <li>• United Nations High Commissioner for Refugees (UNHCR) Guidelines on International Protection 2006</li> <li>• Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) [Trafficking Protocol], supplementing the United Nations Convention on Transnational</li> </ul>

	Organized Crime
<b>Border Control</b>	<ul style="list-style-type: none"> <li>• Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) [Trafficking Protocol], supplementing the United Nations Convention on Transnational Organized Crime</li> <li>• Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 (1956 Slavery Convention)</li> </ul>
<b>International Cooperation and Communication</b>	<ul style="list-style-type: none"> <li>• Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) [Trafficking Protocol], supplementing the United Nations Convention on Transnational Organized Crime</li> <li>• Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 (1956 Slavery Convention)</li> <li>• International Labour Organization C182 Worst Forms of Child Labour Convention 1999 (ILO C182)</li> <li>• Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 (OPSC)</li> <li>• R190 Worst Forms of Child Labour Recommendation 1999 (R190)</li> <li>• UNICEF Child Trafficking in Europe: A Broad Vision to Put Children First (2008)</li> </ul>

**Table 2 : Summary of the Trafficking Protocol 2000**

<b>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (Trafficking Protocol)</b>		
Brief Overview		<p>Not a human rights instrument. The UN Crime Commission which developed this Protocol is a law enforcement body.</p> <p><i>Article 2</i></p> <ul style="list-style-type: none"> <li>- The primary purpose of the Protocol is to prevent and combat human trafficking</li> <li>- Protect and assist victims with full respect for their human rights</li> <li>- Promote cooperation among State Parties in order to meet those objectives</li> </ul>
Entry into force		25 December 2003
States	Parties	<p>137 including:</p> <p>(1) Australia (signed 11 Dec 2002, ratified 14 Sept 2005)</p> <p>(2) Brazil (signed 12 Dec 2000, ratified 20 Jan 2004)</p> <p>(3) Malaysia (Acceded 26 Feb 2009)</p> <p><i>Reservations:</i></p>

		<ul style="list-style-type: none"> <li>- Does not consider itself bound by Art 15(2) and reserves the right specifically to follow the arbitration procedure in Art 15(2) or any other procedure for arbitration</li> </ul> <p>(4) US (Signed 13 Dec 2000, ratified 3 Nov 2005)</p> <p><i>Reservations:</i></p> <ul style="list-style-type: none"> <li>- Does not consider itself bound by Art 15(2)</li> <li>- reserves the right to apply in part Art 15(1)(b) to the extent provided for under its federal law</li> <li>- reserves the right to assume obligations under this Protocol in manner consistent with its fundamental principles of federalism</li> </ul>
	Non-Parties	Haiti (13 Dec 2000), India (12 Dec 2002), Thailand (18 Dec 2001) [only signatories]
Important provisions		<i>Article 1</i> The Protocol shall be interpreted together with the Convention.
		<i>Article 4</i> Scope of application of the Protocol to include prevention, investigation and prosecution as well as to protection of victims.
		<i>Article 5</i> Criminalization of trafficking of persons in States national laws.
		<i>Article 9</i> Comprehensive list of preventive measures States are to adopt.
		<i>Article 10</i> Authorities of States shall exchange information and undertake training to enable better detection of the crime, identification of the victims and the protection of victims' rights (gender and age specific)
		<i>Article 11</i> Strengthen border controls to prevent and detect trafficking in persons and consider establishing and maintaining direct channels of communication
Important definitions		<p><i>Article 3</i></p> <ul style="list-style-type: none"> <li>(a) Definition for 'trafficking in persons' – 3 elements (movement, coercion/fraud, exploitation)</li> <li>(b) Consent of a victim is irrelevant</li> <li>(c) Coercion/fraud is not a necessary element for the trafficking of children</li> <li>(d) 'Child' is any person under 18 years of age</li> </ul>
Enforcement mechanisms		<p><i>Article 15 of the Protocol</i></p> <p>Any disputes concerning the interpretation or application of the Protocol shall be settled through arbitration.</p> <p>(2) If still unable to agree after 6 months, can refer to ICJ</p> <p>(3) State Party can declare that it does not consider itself bound by this provision</p>
		<p><i>Article 32 of the Convention – Conference of the Parties to the Convention</i></p> <p>Facilitate and encourage States' cooperation, action and exchange of information.</p> <p>Review periodically the implementation of the Convention.</p>

	<p>Make recommendations to improve the Convention and its implementation. Shall acquire the necessary information from State Parties.</p> <p><i>Article 33 of the Convention – Secretariat</i> Assist the Conference of the Parties, assist State Parties upon request and ensure coordination with other secretariats of international and regional organizations</p>
Gaps	<p>No specific enforcement mechanisms for the Trafficking Protocol.</p> <p>The enforcement mechanisms provided in the Convention have no time period stated for the review of State implementation.</p> <p>The arbitration provision (Art 15) can be declared by States as non-binding upon them. What happens then if any disputes cannot be settled?</p> <p>Definition of exploitation is not an exhaustive list but nevertheless, it does not include the form of exploitation for ‘armed conflict’ or ‘illegal adoption’. Are these two forms of exploitation significant enough to be included?</p> <p>Protocol is concerned mainly with criminalization and law enforcement. How about from the human rights perspective?</p> <p><i>‘States shall take all measures appropriate...legislative, administrative, etc’</i></p> <ul style="list-style-type: none"> <li>- Up to the States to decide how they are to implement the provisions of the protocol in national law. Too vague and broad a spectrum for States to be really effective.</li> <li>- The differences in various national laws can pose a problem as human trafficking is a transnational organized crime</li> </ul>

