

# ADVISORY COUNCIL OF JURISTS



**THE ASIA PACIFIC FORUM**  
OF NATIONAL HUMAN RIGHTS INSTITUTIONS

...a partnership for human rights in our region

## CONSIDERATION OF THE ISSUE OF TRAFFICKING

11 – 12 November 2002  
New Delhi, India

### FINAL REPORT

December 2002

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## INTRODUCTION

At the Sixth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF), which was held in Colombo, Sri Lanka in September 2001, the members of the APF:

- agreed to consider a reference on the issue of trafficking to the Advisory Council of Jurists; and
- requested the Secretariat to develop a proposal for such a reference for consideration by Forum members between meetings.

The Advisory Council of Jurists<sup>1</sup> met in New Delhi, India from 11 to 12 November 2002 to consider the Terms of Reference. An interim report was presented to the Forum on 13 November 2000. The Council now presents its Final Report to the Forum.

This report contains the recommendations of the Council and answers the specific questions set out in the reference. Annexed to this report are the recommendations of Ms Anne Gallagher, extracted from her background paper provided to the Council and the Resolution of the Pre Forum NGO Consultation on Trafficking and National Institutions. The Advisory Council of Jurists substantially endorses the recommendations contained therein.

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<sup>1</sup> Members of the Advisory Council of Jurists present were Mr Fali Sam Nariman (India) (President), Professor Gillian Triggs (Australia), Honourable Justice Jayant Prakash (Fiji), Professor Jacob E Sahetapy (Indonesia), Mr Jugnee Amarsanaa (Mongolia), Mr Daman Nath Dhugana (Nepal), Honourable Justice Susan Glazebrook (New Zealand) and Ambassador Sedfrey Ordonez (Philippines).

## PREAMBLE

Trafficking in persons is a grave breach of international human rights law. Trafficking is a global problem: it requires global and regional solutions. The Advisory Council of Jurists recognises that the root causes of trafficking lie in poverty and social injustice, particularly gross gender discrimination. While recognizing the underlying causes, the development of new international laws provides an important step towards combating trafficking in women, men and children.

It is against this background that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) 2000<sup>2</sup> (described by the UN Secretary General Kofi Annan as “the universal instrument that addresses all aspects of trafficking in persons”) has now been signed by more than 100 states.

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<sup>2</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, Report of the Ad Hoc Committee on the Elaboration of a Convention against transnational organized crime on the work of its first to eleventh sessions, UN Doc. A/55/383 (2000), Annex II.

## **PART A: RECOMMENDATIONS**

The following sets out our central recommendations.

### **1. THE NEED TO RATIFY**

- The Council would urge ratification by States of the Trafficking Protocol. Ratification of an instrument in which there have been global inputs provides clear norms and standards for all States to work towards the three-fold objective of this new international treaty, namely to prevent and combat trafficking, to assist the victims of trafficking and to promote cooperation among the party States to achieve these objectives.
- A prominent feature of the Trafficking Protocol is that it is aspirational and its importance is that it builds upon existing international treaties, incorporating in one comprehensive document all presently conceived aspects of the problem, along with a humanitarian approach.
- When an individual is a victim of trafficking, the nation State is also a victim. Ratification of the Trafficking Protocol would promote greater respect for human rights and help to combat what is a major social (and increasingly public health) problem in so much of the region.
- Ratification of the Trafficking Protocol 2000 would be to the benefit of all States as it would facilitate a global network of co-operation and information sharing. Ratification would encourage countries of origin, of transit and of destination to recognise their role in the problem and its solution and to act accordingly. The prevalence of countries in which trafficking takes place in the Asia Pacific region amplifies the need for ratification of the Trafficking Protocol to ensure effective and timely regional cooperation.
- Ratification of the Trafficking Protocol is also particularly important for all States with fewer or inadequate resources as it provides them with greater access to regional and global support in their fight against trafficking and related exploitation.

### **2. IMPLEMENTATION**

- Ratification is not an end in itself; the expectation is that legislative and administrative measures would follow and such measures need not await formal procedures involved in ratification.

- In the meantime, before ratification of the Protocol and implementation of the legislation consequent upon that, National Human Rights Institutions should encourage their respective States to use existing criminal laws and procedures as well as appropriate welfare measures to deal with various aspects of trafficking and help the victims thereof.
- These institutions have a lead role to play in monitoring the implementation of various existing legal and administrative measures and also the implementation of the Trafficking Protocol 2000, when ratified. Reports based on such monitoring and other experiences gained by these institutions, if shared with their respective States and with the public, would go a long way towards raising awareness as well as ensuring that anti-trafficking measures do not have adverse, unintended consequences for individual rights and freedoms.
- The Council also recommends that member institutions embark on the development of a regional legislative model which could be adopted by States in order to address more effectively the criminalisation of trafficking and the protection of trafficked persons. The Council recommends the endorsement of any model legislative projects undertaken by the United Nations which may provide useful and appropriate guidance for the region.

### **3. ENFORCEMENT**

- Trafficking proliferates when there is no serious challenge by law enforcement officials and agencies (and in some cases corruption of border officials and police aids traffickers). There must be more aggressive enforcement of laws – both existing and future – to combat trafficking. In such enforcement all judicial and administrative authorities must actively co-operate. Fear of apprehension, prosecution and conviction on the part of traffickers and their agents and supporters is the best disincentive; once adequate enforcement measures are upheld there should be social support and mobilisation programmes to maximise their impact.
- Innovative ways need to be devised to identify the victims of trafficking and encourage them (and others with whom they come into contact) to come forward to report traffickers, and co-operate with enforcement agencies as available witnesses. It is here that Non-Government Organisations (NGOs) who operate at the ‘grass-roots’ level would be able to provide vital information, motivation and support. At the same time, law enforcement authorities should develop proactive mechanisms and processes which decrease their reliance on victim or witness testimony.
- Needless to say, enforcement agencies must have due regard to the rights of both victims and accused persons and in particular the right of accused persons to due process.

- A more creative and constructive approach on the part of the administration, the judiciary and National Human Rights Institutions will prove significant in implementation, enforcement and enactment of laws and also in measures for the protection of the victims of trafficking as discussed in the next recommendation.

#### **4. PROTECTION OF VICTIMS**

- Enforcement is not the only object of trafficking laws and conventions – the victims (trafficked persons) can never be lost sight of. Any measures that are introduced to combat trafficking must take into account the securing and promoting of the human rights of trafficked persons, and must take care of their protection and welfare including healthcare, education and vocational training. Victims should not be revictimised. The wishes of adult victims of trafficking must be respected and any measures must take account of a woman’s right to self determination.
- There is much evidence in the region of significant work being done by a variety of NGOs who, whether acting either independently or in co-ordination with State or United Nations Agencies, have been able to provide important protection and support to trafficked persons. We would encourage coordination between NGOs, National Human Rights Institutions, the APF and the United Nations on this issue.
- National Human Rights Institutions and the APF could instigate a process to ensure that States implement the protection of victim’s rights, as articulated in the Trafficking Protocol (see Article 6) and the United Nations *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (see Recommended Principles 7 – 11 and Guideline 6). Member institutions and the APF could also, in coordination with NGOs and other agencies, encourage States to move towards amending the Trafficking Protocol so that it incorporates a stronger human rights focus.

#### **5. RESEARCH AND POLICY MAKING**

- Sound legislative and administrative procedures depend upon a foundation of accurate research and data collection.
- National Human Rights Institutions and the APF are uniquely placed to encourage and facilitate research and analysis of trafficking and its related issues.
- An example is an action research project on trafficking in women and children in India, currently carried out by the National Human Rights Commission of India. This project is being supported by the United Nations Development Fund for Women (UNIFEM) and is executed by an NGO (Institute of Social Sciences, New Delhi). The main focus of the action research is to ascertain and analyse trends, dimensions, factors and responses related to trafficking in women and children in India. When completed, this project will, it is expected, help to

provide a significant input for law reform in the trafficking sector, as well as for law enforcement.

- The development of research projects can provide a sound basis for policy recommendations by the National Human Rights Institutions in the region to their respective governments.
- The Council notes that research and policy initiatives should include consideration of the wider social and economic measures necessary to deal with the root causes of trafficking. Such measures should enhance the rights of women and children and attack the causes of economic disparity both within and between States as well as address the demand for the products of trafficking.

## **6. EDUCATION**

- Education can provide a crucial role for any measures to be taken for combating trafficking in all its forms.
- Education and training programmes for border control officials, law enforcement personnel, labour inspectors, the judiciary, and all other relevant government officials in relation to each element involved in the trafficking issue should be devised – for example education in the identification of forced labour and sexual exploitation.
- Education programmes should involve educating the community about trafficking, its causes and consequences as well as potential victims and vulnerable groups.
- In addition to national programmes for education and training, each State should work together and with the APF and relevant NGOs and international agencies to develop regional programmes.

## **7. CO-OPERATION**

- The global nature of trafficking requires cooperation by States on a bi-lateral and multi-lateral basis. The in-depth pilot study currently undertaken by India and Nepal furnishes an excellent example of regional co-operation in obtaining greater understanding of the causes and consequences of trafficking and its prevention.
- The Council believes that the APF can play a major role in facilitating co-operative measures. One initiative that would be very useful is for National Human Rights Institutions to share information and research data among themselves and with NGOs and international and national agencies on “best practice” in the region.

- The Council recommends that APF members work cooperatively to seek funding for regional initiatives from agencies such as the World Bank, the Asian Development Bank, national funding bodies and the business community.

## PART B: QUESTIONS POSED BY THE TERMS OF REFERENCE

The Advisory Council of Jurists has been asked to respond to specific questions. After carefully considering the same the responses offered are as follows:

- (i) **The nature and scope of state responsibility for trafficking and related conduct taking into account that much trafficking activity is undertaken by non-state entities**

It is widely accepted that human rights violations are an important root cause of trafficking and that the trafficking process itself constitutes a serious violation of human rights<sup>3</sup>. However, in most parts of the world, traffickers are private individuals or criminal groups, not State officials or instrumentalities.

In addressing the issue of State responsibility for trafficking, it is relevant to examine the nature of a State's obligations *vis a vis* human rights. States are under an international legal obligation to respect, protect and fulfill human rights.<sup>4</sup> The obligation to *respect* rights requires the State to refrain from any act or omission that violates rights. The obligation to *protect* rights requires the State to take active measures aimed at preventing violations whether committed by agents of the State or by non-State actors. Finally, the obligation to *fulfill* rights requires the State to implement affirmative measures to enable all persons to realize their rights.

The fact that much trafficking activity is undertaken by non-State actors does not prevent States from being held responsible under international law for such actions. Where human rights violations (such as those arising in trafficking) occur with official support then the State is held to be complicit and therefore directly responsible for the violation itself<sup>5</sup>: for example, direct involvement of law enforcement or border officials in trafficking rackets.

In situations where the government has allowed the violative act to take place without adopting effective measures to prevent it, or to punish those responsible, then the State

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<sup>3</sup> The most recent General Assembly resolution on this subject asserts that “sexual violence and trafficking in women and girls for purposes of economic exploitation, sexual exploitation through prostitution and other forms of sexual exploitation and contemporary forms of slavery are serious violations of human rights”. A/RES/55/67.

<sup>4</sup> (a) Charter of the United Nations  
(b) Universal Declaration of Human Rights, 1948, Preamble and Article 4.  
(c) International Covenant on Civil and Political Rights, 1966, Article 4.

<sup>5</sup> The jurisprudence on this point is relatively recent and somewhat scant. The usual citation for the principle is the Velasquez-Rodriguez case, Judgement of July 29, (1988) Inter-Am. Ct.H.R. (Ser.C) No. 4, para. 182: “What is decisive is whether a violation of the rights recognized by the [Inter-American Convention on Human Rights] has occurred with the support or acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible”. See as a general reference on this subject Shearer, I. A. *Starks International Law*” 11<sup>th</sup> edition, Butterworths, Chapter 10.

itself is *indirectly* responsible for the human rights violations flowing from that private act.

State responsibility will arise where the State has failed to exercise *due diligence* in preventing trafficking, punishing traffickers and protecting victims. Progressive application of the due diligence standard in practice may yield results which are beneficial to trafficked persons by requiring the State to undertake a range of measures including (but not limited to): legislative prohibition of trafficking and related practices, effective enforcement of this prohibition, provision of assistance and legal remedies for victims and general preventive actions aimed at addressing the underlying causes of trafficking.

A finding of state responsibility places an international legal obligation on the relevant State to take action to remedy the wrong which has occurred and to prevent its reoccurrence.

## **(ii) Whether international law requires States to criminalize, investigate and punish trafficking and related conduct**

As noted above, the basic rules of state responsibility including the principle of due diligence require states to take positive action to prevent and redress trafficking including through criminalization, investigation and punishment.

The only current international instrument dealing explicitly with trafficking is the Convention for the Suppression of the Exploitation of the Prostitution of Others 1949 (Trafficking Convention 1949) which requires States to criminalize, investigate and punish “trafficking” – where such trafficking and exploitation is by “prostitution and the accompanying evil of the traffic in persons”. See Articles 1<sup>6</sup>, 17 and 20 of the Trafficking Convention, 1949.

In addition there exist widely accepted treaties (for example the International Convention on Civil and Political Rights 1966 (ICCPR), Convention on the Rights of the Child 1989 (CRC), Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) and the Slavery Conventions)<sup>7</sup> each of which requires States to

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<sup>6</sup> Article 1

“The Parties to the Present Convention agree to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person.”

<sup>7</sup> (a) ICCPR: Article 2(2) (read with Article 8);

(b) Article 6 of CEDAW provides:

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

(c) CRC: Articles 4, 5.