**Table 3: Summary of the Convention on the Rights of the Child 1989**

Convention on the Rights of the Child 1989 (CRC)		
Brief overview		<ul style="list-style-type: none"> <li>- The most widely adopted human rights treaty in history</li> <li>- CRC is a universally agreed set of standards and obligations which place children center-stage in the quest for a just, respectful and peaceful society.</li> <li>- Spells out basic human rights for all children, everywhere, all the time.</li> <li>- CRC protects these rights by setting standards in health care, education, as well as legal, civil and social services.</li> <li>- These standards are benchmarks against which progress can be assessed and States that ratify CRC are obliged to keep the <i>best interests of the child</i> in mind in their actions and policies.</li> </ul>
Entry into force		2 September 1990
States	Parties	<p>193 including:</p> <p>(1) Australia (signed 22 Aug 1990, ratified 17 Dec 1990)</p> <p><i>Reservations:</i></p> <ul style="list-style-type: none"> <li>- Ratifies the Convention to the extent that it is unable to comply with obligation imposed by article 37(c) (separation of children from adults in prison) but accepts the general principles of art 37.</li> </ul>

		<p>(2) Brazil (signed 26 Jan 1990, ratified 24 Sept 1990)</p> <p>(3) Haiti (signed 26 Jan 1990, ratified 8 Jun 1995)</p> <p>(4) India (Acceded 11 Dec 1992)</p> <p>(5) Malaysia (Acceded 17 Feb 1995)</p> <p><i>Reservations:</i></p> <ul style="list-style-type: none"> <li>- Art 1, 2, 7, 13, 14, 15, 28(1)(a), 37 only applicable if in conformity with the Constitution, national laws and policies.</li> <li>• Several objections were made to the Malaysia's reservations. The States stated that those reservations are contrary to the object and purpose of the CRC and its implementation. (Austria, Finland, Germany, Ireland, Netherlands, Norway, Portugal, Sweden)</li> </ul> <p>(6) Thailand (Acceded 27 Mar 1992)</p> <p><i>Reservations:</i></p> <ul style="list-style-type: none"> <li>- Art 7,22 subject to national laws, regulations and prevailing practices in Thailand.</li> </ul>
	Non-Parties	Somalia, US (signed 16 Feb 1995) [only signatories]
Important provisions		<p>Four foundation principles:</p> <ul style="list-style-type: none"> <li>(i) Non-discrimination (art 2)</li> <li>(ii) <i>Best interests of the child</i> (art 3)</li> <li>(iii) Right to life, survival and development (art 6)</li> <li>(iv) Respect for the views of the child (art 12)</li> </ul>
		<p><b>Article 11</b></p> <p>Combat the illicit transfer and non-return of children abroad.</p>
		<p><b>Article 19</b></p> <p>Protect the child from all forms of...exploitation...including providing support, prevention, identification, reporting, referral, investigation, treatment and follow-up and judicial involvement.</p>
		<p><b>Article 21</b></p> <p>Adoption – <i>best interests of the child</i> shall be the paramount consideration.</p> <p>(d) Ensure that in inter-country adoption, the placement does not result in improper financial gain for those involved</p>
		<p><b>Article 22</b></p> <p>A child seeking refugee status receive appropriate protection and humanitarian assistance</p>
		<p><b>Article 32</b></p> <p>Ensure that children are protected from economic exploitation and from performing any work that is hazardous or which interferes with education</p>
		<p><b>Article 33</b></p> <p>Prevent the use of children in the illicit production and trafficking of narcotic drugs and psychotropic substances.</p>
		<p><b>Article 34</b></p> <p>Protect children from all forms of sexual exploitation and sexual abuse.</p>
		<p><b>Article 35</b></p> <p>Prevent the abduction, sale or traffic of children for any purpose or in any form</p>

	<i>Article 36</i> Protect children against all other forms of exploitation prejudicial to any aspects of the child's welfare
	<i>Article 38</i> Undertake to respect and ensure respect for rules of IHL applicable to them in armed conflict which are relevant to the child
	<i>Article 39</i> Promote recovery and reintegration of children victims of any form of...exploitation, abuse...armed conflicts.
	<i>Article 9 and 18</i> 'Best interests of the child' in regards to parental care of children.
Important definitions	<i>Article 1</i> A child means every human being below the age of 18 <u>unless under the law applicable to the child (i.e. national law) majority is attained earlier.</u>
Enforcement mechanisms	<i>Article 43</i> Committee on the Rights of the Child established to examine the progress made by State Parties in achieving the realization of the obligations undertaken in CRC
	<i>Article 44</i> State Parties are to submit reports on the measures they have adopted which give effect to CRC within 2 years of the entry into force of CRC for the State Party concerned and every 5 years thereafter. Reports shall indicate factors and difficulties affecting the fulfillment of the obligations under CRC. Shall also contain sufficient info to provide the Committee with a comprehensive understanding of the implementation of CRC in the country concerned.
	<i>Article 45</i> Specialized agencies and other competent bodies can be invited to provide expert advice and submit reports on the implementation of CRC. The Committee may recommend to GA to request an undertaking of studies on specific issues relating to the rights of the child. The Committee may make suggestions and recommendations based on info received pursuant to art 44 and 45 and shall be transmitted to any State Party concerned.
Gaps	<i>'Best interests of the child'</i> - Not defined - Not stated who decides
	<i>'States shall take all measures appropriate...legislative, administrative, etc'</i> - Up to the States to decide how they are to implement the provisions of CRC in national law.
	Only progress monitoring and recommendations can be made. When States do not comply with obligations, what happens? Nothing is stated in the CRC as to this effect.
	Age of attaining majority not standardized.

**Table 4: Summary of the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000) [OPSC]**

<b>Optional Protocol to the CRC on the sale of children, child prostitution and child pornography 2000</b>		
Brief Overview		To eliminate the sale of children, child prostitution and child pornography by adopting a holistic approach addressing the contributing factors which include trafficking of children.
Entry into force		18 Jan 2002
States	Parties	<p>137 including:</p> <ul style="list-style-type: none"> <li>(1) Australia (signed 18 Dec 2001, ratified 8 Jan 2007)</li> <li>(2) Brazil (signed 6 Sep 2000, ratified 27 Jan 2004)</li> <li>(3) India (signed 15 Nov 2004, ratified 16 Aug 2005)</li> <li>(4) Thailand (Acceded 11 Jan 2006)</li> <li>(5) US (signed 5 Jul 2000, ratified 23 Dec 2002)</li> </ul> <p><i>Reservation:</i> Article 4(1) of the Protocol shall not apply to US (i.e. there is no jurisdiction for offences described in Art 3(1) if committed on board a ship or aircraft registered in US) until the US domestic law is in full conformity and US has notified the Sec-Gen of the UN.</p> <p><i>Understandings:</i> No assumptions of obligations under the CRC. No obligation to take certain action.</p>
	Non-Parties	Haiti (signed 15 Aug 2002), Malaysia (not at all)
Important provisions		<p><i>Article 3</i> Provides a list of acts and activities that must be covered under State Parties' criminal or penal law which includes sexual exploitation, transfer of organs for profit, engagement of child in forced labour, and illegal adoption. *a more comprehensive list of forms of 'exploitations' that may occur in the trafficking of children (as compared to that found in the Trafficking Protocol)?</p>
		<p><i>Article 6</i> State Parties are to cooperate and assist one another in connection with investigation or criminal or extradition proceedings in conformity with any treaties or other mutual arrangements or in accordance with domestic law.</p>
		<p><i>Article 8</i> Protect the rights and interests of child victims at all stages of the criminal justice process. Best interests of the child a primary consideration. Training for those working with victims and adopt measures to ensure the protection and rehabilitation of victims.</p>
		<p><i>Article 9</i> All feasible measures to ensure full social reintegration and physical and psychological recovery of victims.</p>
		<p><i>Article 10</i> All necessary steps to strengthen international cooperation and promote</p>

	international cooperation and coordination between States authorities, national and international NGOs and international organizations.
Important definitions	<p><i>Article 2</i></p> <p>(a) Sale of children defined</p> <p>(b) Child prostitution defined</p> <p>(c) Child pornography defined</p>
Enforcement mechanisms	<p><i>Article 12</i></p> <p>Submit a report two years after entry into force to the Committee on the Rights of the Child providing comprehensive info on the measures taken for implementation of the Protocol.</p> <p>Committee may request further information relevant to the implementation of the Protocol.</p>
Gaps	Only progress monitoring. How about recommendations? Or getting assistance from specialized agencies or other competent bodies?
	Nothing stated on what happens if a State Party breaches its obligations under this Protocol.
	Acknowledges in its Preamble that increase in trafficking of children is a grave concern and a <i>contributing factor</i> . Perhaps the trafficking of children is not a contributing factor but is in fact the means to an end – which is exploitation, and in this instance, sale of children for various forms of exploitations including sexual exploitation.
	'Take all feasible measures' is too vague and broad a spectrum.

**Table 5: Summary of the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict (2000) [OPAC]**

Optional Protocol to the CRC on the involvement of children in Armed Conflict 2000		
Brief Overview		<ul style="list-style-type: none"> <li>- To protect children from the harmful and widespread impact of armed conflict and educate society concerning the implementation of this Protocol</li> <li>- To raise the age of possible recruitment of persons into armed forces and their participation in hostilities so as to contribute effectively to the implementation of the principle of the 'best interests of the child'</li> </ul>
Entry into force		12 February 2002
States	Parties	<p>132 including:</p> <p>(1) Australia (signed 21 Oct 2002, ratified 26 Sep 2006)</p> <p><i>Declaration:</i></p> <p>Shall continue to observe a minimum voluntary recruitment age of 17 years</p> <p>(2) Brazil (signed 6 Sept 2000, ratified 27 Jan 2004)</p> <p><i>Declaration:</i></p> <p>Can present themselves to voluntary military service at the age of 16 but acceptance only possible the year they are supposed to turn 17 and requires special authorization with written consent from parent/guardian.</p> <p>There is compulsory military service which begins 1<sup>st</sup> Jan the year</p>



		<p>the person turns 18 years old.</p> <p>(3) India (signed 15 Nov 2004, ratified 30 Nov 2005)  <i>Declaration:</i>  Minimum age of recruitment is 16 but only sent to operational area after 18 years old.  Recruitment is purely voluntary.</p> <p>(4) Thailand (Acceded 27 Feb 2006)  <i>Declaration:</i>  Compulsory military service for 18 year olds. Women exempt but subject to other duties assigned by law.  Students regardless of gender can voluntarily apply to receive military training/go to military school with the consent of parents/legal guardians. If complete 3 years of training, exempt from being active military personnel when they reach the age of 21.</p> <p>(5) US (signed 5 Jul 2000, ratified 23 Dec 2002)  <i>Declaration:</i>  Minimum age of recruitment is 17. Voluntary recruitment and must have written consent from parents or guardian if under 18.  <i>Understandings:</i>  No assumptions of obligations under CRC.  No basis for jurisdiction by any international tribunal.</p>
	Non-Parties	Haiti (signed 15 Aug 2002), Malaysia (not at all)
Important provisions		<p><i>Article 3</i>  Binding declaration must be given that states the minimum age of voluntary recruitment and a description of safeguards adopted to ensure that there is no coercion. If minimum age is below 18, States must maintain safeguards to ensure, as a minimum, that recruitment is <u>genuinely voluntary, with informed consent from parents or legal guardians, the person is fully informed of the duties involved in military service, and with reliable proof of age prior to acceptance.</u></p>
		<p><i>Article 4</i>  Armed groups distinct from the armed forces of a State should not recruit or use in hostilities anyone under 18. States shall take all feasible measure to prevent, prohibit and criminalize such practices.</p>
		<p><i>Article 6</i>  Take all measure to ensure effective implementation and enforcement of the Protocol within its jurisdiction.</p>
Enforcement mechanisms		<p><i>Article 8</i>  Submit a report two years after entry into force to the Committee on the Rights of the Child providing comprehensive info on the measures taken for implementation of the Protocol.  Committee may request further information relevant to the implementation of the Protocol.</p>
Gaps		<p>Only progress monitoring. How about recommendations? Or getting assistance from specialized agencies or other competent bodies?</p>
		<p>Nothing stated on what happens if a State Party breaches its obligations</p>