Article 35 of the Convention on the Rights of the Child provides:

criminalize, investigate and punish conduct which may be included in the wide definition of trafficking (in the Trafficking Protocol 2000), particularly through the prohibition on persons being held in slavery and servitude.

The prohibition on slavery is recognized as *jus cogens* – a fundamental norm of international law. Consequently, even States which have not signed the 1949 Trafficking Convention or the Trafficking Protocol 2000 will nevertheless be bound to uphold the prohibition. While presently this prohibition is (technically) limited to slavery in its classical form, there is considerable argument that it may be extended to slavery-like practices such as trafficking.

The Trafficking Protocol 2000, signed by 113 States and ratified by 20 States as of December 2002, has not yet come into force.<sup>8</sup> But when this Protocol enters into force it will require, as a matter of international law, State Parties to criminalize, investigate and punish (Articles 4 and 5) “trafficking” as broadly defined (Article 3).

Principles 12 and 13 of the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* issued by the Office of the High Commissioner for Human Rights (OHCHR) and transmitted to the Economic and Social Council of the UN (ECOSOC) in July 2002 by the High Commissioner, while not legally binding, urge States both to adopt appropriate legislative measures to criminalize and to investigate effectively trafficking and its component acts.

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention)<sup>9</sup> – signed by all 7 member States but not

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

(d) Convention on Slavery 1926: Article 3.  
(e) Supplementary Convention on the Elaboration of slavery, the Slave Trade and Institutions and Practices  
(f) Similar to Slavery 1956: Article 3.

<sup>8</sup> “Trafficking” is defined in Article 3 of the Trafficking Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring 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 labor, or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.

<sup>9</sup> ‘Trafficking’ is defined in Article I of the SAARC Convention:

ratified by any so far – requires State Parties to take effective measures to ensure that trafficking for prostitution is an offence under domestic criminal law and to make it punishable by appropriate penalties (Article 3). It also provides that State Parties shall grant to each other the widest mutual legal assistance in investigation, inquiries, trials and other proceedings in the requesting state in respect of offences under Article 3 (in Article 6). Article 8(1) deals with prosecution and investigation and requires State parties to provide “means, training and assistance” for *inter alia* prosecution of offences.

**(iii) Whether international law prevents the detention or prosecution of trafficked persons for their unwilling or coerced involvement in unlawful activities**

International law does not provide authoritative guidance on this point. However good practice and basic notions of human rights suggests that no State should detain or prosecute persons in the circumstances mentioned. This point is made very strongly in Recommended Guideline 6 and Principle 7.<sup>10</sup>

It is also relevant to note that international law prohibits arbitrary detention. All persons, irrespective of their race, sex, nationality or any other difference are entitled to due process.<sup>11</sup>

Article 8 of the Trafficking Protocol will require States to facilitate and accept the return of trafficked persons with due regard for their safety and without undue or unreasonable delay. This may therefore point against any unnecessary detention. Article 9(1)(b) of the Protocol requires States to establish comprehensive policies, programmes and other measures “To protect victims of trafficking in persons, especially women and children, from revictimisation”. In certain circumstances and on one interpretation detention and prosecution of victims may breach this article.

Article IX of the SAARC Convention requires State Parties to establish protective homes or shelters for rehabilitation of victims of trafficking. The detention and prosecution of trafficked persons could arguably breach this provision.

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“(3) “Trafficking” means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.”

<sup>10</sup> *Guideline 6: Protection and support for trafficked persons:*

“1. ...Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.”

*Principle 7:*

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”

<sup>11</sup> ICCPR, Articles 9 and Article 14.

**(iv) Whether international law requires States to provide legal and social assistance to trafficked persons**

International law does require a certain level of legal or welfare assistance to persons as a general matter of human rights law, for example ICCPR (Article 14(d)) and ICESCR (Articles 2 and 3). International law, however, in certain circumstances does permit States to make special provisions regarding legal and welfare assistance rights depending upon citizenship/residential status in the country. Nevertheless, trafficked persons are victims of crime and, as such, are entitled to the assistance and support of the State. This principle can be inferred from basic principles of human rights and is enshrined in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>12</sup>

The Trafficking Protocol, when it comes into effect, has relatively weak provisions in relation to legal and welfare assistance to trafficked persons. Under Article 6(2) State Parties are to ensure that their domestic legal or administrative systems contain measures that provide to victims of trafficking in persons information on and assistance in relevant court and administrative proceedings, but only “in appropriate cases”. Article 6(3) requires States only to “consider” implementing measures relating to housing, health and employment, educational and training opportunities. Article 6(6) states that “[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered”. The Council notes the practical difficulties that obtaining damages may pose for trafficked persons who have been repatriated. The Recommended Principles and Guidelines set out best practices in this area.

**(v) Whether international law prevents the compulsory testing of trafficked persons for HIV/AIDS and other diseases**

Yes, if such testing constitutes an illegal form of discrimination.

The Council notes that Recommended Guideline 6 provides that appropriate protection and support should be extended to all trafficked persons without discrimination; and that Guideline 6(2) provides that trafficked persons should not be subject to mandatory testing for diseases, including HIV/AIDS. The general question of compulsory testing for diseases is an important and a complex one for contemporary human rights law. Any further analysis of this question, beyond the general principles mentioned above, requires further research and analysis.

Any testing (whether voluntary or compulsory) should be consistent with the dignity and rights of the trafficked person.

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<sup>12</sup> Adopted on the recommendation of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by the General Assembly in its resolution 40/34 of 29 November 1985.

**(vi) Whether international law prevents States from summarily deporting or returning a trafficked person when such deportation or return poses a serious and verifiable risk to the safety of the trafficked person and/or that person's family**

If the trafficked person qualifies for refugee status under the 1951 Status of Refugees Convention they have a non-derogable right not to be returned to the State of origin.<sup>13</sup> States of destination should ensure that procedures are in place for ensuring that trafficked persons who fall within the definition of a refugee are aware of and able to exercise their right to seek and receive asylum.

It is also arguable that, even if the trafficked person is not a refugee, general principles of human rights law may prevent the deportation or return of that person where this is shown to pose a serious and verifiable risk to the safety of the trafficked person and/or that person's family.

As indicated above, Article 8 of the Trafficking Protocol provides that the repatriation of victims of trafficking must be conducted with due regard to the safety of the trafficked person - Articles 8(1) and (2).

Recommended Principle 11 is evidence of good practice. It provides:

“Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.”

**(vii) The nature and extent of States' obligation to take active and timely steps to identify trafficked persons from among vulnerable groups such as irregular migrants**

International law generally does not articulate the nature and extent of the obligation of States to identify trafficked persons. However Article 18 of the 1949 Trafficking Convention does require States to have a declaration taken from aliens who are prostitutes in order to establish their identity and civil status and to discover who has caused them to leave their State.

It is evident that a failure to identify trafficked persons as such would cause the State also to fail to discharge its international obligations towards such persons. Accordingly, it can be said that the identification of trafficked persons as such, is a fundamental aspect of the State's obligation to protect, respect and fulfill human rights.