	under this Protocol.
	Trafficking of children for the purpose of armed conflict not mentioned.
	'Take all feasible measures' is too vague and broad a spectrum.

**Table 6: Summary of the ILO C182 Worst Forms of Child Labour Convention (1999) [ILO C182]**

<b>ILO C182 Worst Forms of Child Labour Convention 1999</b>		
Brief Overview		<ul style="list-style-type: none"> <li>- Adopted especially for the prohibition and elimination of the worst forms of child labour and considers international cooperation and assistance to be essential to this end.</li> <li>- Meant to complement other international instruments on child labour such as Convention and Recommendation concerning Minimum Age for Admission to Employment 1973, Forced Labour Convention 1930, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956.</li> </ul>
Entry into force		19 Nov 2000
States	Parties	171 including: <ol style="list-style-type: none"> <li>(1) Australia (ratified 19 Dec 2006)</li> <li>(2) Brazil (ratified 2 Feb 2000)</li> <li>(3) Haiti (ratified 19 July 2007)</li> <li>(4) Malaysia (ratified 10 Nov 2000)</li> <li>(5) Thailand (ratified 16 Feb 2001)</li> <li>(6) US (ratified 2 Dec 1999)</li> </ol>
	Non-Parties	India
Important provisions		<i>Article 1</i> Immediate and effective measures to be taken as a matter of urgency to secure the prohibition and elimination of the worst forms of child labour.
		<i>Article 4</i> Types of work under art 3(d) to be determined by national laws/regulations/competent authorities and periodically examined and revised as necessary.
		<i>Article 6</i> Design and implement programmes of action to eliminate the worst forms of child labour.
		<i>Article 7</i> Provision and application of sanctions including penal sanctions, take into account the importance of education, take effective and time-bound measures of prevention, assistance for removal, rehabilitation, reintegration, access to free basic education and vocational training, identification of children at special risk, special situation of girls and designate a competent authority to implement
		<i>Article 8</i> States to enhance international cooperation and/or assistance through support for social/economic development, poverty eradication programmes and universal education.

Important definitions	<i>Article 2</i> For the purposes of this Convention, child = under 18.
	<i>Article 3</i> 'The worst forms of child labour': (a) Slavery eg. Sale/trafficking of children, armed conflict, etc. (b) Prostitution, pornography (c) Illicit activities i.e. production and trafficking of drugs (d) Work likely to harm the health, safety and morals of children
	<i>Article 3 of the Forced Labour Convention 1930</i> 'Competent authority': An authority of the metropolitan country or the highest central authority in the territory concerned.
Enforcement mechanisms	<i>Article 5</i> Member States are to establish/designate appropriate mechanisms to monitor the implementation of this Convention.
	<i>Article 14</i> The Governing Body of the ILO shall present to the General Conference a report on the workings of this Convention and shall examine the desirability of revision of its whole or part by the Conference.
Gaps	<i>Article 14</i> 'At such times as it may consider necessary' – no time period given. When would it be necessary? No guidelines to this given either.
	<i>Article 4-8</i> No review of State implementation and no time period given and no guidelines as to when would be necessary for revision of implementation.
	Nothing mentioned on what would happen if States do not fulfill their obligations under the Convention.
	Mechanisms to monitor the implementation of the Convention are State appointed – concern for neutrality. Perhaps a central international body would be better?

**Table 7: Summary of the R190 Worst Forms of Child Labour Recommendation (1999) [R190]**

<b>R190 Worst Forms of Child Labour Recommendation 1999</b>	
Brief Overview	Meant to supplement the ILO C182 and to be applied in conjunction with it.
Date of adoption	17 June 1999
Important points	Giving guidelines as to what the programmes of action need to address.
	Guidelines as to what is considered hazardous work
	Guidelines as to what information should be gathered and kept up to date to determine priorities for prohibition and elimination of the worst forms of child labour
	Guidelines as to what member States should do to this end – gather and exchange info, detecting, prosecuting and registering offenders
	Guidelines as to what forms of child labour should be criminalized
	Guidelines as to what 'other measures aimed at prohibition and elimination' include – education of the public and appropriate training for

	relevant officials/people concerned, etc
	Guidelines as to what 'international cooperation' entails
Weaknesses	If member States do not apply the R190 in conjunction with the Convention, who is to review?
	Perhaps member States should submit reports on how they have considered the guidelines given and implemented it into national laws or the modifications made?
	Provisions of funding – most States severely affected with child labour are poorer than other States – how will they have the funding to implement programmes of action and education?

**Table 8: Summary of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) [1956 Slavery Convention]**

Supplementary Convention on the Abolition of Slavery, The Slave Trade, and Institutions and Practices Similar to Slavery 1956		
Brief Overview		To supplement the Slavery Convention of 1926 and designed to intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery.
Entry into Force		30 April 1957
State	Parties	123 including: (1) Australia (signed 7 Sep 1956, ratified 6 Jan 1958) (2) Brazil (Acceded 6 Jan 1966) (3) Haiti (signed 7 Sep 1956, ratified 12 Feb 1958) (4) India (signed 7 Sept 1956, ratified 23 Jun 1960) (5) Malaysia (Acceded 18 Nov 1957) (6) US (Acceded 6 Dec 1967)
	Non-Parties	Thailand
Important provisions		<b>Article 1</b> Each State Party shall take all practicable and necessary legislative and other measures to bring about progressively and ASAP the complete abolition/abandonment of (practices similar to slavery) (a) debt bondage (b) serfdom (c) forced marriage (d) any institution or practice whereby a child/young person is delivered by parents/guardian to another person (regardless of reward) for exploitation or labour.
		<b>Article 3</b> Slave trade criminalized and State Parties to take all effective measures to ensure their ships, aircrafts, ports, airfields and coasts are not used for the conveyance of slaves. State Parties are to exchange info to ensure practical coordination in combating the slave trade.
		<b>Article 5 and 6</b> Activities related to slavery and the slave trade is to be criminalized.

	<i>Article 8</i> Cooperation and communication essential between States and the United Nations.
Important definitions	<i>Article 1</i> Definition of debt bondage, serfdom, forced marriage and trafficking of children('trafficking' not mentioned though)
	<i>Article 7</i> Definition of slavery, a person of servile status and slave trade.
Enforcement mechanisms	<i>Article 8(3)</i> The Economic and Social Council can make further recommendations based on the information received from the State Parties concerning laws, regulations and admin measures enacted or put into effect to implement the Convention.
	<i>Article 9</i> No reservations may be made to the Convention
	<i>Article 10</i> Any dispute between State Parties relating to the interpretation or application of the Convention shall be referred to the ICJ (unless another mode of settlement is agreed upon) if not settled by negotiation.
Gaps	No specific enforcement mechanisms. <i>Article 8</i> just mentions that the State Parties are to 'undertake to co-operate/communicate'. There is no set process by which they are to do so.
	<i>Article 1</i> 'take all practicable and necessary legislative and other measures' – what does this mean? Too vague.
	If States do not fulfill their obligations, another State can take the matter to ICJ if cannot be settled through negotiation. Should there instead be a neutral international body given the power to do this? To review State progress in the abolition of slavery and the slave trade and bring the matter to ICJ if the dispute cannot be settled?
	<i>Article 3</i> – how is border control going to be made more effective in ensuring that the modes of transport between States and the ports, airfields and coasts are not used for human trafficking? Guidelines? Suggestions? Review of effectiveness?

**Table 9: Summary of the African Charter on The Rights and Welfare of the Child (1990) [ACRC]**

African Charter on The Rights and Welfare of the Child 1990		
Brief Overview		<ul style="list-style-type: none"> <li>- Established a year after the CRC and fashioned in light of it too</li> <li>- To reaffirm the principles of the CRC and the Organization of African Unity Heads of State and Government's Declaration on the Rights and Welfare of the African Child</li> </ul>
Entry into Force		29 Nov 1999
States	Parties	The African Member States of the Organization of African Unity
Important provisions		<i>Article 1</i> State Parties are obliged to recognize the rights, freedoms and duties in the Charter and give effect to the provisions of the Charter. However,

	<p>nothing in the Charter shall affect any more conductive provisions contained in the law of a State Party or in any other international Convention or agreement in force in that State. Besides that, any custom, tradition, cultural or religious practice that is inconsistent with the Charter shall be discouraged to the extent of its inconsistency.</p>
	<p>Have the same four foundation principles as the CRC:</p> <ul style="list-style-type: none"> <li>(v) Non-discrimination (art 3)</li> <li>(vi) <i>Best interests of the child</i> (art 4)</li> <li>(vii) Right to life, survival and development (art 5)</li> <li>(viii) Respect for the views of the child (art 7)</li> </ul>
	<p><i>Article 15 – Child Labour</i></p> <p>Every child to be protected from all forms of economic exploitation and any work likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral or social development.</p> <p>State Parties are to cover both formal and informal sectors of employment and have regard to the relevant provisions of the ILO instruments regarding children and shall provide in particular:-</p> <ul style="list-style-type: none"> <li>(i) Minimum wages</li> <li>(ii) Appropriate regulation of hours and conditions of employment</li> <li>(iii) Appropriate penalties or sanctions for effective enforcement</li> <li>(iv) Dissemination of information on the hazards of child labour to all sectors of the community</li> </ul>
	<p><i>Article 16 – Protection Against Child Abuse and Torture</i></p> <p>Every child to be protected from all forms of torture, inhuman or degrading treatment, neglect or maltreatment and abuse including physical, mental and sexual abuse.</p> <p>Protective measures are to include:-</p> <ul style="list-style-type: none"> <li>(i) establishment of special monitoring units to provide support for the child and for those who have care of the child</li> <li>(ii) other forms of prevention and identification</li> <li>(iii) reporting referral investigation</li> <li>(iv) treatment</li> <li>(v) follow-up of instances of child abuse and neglect</li> </ul>
	<p><i>Article 22 – Armed Conflicts</i></p> <p>State Parties are to respect and ensure respect for rules of IHL applicable in armed conflicts which affect the child. Such rules also apply to children in situations of internal armed conflicts, tension and strife.</p>
	<p><i>Article 24 – Adoption</i></p> <p>State Parties shall ensure that the best interest of the child shall be the paramount consideration and that inter-country adoption shall be the last resort and if so, to ensure that the child enjoys safeguards and standards equivalent to those existing in the case of national adoption. State Parties are also to ensure that such a placement does not result in trafficking or improper financial gain for those who try to adopt a child.</p>
	<p><i>Article 27 – Sexual Exploitation</i></p> <p>State Parties are to protect the child from all forms of sexual exploitation and sexual abuse including any sexual activity, prostitution or other sexual</p>