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<sup>13</sup> Article 1 defines a “refugee” as including persons of a “particular social group”, thus possibly including certain trafficked persons. The principle of “non-refoulement” is defined in Article 33.

Although not explicitly articulated, the requirement to identify trafficked persons is implicit in the provisions of the Trafficking Protocol - see for example Articles 6, 9 and 13 as clarified in Recommended Guideline 2 (*Identification of trafficked persons and traffickers*).

**(viii) The nature of special protections which should be extended to trafficked children in accordance with international law**

Historically international treaties have recognized that a child is in need of special protection. International law demands that all actions taken by and for children, including child victims of trafficking, be based upon the best interests of the child. It is this basic principle which is the foundation and reference point against which the treatment of trafficked children should be measured.<sup>14</sup>

Several articles of the CRC make detailed provisions for the special protection of children, for example Articles 11, 21, 32, 33, 34, 35, 36 and 39, and Article 10(3) of the ICESCR and Articles 1, 3 and 7(2) of ILO Convention No 182 (on the Worst forms of Child Labor).

The Trafficking Protocol recognises the special status, and need for greater protection of children in international law. A determination that trafficking has taken place will not require evidence of force or coercion if the individual involved is a child.<sup>15</sup> In addition, upon the Trafficking Protocol 2000 being ratified there would be special provisions available to trafficked children (see Article 6(4) read with Article 1), further amplified by Recommended Guideline 8 (*Special measures for the protection and support of child victims of trafficking*) and Principle 10 (*Protection and Assistance to children*).

In the SAARC Region attention is drawn to Article 4(1)(a) and Articles 8 and 9 of the regional Convention.

**(ix) Whether trafficking should constitute an extraditable offence and thereby be included as such in bilateral and multilateral extradition treaties**

Yes. Article 8 of the 1949 Trafficking Convention provides that trafficking offences coming within that Convention shall be regarded as extraditable offences.

Article 1(3) of the Trafficking Protocol provides that the offences established under the Protocol are regarded as offences established in accordance with the Convention against Transnational Organized Crime 2000: Article 16 of that Convention relates to extradition. See also Article 9(1)(a) of the Trafficking Protocol 2000 further clarified in Recommended Guideline 11 and Principle 14.

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<sup>14</sup> We note Article 17 of the 1949 Trafficking Convention (providing for the protection of women and children emigrating and immigrating).

<sup>15</sup> Trafficking Protocol, Article 3(c).

Article 7 of the SAARC Convention provides that all offences within the Convention are extraditable offences in any extradition treaty.

**(x) The extent to which international law permits the development and implementation of extraterritorial measures aimed at preventing trafficking and apprehending traffickers**

This is a branch of international law which is both controversial and evolving. There is a growing recognition in international law as to the legitimacy of extraterritorial application of domestic laws to prevent certain heinous criminal acts. Several nation States have given extraterritorial effect to laws relating to child sex offences (for example the sections added in 1995 to the New Zealand *Crimes Act 1961*, ss 144A - 144C, and the Australian *Crimes (Child Sex Tourism) Act 1994*).

It is probable that contemporary international law would support the extension of such laws to “trafficking”; reference may also be made to the Convention against Transnational Organized Crime 2000 (Article 15(2)); and to the Trafficking Protocol 2000 (Article 1(3)).

International law has been significantly advanced by the entry into force of the Rome Statute establishing the International Criminal Court, under which universal jurisdiction may now be exercised through the newly established criminal court. In the definition of “crimes against humanity” the Rome Statute specifically refers to “trafficking in persons in particular women and children” (Article 7(1)(c) and 7(2)(c)).

**(xi) The nature of States’ obligations, under international law, to provide trafficked persons with access to effective and appropriate remedies**

As noted above, States are required to provide victims of human rights violations, including victims of trafficking, with access to effective and appropriate remedies.<sup>16</sup>

Considerable advances have been made in the levels of protection that may be afforded to trafficked persons under Part II of the Trafficking Protocol 2000. The rights of protection are further clarified by Recommended Guideline 6 (*Protection and support of trafficked persons*) and Principle 17 (States shall ensure that trafficked persons are given access to effective and appropriate legal remedies).

**(xii) The extent to which the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (as the only directly relevant regional instrument) provides an adequate framework for responding to the problem of trafficking**

The SAARC Convention is an innovative initiative in the region and in our view provides an important step forward in the fight against trafficking, particularly the trafficking of women and children into commercial sexual exploitation. Based on experience derived

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<sup>16</sup> See the response to Question (iv), above.

from its implementation it could be further developed and refined (by means of protocols etc) to cover trafficking in men as well as trafficking for additional purposes such as forced and exploitative labour which is a significant problem in the region.

In addition, in contrast to the relatively weak provisions in the Trafficking Protocol on victim protection, the SAARC Convention in Article IX has mandatory provisions for the protection of victims, including the provision of legal advices, health care and protective shelters. It also explicitly recognises a role for NGOs in victim protection and rehabilitation. The SAARC Convention thus has a much stronger human rights focus than the Trafficking Protocol.

Training programmes and research programmes should be initiated with the support of the Asia Pacific Forum and National Human Rights Institutions to further the purposes of the SAARC Convention and to ensure the evolution of this instrument into an effective weapon against trafficking and related exploitation.

## **ONE LAST WORD**

The Advisory Council of Jurists would like to express its sincere gratitude to Ms Anne Gallagher for the excellent background paper she has provided to the Council for its consideration.

The Council was greatly aided in its deliberations and analysis by Professor Mool Chand Sharma, Dr Savita Bhakry, and Ms Sudha Shrotria of the National Human Rights Commission of India and Mr Subhash Sharma, Advocate. The Council acknowledges the assistance of Mr Robert Hesketh of the New Zealand Office of Human Rights Proceedings.

The Council especially desires to acknowledge the able and expert assistance of the Secretariat (Ms Pip Dargan and Ms Kate Fitzgerald) without whose untiring efforts this report would not have been completed.

The Council is also grateful to the United Nations Office of the High Commissioner for Human Rights for the financial support it provided to the meeting.

## **ANNEX 1: Terms of Reference**

## TERMS OF REFERENCE

The Asia Pacific Forum of National Human Rights Institutions refers to the Advisory Council of Jurists for advice and recommendation regarding the nature and scope of State's obligation under international law, including international human rights law, to prevent trafficking, investigate and prosecute traffickers, and provide protection, assistance and redress to trafficked persons.

In particular the Council is to consider:

- (i) The nature and scope of state responsibility for trafficking and related conduct taking into account that much trafficking activity is undertaken by non-state entities;
- (ii) Whether international law requires States to criminalize, investigate and punish trafficking and related conduct.
- (iii) Whether international law prevents the detention or prosecution of trafficked persons for their unwilling or coerced involvement in unlawful activities;
- (iv) Whether international law requires States to provide legal and social assistance to trafficked persons;
- (v) Whether international law prevents the compulsory testing of trafficked persons for HIV/AIDS and other diseases;
- (vi) Whether international law prevents States from summarily deporting or returning a trafficked person when such deportation or return poses a serious and verifiable risk to the safety of the trafficked person and/or that person's family;
- (vii) The nature and extent of States' obligation to take active and timely steps to identify trafficked persons from among vulnerable groups such as irregular migrants;
- (viii) The nature of special protections which should be extended to trafficked children in accordance with international law;
- (ix) Whether trafficking should constitute an extraditable offence and thereby be included as such in bilateral and multilateral extradition treaties;
- (x) The extent to which international law permits the development and implementation of extraterritorial measures aimed at preventing trafficking and apprehending traffickers;
- (xi) The nature of States' obligations, under international law, to provide trafficked persons with access to effective and appropriate remedies.
- (xii) The extent to which the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (as the only directly relevant regional instrument) provides an adequate framework for responding to the problem of trafficking

The Council may comment upon:

- (i) the socio-economic, political and legal environments in Forum Member States;

- (ii) the religious and cultural traditions in Forum Member States;
- (iii) the roles to be served by a criminal justice system; and
- (iv) the international legal obligations of each Member State, including duties of cooperation between Member States.

International human rights law includes but is not limited to the:

- Universal Declaration of Human Rights;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Rights of the Child and its relevant Optional Protocol;
- Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182)
- Convention on the Elimination of All Forms of Discrimination against Women;
- United Nations Protocol to Suppress, Prevent and Punish Trafficking in Persons especially Women and Children supplementing the Convention against Transnational Organized Crime;
- SAARC Convention on Combating Trafficking in Women and Children for Prostitution.

This report will be considered by the Advisory Council of Jurists at the second meeting of the Council to be held in New Delhi, India, from 11-12 November 2002.

**ANNEX 2: Concluding Statement from Seventh Annual Meeting of Asia Pacific  
Forum**

**SEVENTH ANNUAL MEETING OF THE ASIA PACIFIC FORUM OF  
NATIONAL HUMAN RIGHTS INSTITUTIONS**

**11<sup>th</sup> – 13<sup>th</sup> November 2002, New Delhi, India**

**CONCLUDING STATEMENT**

**Introduction**

1. The Asia Pacific Forum of National Human Rights Institutions, consisting of the National Human Rights Commissions of India, Australia, Fiji, Indonesia, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka and Thailand, held this Seventh Annual Meeting in New Delhi, India from 11<sup>th</sup> to 13<sup>th</sup> November 2002.
2. The Forum expressed its gratitude to the National Human Rights Commission of India for hosting the meeting, to the United Nations Office of the High Commissioner for Human Rights for its co-sponsorship and to the governments of India, Australia and New Zealand for their financial support. The Forum paid tribute to Mr Brian Burdekin and thanked him for his exceptional work as Special Advisor to the United Nations High Commissioner for Human Rights. The Forum also expressed its appreciation for the efforts of the Commissioners and staff of the National Human Rights Commission of India and the Secretariat of the Forum for their work in the organisation of the meeting.
3. The Forum welcomed the participation of representatives as observers from the governments of Australia, Myanmar, New Zealand, Thailand and Timor-Leste, the institutions from Afghanistan, Iran, New Zealand and Palestine, and international, regional and national non-governmental organizations.
4. The Hon. Shri Atal Bihari Vajpayee, Prime Minister of India, Justice J.S. Verma, Chairman of the National Human Rights Commission of India and the Chairperson of the Asia Pacific Forum of National Human Rights Institutions and Mr Brian Burdekin, Special Advisor to the United Nations High Commissioner for Human Rights, addressed the inaugural session. In the opening statements the distinguished speakers recognised human rights as a vital constituent of the rule of law and an essential element of good governance. In this, the important role of national human rights institutions in protecting and promoting human rights was reiterated. Particular attention was drawn to the challenges posed by terrorism and the human rights issues associated with trafficking and disability.

**Conclusions**

5. The Forum reaffirmed that the structure and responsibilities of national institutions should be consistent with the Principles Relating to the Status of National Institutions adopted by the United Nations General Assembly (Resolution 48/134) commonly

referred to as the ‘Paris Principles.’ On this basis it admitted the national human rights institutions of Malaysia, Republic of Korea and Thailand as full members of the Forum, thereby increasing its membership to 12 institutions.

6. The Forum considered a discussion paper examining the category of ‘Associate Membership.’ The Forum agreed on two guiding criteria in considering applications for associate membership: namely the requirement to possess a broad mandate; and the desirability of admitting only one institution per member state of the United Nations.
7. The Forum considered it was important to strengthen strategic partnerships with human rights institutions. Invitations would be issued to relevant institutions / organisations to participate as observers depending on the focus of the meetings.
8. The Forum unanimously elected the National Human Rights Commission of India (as the current host institution of the annual meeting) to the position of Chairperson of the Forum. The National Human Rights Commission of Sri Lanka (as the host institution for the last annual meeting) and the National Human Rights Commission of Nepal (as the host institution for the next annual meeting) were also elected unanimously to the two positions of Deputy Chairpersons.
9. The Forum elected the national human rights institutions from Australia, Fiji, Nepal and the Philippines to be the four regional representatives to the International Coordinating Committee of National Institutions. The Fiji Human Rights Commission will also serve on the International Coordinating Committee accreditation sub-committee.
10. The Forum welcomed the inaugural meeting of Senior Executive Officers of Forum member institutions. The Forum noted the outcomes of the meeting including the establishment of a working group to examine and implement measures to assist the effective and efficient functioning of national human rights institutions. The Forum also requested that the Secretariat assist the Forum Councillors in the development of new governance and management policies for the Forum.
11. The Special Advisor to the United Nations High Commissioner for Human Rights emphasised the continuing commitment of the United Nations to promote the establishment and strengthening of national institutions. The Deputy Chairperson of the Forum provided a report on the Forum’s activities over the last year and the Forum expressed their appreciation for the work of the Secretariat. The representative of non-governmental organisations of the region stressed the importance of national institutions undertaking practical collaborative activities with non-governmental organisations at both the national and regional level for the protection and promotion of human rights.
12. Forum Councillors reported on their implementation of the recommendations of the Advisory Council of Jurists’ reports on the death penalty and child pornography on

the internet. A number of Forum Councillors specifically cited the successful implementation of the Advisory Council's recommendations. Forum Councillors decided to formulate a new reference to the Advisory Council of Jurists on the issue of the primacy of the rule of law in countering terrorism world-wide while protecting human rights and requested the secretariat to prepare draft terms of reference for the consideration and approval of the Forum.