	<p>practices, pornographic activities, performances and materials.</p> <p><i>Article 29 – Sale, Trafficking and Abduction</i> States Parties are to take appropriate measures to prevent the abduction, sale of or traffic in children for any purpose or in any form and the use of children in all forms of begging.</p>
Important definitions	<p><i>Article 2 – Definition of a Child</i> Every human being below 18 years of age.</p>
Enforcement mechanisms	<p><i>Chapter 2 – Establishment and Organization of the Committee on the Rights and Welfare of the Child</i> To promote and protect the rights and welfare of the child as enshrined in this Charter; Article 32. Secretariat is established for the Committee; Article 40.</p>
	<p><i>Chapter 3 – Mandate and Procedure of the Committee</i> <i>Article 42 – Mandate</i> Outlines the functions of the Committee which includes</p> <ul style="list-style-type: none"> <li>(i) collect and document info, give its views and make recommendations to Governments</li> <li>(ii) Formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa</li> <li>(iii) Cooperate with other African, international and regional institutions and organizations concerned</li> <li>(iv) Monitor the implementation and ensure protection of the rights as stated in the Charter</li> <li>(v) Interpret the provisions of the present Charter as requested</li> <li>(vi) Perform other tasks entrusted by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the UN</li> </ul>
	<p><i>Article 43 – Reporting Procedure</i> Every State Party is to submit a report on the measures it has adopted which gives effect to the provisions of this Charter and on the progress made within two years of the entry into force of the Charter for the State Party concerned and thereafter, every three years. Every report is to contain sufficient information on the implementation of the Charter to provide the Committee with a comprehensive understanding to that end in the relevant country and shall indicate factors and difficulties affecting the fulfillment of such obligations under the Charter.</p>
	<p><i>Article 45 – Investigations by the Committee</i> The Committee may resort to any appropriate method of investigating any matter falling within the ambit of the present Charter or the measures the State Party has adopted to implement the Charter and request from State Parties any relevant info. Committee is to submit a report every two years to each Ordinary Session of the Assembly of Heads of State and Government on its activities and on any communication made to it under <i>Article 44</i> and shall publish its report after the report has been considered by the Assembly of Heads of State and Government. This report is to be made available to the public in the</p>

	countries of State Parties.
Gaps	<i>'Best interests of the child'</i> <ul style="list-style-type: none"> <li>- Not defined</li> <li>- Not stated who decides</li> </ul>
	Only progress monitoring and recommendations can be made. When States do not comply with obligations, what happens? Nothing is stated in the Charter as to this effect.
	If dispute arises concerning the interpretation/application of this Charter – no dispute resolution options mentioned
	No definition of what consists of the sale/traffic of children.

**Table 10: Summary of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No.11 and No. 14 [ECHR]**

European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No.11 and No. 14 (ECHR)		
Brief Overview		Established by the members of the Council of Europe who considered that the recognition, observance, maintenance and further realization of human rights and fundamental freedoms as stated therein the Convention would be the foundation of justice and peace in the world.
Entry into Force		1 June 2010
States	Parties	All Council of Europe member states
Important provisions		<i>Article 1</i> High Contracting Parties have an obligation to respect the rights and freedoms defined in Section 1 of the Convention and secure to everyone within their jurisdiction those rights and freedoms
		<i>Article 3</i> Prohibition of torture or inhuman or degrading treatment or punishment
		<i>Article 4</i> Prohibition of slavery and forced labour
		<i>Article 13</i> Right to effective remedy to everyone whose rights and freedoms as set forth in this Convention are violated. *This 'effective remedy' could be read to include the providence of rehabilitation and reintegration into society for victims of child trafficking.
		<i>Article 17</i> This provision further protects these rights and freedoms by prohibiting the abuse of such by any State, group or person.
		<i>Article 53</i> Establishes a safeguard for existing human rights under the laws of any High Contracting Party or under any other agreement to which it is a Party.
Gaps		The Convention does not provide specifically for the protection of children from the abuse, harm and exploitation that could result from trafficking or the promotion of victim's recovery, rehabilitation or reintegration into society.