13. The Forum discussed a proposal to develop a new international convention on the rights of people with disabilities. Forum institutions agreed to respond positively to the invitation of the United Nations Ad Hoc Committee to participate independently in the development of the possible new convention. The Forum adopted the recommendations contained in the discussion paper presented to the meeting and welcomes the United Nations Office of the High Commissioner's support in their implementation. In proceeding further, the Secretariat will keep in mind the comments made by all participants in the meeting.
14. The Forum considered the issue of trafficking, including the views of international experts and non-governmental organisations, and the report of the Advisory Council of Jurists on this issue. The Forum warmly thanked the jurists of the Advisory Council for their expertise and the comprehensive scope of their report which included items on i) ratification; ii) implementation; iii) enforcement; iv) victim protection; v) research and policy; vi) education; and vii) cooperation. Forum member institutions would closely examine the recommendations of the Advisory Council and report back on their implementation to the next annual meeting. The Forum further requested the Secretariat to assist in strengthening regional cooperation on this issue. The Forum also welcomed the agreement of the National Human Rights Commissions of India and Nepal to work together on this issue. The Forum also requested the Secretariat to be in touch with the United Nations Office of the High Commissioner for Human Rights in respect to the need to keep more clearly in mind the human rights of victims of trafficking in the formulation of views and comments on this subject. The Forum recommends the reinvigoration of the network of focal points on trafficking within Forum member institutions.
15. The Forum gratefully accepted the kind offer of the National Human Rights Commission of Nepal to host the Eighth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions in approximately twelve months time and further noted the kind offer of the Australian Human Rights and Equal Opportunity Commission to act as a potential alternate host if necessary.
16. The Forum likewise noted with thanks the offer of the National Human Rights Commission of Mongolia and the National Human Rights Commission of Korea to host the Ninth Annual Meeting in 2004.

### **ANNEX 3: International Law: Sources and Methodology**

## INTERNATIONAL LAW: SOURCES AND METHODOLOGY

### Objectives

During the meeting of the Advisory Council of Jurists (ACJ) at the Seventh Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions (APF) held in New Delhi, India in November 2002, it was agreed that the report on trafficking should be supported by an appendix describing the sources and methodology of contemporary international law. The terms of reference of the ACJ provide that:

“The Council shall provide comment, opinion and advice on the interpretation and application of relevant international human rights standards, upon requests having regard to settled principles of international and the treaty obligations of the concerned States.”

Accordingly, the Council is requested to base its reports on specific issues upon the settled principles of international law and relevant treaties. The following discussion describes the sources and methodology for determining international law in general, without reference to specific legal issues.

### *International law defined*

International law has been defined as “that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore do commonly observe in their relations with each other” (*Hyde, International Law 1947*), including:

- (a) the rules of law relating to the functioning of international institutions or organisations; and
- (b) certain rules of law relating to individuals and non-State entities insofar as they become the concern of the international community.

While there is much academic debate regarding the adequacy of this definition, it suffices to acknowledge the primary role of sovereign and equal nation states in the formation of international law and the contemporary roles of governmental and non-governmental organisations as influences upon the creation and implementation of that law.

### ***What are the sources of international law?***

The question “what is the international rule?” on any issue can be difficult for an international legal adviser to answer with complete confidence. Unlike domestic law, in international law there are no formal statutes agreed upon by a national parliament nor is there a clear hierarchy of courts to provide legal jurisprudence. Rather, an international lawyer asked for an opinion must glean the law from numerous sources and evidences. As a practical matter, international lawyers will turn to Article 38(1) of the Statute of the International Court of Justice providing that, in deciding a matter in accordance with international law, the Court shall apply:

- “(a) international conventions, whether general or particular establishing rules expressly recognised by the contesting States;
- (b) international custom, as evidence of a general practice accepted by law;
- (c) the general principles of law recognised by civilised nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as a subsidiary means for the determination of rules of law.”

In addition to the formal sources and evidences of an international rule, is the concept of pre-emptory norms of international law (*jus cogens*) from which no derogation by treaty or custom is allowed. Examples include the laws governing piracy, slave trading, torture genocide.

### ***Is there any special order of priority for these sources and evidences of law?***

While there is no necessary order in which each of these sources of international law are to apply, in practice, the order listed in Article 38 will be adopted by courts, tribunals, foreign officers and international lawyers. If the parties to a dispute are also parties to relevant bilateral, regional and multilateral treaties, the provisions of these agreements will have a primary role in describing the legal obligations between them. Where there is no relevant treaty, preference may be accorded to established principles of customary international law or, where necessary, to “general principles of law recognised by civilised nations”. Judicial and arbitral decisions and juristic opinion will also constitute evidence of developing jurisprudence and of State practice for the purpose of determining customary law or the existence of general principles.

The primary sources of international law – treaties, custom and general principles- can also provide evidence of the law. A treaty can, for example, be evidence of the practices of States for the purpose of proving a customary norm. A treaty may also, in time, come to reflect a customary norm binding upon States that are not party to the relevant treaty.

In these ways, the sources and evidences of international law are integrated and interdependent.

What are the sources and evidences of international law?

Each of the primary sources of international law is set out below:

### *1. Treaties*

With the exponential growth in “law-making” treaties over the last 30 –50 years, treaties are now the primary source of international law. Law-making multilateral treaties of universal or general application are to be distinguished from treaty “contracts” that simply define the relations between two or a few States in an area of particular interest to regionally or substantively. Law-making treaties have become close to international “legislation” and are a response to the need for a clear description of international legal obligations, particularly where the customary rule is unclear. There are now scores of fundamental human rights treaties setting out norms of universal application. The Advisory Council of Jurists will almost certainly examine these treaties as the primary source of the “settled” international law for the purposes of reporting upon each annual reference.

The Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”) sets out the international law principles of treaty interpretation and application. While most States in the international community are parties to the Vienna Convention, (over 80 Parties and 22 signatories) there may be some members of the APF, now or in the future that are not a party. However, many of the provisions of the Vienna Convention are applicable against all nations whether a party to the treaty or not because they articulate rules which have gained the status of customary law.

A matter that creates some confusion when considering the treaty obligations among States is the difference between a State that has signed a treaty but not yet ratified it and a State that is a party to it through ratification or accession. A State that has signed but not ratified a treaty is under an obligation under Article 18 of the Vienna Convention as follows:

“The State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

Thus a State that has signed a treaty may not act in a way that defeats the object and purpose of a treaty. The importance of Article 18 has been underscored recently by the decision of the United States to “withdraw” from the Kyoto Protocol on Climate Change where it had signed but not yet ratified the agreement. This is a unique decision in international law, demonstrating that the United States is not prepared to accept obligations that might otherwise be applicable against it on the basis of signature alone.

Aside from obligations that clearly exist at customary international law, States will typically deny that they have accepted any obligations unless and until they ratify the relevant treaty.

Some treaties, such as the Vienna Convention, set out existing rules of custom as a codification of the law both for convenience and as a vehicle to progressively develop new additional rules. It is also recognised that a treaty can generate a new rule of custom. The International Court of Justice in the *North Sea Continental Shelf* cases (ICJ 1969, 3 at 42), accepted that a treaty provision could describe a customary rule provided that:

- the purported rule is of a potentially norm-creating character
- there has been a widespread and representative participation in the development of the treaty rule, particularly where the States whose interests have been especially affected, have agreed to that rule.

In summary, treaties play the dominant role in contemporary international law both in formulating the obligations of the parties and in stimulating State practice that can crystallise as custom.