**Table 11: Laws punishing prostitutes**<sup>458</sup>

<b>State/Territory</b>	<b>Street Work</b>	<b>Brothel Work</b>
<b>New South Wales</b> <i>Summary Offences Act 1988</i>	Soliciting near or within view of a dwelling, school, church or hospital, or in a school, church or hospital; s.19. Taking part in an act of prostitution in or within view of a school, church, hospital or public place, or within view of a dwelling, s.20.	Not an offence unless premises are held out as available for massage, sauna, photographs etc; s.16.
<b>Victoria</b> <i>Prostitution Regulation Act 1986</i> <i>Vagrancy Act 1966</i>	Soliciting and Loitering: <i>Prostitution Regulation Act, s.5.</i>	An offence except where premises have a town planning permit; <i>Vagrancy Act 1966, s.11.</i>
<b>Queensland</b> <i>Vagrants, Gaming and Other Offences Act 1931</i>	Soliciting or loitering, being a prostitute behaving in a riotous, disorderly or indecent manner in a public place; soliciting within view or hearing of a person in a public place; s.5.	Occupier of a house frequented by prostitutes; s.5. Using premises held out for other purposes, for prostitution; s.8A. "One-woman" brothel not an offence.
<b>Western Australia*</b> <i>Police Act 1892</i>	Common prostitute who solicits, importunes or loiters; s.59; wandering in streets or highways or being in a place of public resort or behaving in a riotous or indecent manner, s.65 (8), s.76G.	Could be prosecuted if occupier permits premises to be used as a brothel; s. 76F. Occupier of a house frequented by prostitutes; s.76(7). "One-woman brothel" not an offence.
<b>South Australia</b> <i>Police Offences Act 1953</i>	Accosting, soliciting or loitering for the purposes of prostitution in a public place; s.25.	Receiving money paid in a brothel in respect of prostitution; s.28 (l) (b).
<b>Tasmania</b> <i>Police Offences Act 1935</i>	Common prostitute solicits or importunes in a public place or within view or hearing of a public place, or loiters for such a purpose, s.8 (i) (c).	Not an offence
<b>Northern Territory</b> <i>Summary Offences Act (as in force Aug 1987)</i>	Common prostitute accosting, soliciting, or loitering for the purposes of prostitution in a public place; s.53. Persistently solicits or importunes for immoral purposes (males only) s.57(ha). Being a common prostitute wandering in streets or highways or behaving in riotous or indecent manners; s.56 (b). Loitering may be	Could be prosecuted for permitting premises to be used as a brothel.

<sup>458</sup> As cited from No. 22 Prostitution Laws in Australia, compiled and written by Susan Pinto, Anita Scandia and Paul Wilson, Trends and Issues in Criminal Justice, Australian Institute of Criminology, May 1990 at 2<<http://www.aic.gov.au/documents/F/B/5/%7BFB5E3FDC-1AB5-4F04-A1B8-9D4B5C30B42C%7Dt22.pdf>> accessed at 13 May 2011.

	asked to leave public place; s. 47A.	
<b>Australian Capital Territory*</b> <i>Police Offences Ordinance 1930</i>	Persistently soliciting or importuning for an immoral purpose in a public place, s.23.	"One-woman brothel " not an offence

**Note:** In all jurisdictions, escort agency work is not an offence.

\* At the time of writing Western Australia was considering introducing legislation based on the Victorian model of legal brothels. The Australian Capital Territory was considering options other than the criminalisation of prostitution.

**Source:** Consultation Paper No. 2 *Report of the Working Panel on Discrimination and Other Legal Issues - HIV/AIDS*, Dept of Community Services and Health, 1989. pp. 29-32. Adapted with the assistance of Gail Mason, Australian Institute of Criminology.

**Table 12: Laws criminalising prostitution related activities**<sup>459</sup>

<b>State</b>	<b>Living on Earnings</b>	<b>Brothel Keeping</b>	<b>Procuring</b>	<b>Permitting Premises to be used for Prostitution</b>	<b>Advertising</b>	<b>Other</b>
<b>New South Wales</b> <i>Summary Offences Act 1988</i> <i>Crimes Act 1900</i> <i>Disorderly Houses Act 1943</i>	An offence; Summary Offences Act 1988 s.15	Allowing premises held out as available for other purposes, to be used for prostitution; <i>Summary Offences Act 1988</i> s.16.	An offence; <i>Crimes Act 1900</i> , s.91A, 91B <i>Summary Offences Act 1988</i> , s.18	Appearing, acting or behaving as having management of a disorderly house which is habitually used for the purposes of prostitution; <i>Disorderly Houses Act 1943</i> , s.3	Advertising premises are used or a person is available prostitution; Summary Offences ACT 1988 s.18.	
<b>Victoria</b> Prostitution Regulation Act 1986 Vagrancy Act 1966	An offence, except where premises have a town planning permit; <i>Vagrancy Act</i> s. 10.	An offence except when premises have a permit; <i>Vagrancy Act</i> , s.11.	Only an offence where force or violence or child; Prostitution Regulation Act, ss. 10, 11.	Tenant, lessee or occupier who permits premises to be used is guilty of an offence except where premises have a town	Advertising employment in a brothel; Crimes Act 1958, s.59A.	Gutter-crawling in order to enlist the services of a prostitute; Prostitution Regulation Act 1986, s.15 (2).

<sup>459</sup> As cited from No. 22 Prostitution Laws in Australia, compiled and written by Susan Pinto, Anita Scandia and Paul Wilson, Trends and Issues in Criminal Justice, Australian Institute of Criminology, May 1990 at <http://www.aic.gov.au/documents/F/B/5/%7BFB5E3FDC-1AB5-4F04-A1B8-9D4B5C30B42C%7Dt22.pdf> accessed at 13 May 2011.