## 2. *Custom*

Before the 20<sup>th</sup> century growth in multilateral treaties, international law consisted primarily of customary rules. Under the traditional theory of custom, the international customary rules apply to States on the basis of their express or implied consent. However,

the consensual foundation for customary law fails to explain why custom applies to all States, including newly independent States, regardless of their culture or political system.

### *State practice and opinio juris*

Customary rules have evolved through a long historical process through which State practice and recognition of those practices within the international community have crystallized. The underlying theory is that customary law is founded upon the implied consent or general acceptance of the international community. A common usage can become a customary rule where there has been a sufficient recurrence or repetition of an act and can be proved by reference, for example, to diplomatic relations between States, the practice of international organisations, national laws and the decisions of national courts and administrative practices. In this sense, customary laws are inferred from repeated and consistent acts.

In addition to general State practice, international courts have required that the creation of custom must satisfy a psychological aspect described as *opinio juris* and defined as the “mutual conviction that the recurrence is the result of a compulsory rule”. The test of *opinio juris* is circular in the sense that a State must have believed it was bound by the rule before the rule could be binding upon it, raising the question of the time at which any usage can become custom. Moreover, it is by no means clear how the subjective belief in an obligation can be demonstrated in the case of a State. The requirement that there be evidence of *opinio juris* has led to much judicial and academic debate. It remains helpful, however, to use the concept of *opinio juris* to distinguish custom from an act that is followed for reasons of comity or courtesy. The court in *West Rand Central Gold Mining Company v R* ([1905] 2KB 391 at 407) held that *opinio juris* must be proved by satisfactory evidence that the alleged rule “is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it”.

The International Court in the *North Sea Continental Shelf Cases* (ICJ 1969,3) argued that:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.”

Difficulties in demonstrating the subjective element have been recognised by subsequent courts and, in practice, the emphasis has moved to objective evidence of consistent State practice. The International Court adopted a more useful modern approach to custom in the *Nicaragua* case ([1986] ICJ 14):

“The court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”

While it remains necessary to satisfy the twin elements of State practice and *opinio juris* when assessing the status of a purported customary rule, the courts today are more concerned to document State activities as the best evidence of their express or implied consent to a new obligation.

### ***What are ‘soft’ and ‘hard’ international law?***

An important issue of customary law arises where an emerging rule does not yet satisfy the requirements for the creation of custom but is regarded as likely to do so over time. Such an emerging rule is described as *lex ferenda*. Recognition of evolving law is considered by legal commentators as “soft law”, or as an evolving norm that needs to be taken into account when assessing the existence of a binding rule. Not only are there significant difficulties as a matter of methodology in determining whether a customary rule exists, but also it is necessary to take into account the dynamic nature of international law and the place of emerging principles.

The significance of evolving norms creates a particular difficulty when advising on international human rights. Most States are party to the fundamental international human rights documents and treaties such as the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights and the Conventions on Genocide, Torture, Sex Discrimination and Racial Discrimination. However, the more complex provisions of multilateral human rights agreements over the last 20 years have not yet attracted general adherence. For this reason, and while treaties will apply as between the States parties, the principles they contain do not yet have the status of customary law. Such treaty based evolving norms will not be binding on non-parties. Equally however, these principles may well be evolving or crystallising into accepted principles of customary law.

Thus the task for the Council of Jurists will often be to advise in a highly fluid context in which the technically ‘correct’ assessment of the asserted rule is that it does not yet have the status of binding customary law. The consequence of such a ‘hard’ law approach is that advice based upon it will fail to take into account evolving principles of probable future force. A more robust and creative approach has been supported by the United Nations High Commission for Human Rights. At the Seventh meeting of the APF, Mr Brian Burdekin of the UNHCHR argued that an informed and creative judiciary could be willing to understand the dynamic nature of international law and to take judicial notice of evolving principles.

A recent example has been provided by Australia’s High Court in the *Minister for Immigration and Ethnic Affairs v. Teoh* ((1995) 183 CLR 273) (*Teoh Case*) in which the majority of the Court found that there is a “legitimate expectation” that administrative officials will inform themselves about treaty obligations accepted by Australia. The importance of this decision lies in the fact that officials should take into account treaties to which Australia is a party even where Parliament has yet to provide a legislative means of applying those principles in domestic law. The *Teoh* case is illustrative of a universal phenomenon under which States sign and ratify human rights treaties but fail to implement those treaties fully or appropriately in domestic law. The potential role of a creative and informed judiciary in taking notice of such treaties in the absence of implementing legislation remains controversial however.

With these complexities in mind, the Council of Jurists might appropriately state both the clear “hard’ law insofar as it exists in treaties and custom and then explain the evolving principles or ‘soft’ law that are thought likely to create or stimulate new laws.

### ***Evidences of custom***

As a practical matter, advice as to the status of a customary rule will require documentation of State practice through the following kinds of evidence.

- Practices of international organs including the National Labour Organisation, United Nations General Assembly and Security Council and specialised agencies. The legal effect of a UN General Assembly resolution is highly controversial. For a resolution to be evidence of custom, it will be necessary to show a strong adherence to the asserted rule, including that of the most affected States (*Texaco Case*).
- Jurisprudence of international courts and tribunals including the International Court of Justice, arbitral tribunals, *ad hoc* war crimes tribunals, International Criminal Court, mixed claims commissions, WTO’s Appellate Body and the International Tribunal for the Law of the Sea
- State legislation.

- Judicial decisions of State courts, official State documents such as military, naval and air-force manuals.
- Acts or declarations by representatives of States, opinions of legal advisers.
- Bilateral and regional treaties.
- Decisions of international arbitral tribunals.
- Decisions of other international courts such as the International Tribunal for Law of the Sea, the World Trade Organization's dispute body.
- The findings and resolutions of mixed claims commissions.
- Juristic works as a subsidiary means for determining the rules of law.

### 3. *General principles of law*

International courts and tribunals have traditionally considered general principles as a source of international law, relying upon judicial reason and logic to 'discover' the normative rule. Examples are to be found in the jurisprudence of the Permanent Court of International Justice that recognised the obligation of States to make reparations on breach of the law in the *Chorzow Factory (Indemnity)* case (1928) PCIJ, Series A, No 17, page 29. In the *Mavrommatis Palestine Concessions* case, the Court adopted the general principle of subrogation (1924) PCIJ, Series A, No 2, page 28 and in the *Diversion of Water from the Mews* case, Judge Hudson considered that Anglo-American equitable doctrines could be applied as general principles. A private law doctrine of trusts was, for example, employed to develop the concept of mandates and trusteeship in the *Advisory Opinion on the Status of South West Africa* case (ICJ 1950, 146-150).

General principles of international law might also include procedural and evidentiary issues where they are of a general character and not confined to a particular legal system. International arbitrators in disputes such as the *Texaco Case* have adopted general obligations of international commercial law. Here the arbitrator recognised the concept of an "internationalised contract", applying general principles of contract law to substantiate his legal conclusions.