				planning permit; <i>Vagrancy Act</i> s.12. Similarly for landlords.		
<b>Queensland</b> <i>Vagrants, Gaming and Other Offences Act 1931-1987 Criminal Code</i>	An offence; <i>Vagrants, Gaming and Other Offences Act</i> s.5	Keeping or managing a brothel; s.8 Keeping a bawdy house; Criminal Code, s 231.	An offence; Criminal Code, s.217	Tenant, lessee or occupier who permits premises to be used, landlord who knows premises to be used; <i>Vagrants, Gaming and Other Offences Act</i> s.8	An advertiser may be held as being a party to an offence of partly living on earnings of prostitution, or the keeping of a brothel by knowingly assisting in the operation thereof	Keeper of a lodging house permitting it to be the resort or place of meeting of prostitutes; <i>Vagrants, Gaming and Other Offences Act</i> s.9.
<b>Western Australia*</b> Police Act 1892 Criminal code	An offence; Police Act 1892 s.76G	Keeping or managing a brothel; Police Act 1892 s.76F Keeping a place for prostitution; Criminal Code, s.231.	An offence; Criminal Code, s.191	Tenant lessee or occupier who permits premises to be used for prostitution, landlord who knows premises used; Police Act 1892 s.76F		Occupier of a house frequented by prostitutes; Police Act 1892 s.65.
<b>South Australia</b> Police Offences Act 1953 Criminal Law Consolidation Act 1935	An offence; Police Offences Act 1953 s.26	Keeping or managing a brothel; Police Offences Act 1953 s.28(i)(a)	An offence; Criminal Law Consolidation Act, 1935, s.63.	Lets or sublets premises knowing to be used as a brothel; Police Offences Act 1953 s.29.		
<b>Tasmania</b> <i>Police Offences Act</i>	An offence; <i>Police Offences</i>	Keeping a bawdy house;	An offence; <i>Criminal Code</i> , s. 128	Letting a house, knowing it is		Occupying a house and harbouring

1935 <i>Criminal Code</i>	<i>Act</i> 1935 s.8	<i>Criminal Code</i> , s.143.		to be used as a brothel; <i>Police Offences Act</i> 1935, s.11		prostitutes; <i>Police Offences Act</i> 1935, s.10 (l) (b). Lodging or entertaining a prostitute to the annoyance of the inhabitants; <i>Police Offences Act</i> 1935, s.10 (i) (d).
<b>Northern Territory</b> <i>Summary Offences Act</i> (in force as at 17 Aug 1987) <i>Criminal Code</i> Suppression of Brothels Act 1907	An offence; <i>Summary Offences Act</i> s.59(b) <i>Suppression of Brothels Act</i> 1907, s.7	An offence; <i>Suppression of Brothels Act</i> 1907, s.3	An offence; <i>Criminal Code</i> s.136.	Leases lets, knowingly permits; <i>Suppression of Brothels Act</i> 1907, ss.8,9.		Person who keeps a house, shop, room where refreshment s sold and permits prostitutes to meet together or remain there; <i>Summary Offences Act</i> s.66.
<b>Australian Capital Territory</b> <i>Police Offences Ordinance</i> 1930 <i>Crimes Act</i> 1900 (NSW)	An offence; <i>Police Offences Ordinance</i> 1930 s.23(j)	Manages or conducts a brothel, or knowingly concerned in management ; <i>Police Offences Ordinance</i> 1930 s.18	Only an offence if child under 16; <i>Crimes Act</i> 1900 (NSW) s.92N.	Leases, lets, sublets knowingly permits; <i>Police Offences Ordinance</i> 1930 s.19.		Person who keeps house, room, shop, where refreshment s sold permitting prostitutes to meet or remain there; <i>Police Offences Ordinance</i> 1930 s.34.

**Note:** At the time of writing Western Australia was considering introducing legislation based on the Victorian model of legal brothels. The Australian Capital Territory was considering options other than the criminalisation of prostitution.

**Source:** Consultation Paper No. 2 Report of the Working Panel on Discrimination and Other Legal Issues - HIV/AIDS, Dept of Community Service and Health, 1989, pp. 29-32. Adapted with the assistance of Gail Mason, Australian Institute of Criminology.

**Table 13: Age of consent laws**

<b>State/Territory</b>	<b>Legislation</b>	<b>Age of Consent</b>
<b>Australian Capital Territory</b>	<i>Crimes Act 1900</i> (Section 55) <sup>460</sup>	16
<b>New South Wales</b>	<i>Crimes Act 1900</i> (Section 66C) <sup>461</sup>	16
<b>Northern Territory</b>	<i>Criminal Code Act 1983</i> (Section 127) <sup>462</sup>	16
<b>Queensland</b>	<i>Criminal Code Act 1899</i> (Sections 208 and 215) <sup>463</sup>	16 or 18
<b>South Australia</b>	<i>Criminal Law Consolidation Act 1935</i> (Section 49) <sup>464</sup>	17
<b>Tasmania</b>	<i>Criminal Code Act 1924</i> (Section 124) <sup>465</sup>	17
<b>Victoria</b>	<i>Crimes Act 1958</i> (Section 45) <sup>466</sup>	16
<b>Western Australia</b>	<i>Criminal Code Act Compilation Act 1913</i> (Section 321) <sup>467</sup>	16

<sup>460</sup> <[www.austlii.edu.au/au/legis/act/consol\\_act/ca190082/](http://www.austlii.edu.au/au/legis/act/consol_act/ca190082/)>

<sup>461</sup> <[www.austlii.edu.au/au/legis/nsw/consol\\_act/ca190082/](http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/)>

<sup>462</sup> <[www.austlii.edu.au/au/legis/nt/consol\\_act/cca115/](http://www.austlii.edu.au/au/legis/nt/consol_act/cca115/)>

<sup>463</sup> <[www.austlii.edu.au/au/legis/qld/consol\\_act/cc189994/](http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/)>

<sup>464</sup> <[www.austlii.edu.au/au/legis/sa/consol\\_act/clca1935262/](http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/)>

<sup>465</sup> <[www.austlii.edu.au/au/legis/tas/consol\\_act/cca1924115/](http://www.austlii.edu.au/au/legis/tas/consol_act/cca1924115/)>

<sup>466</sup> <[www.austlii.edu.au/au/legis/vic/consol\\_act/ca195882/](http://www.austlii.edu.au/au/legis/vic/consol_act/ca195882/)>

<sup>467</sup> <[www.austlii.edu.au/au/legis/wa/consol\\_act/ccaca1913252/](http://www.austlii.edu.au/au/legis/wa/consol_act/ccaca1913252/)>