### 4. *Judicial decisions and the teachings of the most highly qualified publicists*

A subsidiary means of determining the rules of law are to be found in the decisions of international courts and tribunals and in the analysis of international law in the writings of jurists. While international decisions have greater weight, the writings of jurists are important in describing and analysing evolving norms and can be particularly important in identifying principles of international human rights law. In reaching a view on issues referred to it the ACJ is thus able to consult eminent jurists to clarify their understanding of the law.

## **ANNEX 4: Status of International Instruments**

## STATUS OF INSTRUMENTS

INSTRUMENT	DATE OF ENTRY INTO FORCE	STATE PARTIES	SIGNATORIES
<b>CESCR</b> 1966	1976	145	7
<b>CCPR</b> 1966	1976	148	8
<b>CCPR-OP1</b> 1966	1976	102	5
<b>CEDAW</b> 1979	1981	170	3
<b>CEDAW-OP</b> 1999	2000	42	38
<b>CRC</b> 1989	1990	191	2
<b>CRC-OP-SC</b> 2000	2002	36	76
<b>ILO 182</b> 1999	2000	132	-
<b>Trafficking Protocol</b> 2000	not yet in force	20	110
<b>SAARC</b> 2002	not yet in force	-	7
<b>Trafficking Convention</b> 1949	1951	74	14
<b>Slavery Convention</b> 1926	1955	95	-
<b>Supplementary Slavery Convention</b> 1956	1957	119	35

The **Trafficking Protocol 2000** will come into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention against Transnational Organized Crime (Article 17).<sup>17</sup>

The **SAARC Convention** will enter into force on the fifteenth day following the day of the deposit of the seventh Instrument of Ratification with the Secretary-General (Article XIII).

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<sup>17</sup> The Convention against Transnational Organized Crime shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. (Article 38 of the Convention). The Convention currently has 27 Parties and 143 Signatories (at Dec 2002).

## **ANNEX 5: Chart of Ratifications**

	<b>CESCR</b>	<b>CCPR</b>	<b>CCPR- OP1</b>	<b>CEDAW</b>	<b>CEDAW- OP</b>	<b>CRC</b>	<b>CRC- OP- SC</b>	<b>ILO 182</b>	<b>Trafficking Protocol 2000</b>	<b>SAARC 2002</b>	<b>Trafficking Convention 1949</b>	<b>Slavery Convention 1926</b>	<b>Supplementary Slavery Convention 1956</b>
<b>Australia</b>	R	R	a	R	-	R	s	-	s	n/a	-	S	R
<b>Fiji</b>	-	-	-	R	-	R	-	R	-	n/a	-	S	d
<b>India</b>	a	a	-	R	-	a	-	-	-	s	R	S	R
<b>Indonesia</b>	-	-	-	R	s	R	-	R	s	n/a	-	-	-
<b>Malaysia</b>	-	-	-	R	-	a	-	R	-	n/a	-	-	-
<b>Mongolia</b>	R	R	a	R	R	R	s	R	-	n/a	-	A	A
<b>Nepal</b>	a	a	a	R	s	R	s	R	-	s	-	A	A
<b>New Zealand</b>	R	R	a	R	R	R	s	R	R	n/a	-	S	A
<b>Philippines</b>	R	R	a	R	s	R	s	R	R	n/a	R	A	A
<b>Republic of Korea</b>	a	a	a	R	-	R	s	R	s	n/a	a	-	-
<b>Sri Lanka</b>	a	a	a	R	-	R	-	R	s	s	a	A	R
<b>Thailand</b>	a	a	-	A	s	a	-	R	s	n/a	-	-	-

R ratified  
a accession

s signed  
d succession

The relevant human rights instruments include:

**CESCR** the International Covenant on Economic, Social and Cultural Rights, which is monitored by the Committee on Economic, Social and Cultural Rights;

**CCPR** the International Covenant on Civil and Political Rights, which is monitored by the Human Rights Committee;

**CCPR-OP1** the Optional Protocol to the International Covenant on Civil and Political Rights, which is administered by the Human Rights Committee;

**CEDAW** the Convention on the Elimination of All Forms of Discrimination against Women, which is monitored by the Committee on the Elimination of Discrimination against Women;

**CEDAW-OP** the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women;

**CRC** the Convention on the Rights of the Child, which is monitored by the Committee on the Rights of the Child;

**CRC-OP-SC** the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;

**ILO No.182** the International Labor Organization Convention 182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor;

**Trafficking Protocol 2000** Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; and

**SAARC** the South Asian Association for Regional Cooperation Convention on Preventing and Combating Trafficking in Women and children for Prostitution.

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

**Slavery Convention 1926** Convention on Slavery (1926)

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

**ANNEX 6: Trafficking Protocol 2000**

**PROTOCOL TO PREVENT, SUPPRESS AND PUNISH  
TRAFFICKING IN PERSONS, ESPECIALLY WOMEN  
AND CHILDREN, SUPPLEMENTING THE UNITED  
NATIONS CONVENTION AGAINST  
TRANSNATIONAL ORGANIZED CRIME  
UNITED NATIONS  
2000**

**Preamble**

*The States Parties to this Protocol,*

*Declaring* that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

*Taking into account* the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

*Concerned* that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

*Convinced* that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

*Have agreed as follows:*

## **I. General provisions**

### *Article 1*

#### *Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

### *Article 2*

#### *Statement of purpose*

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

### *Article 3*

#### *Use of terms*

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the

intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

*Article 4*  
*Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

*Article 5*  
*Criminalization*

1. Each State Party shall adopt such legislative 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.

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; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

## **II. Protection of victims of trafficking in persons**

### *Article 6*

#### *Assistance to and protection of victims of trafficking in persons*

1. 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 persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counseling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

*Article 7*  
*Status of victims of trafficking in persons*  
*in receiving States*

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

*Article 8*  
*Repatriation of victims of trafficking in persons*

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

### **III. Prevention, cooperation and other measures**

#### *Article 9*

##### *Prevention of trafficking in persons*

1. States Parties shall establish comprehensive policies, programs and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavor to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programs and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

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 persons, especially women and children, that leads to trafficking.

#### *Article 10*

##### *Information exchange and training*

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, 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 border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in

persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, 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 persons. 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 child- 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 11* *Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, 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.

4. 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 3 of this article.

5. Each State Party shall consider taking 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 Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

*Article 12*  
*Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

(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 13*  
*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 persons.

#### **IV. Final provisions**

*Article 14*  
*Saving clause*

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as

contained therein.

2. The measures set forth in this Protocol 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 15*  
*Settlement of disputes*

1. States Parties shall endeavor to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol 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 may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

*Article 16*  
*Signature, ratification, acceptance,*  
*approval and accession*

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol 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 Protocol. 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

*Article 17*  
*Entry into force*

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. 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 Protocol after the deposit of the fortieth instrument of such action, this Protocol 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 Protocol enters into force

pursuant to paragraph 1 of this article, whichever is the later.

*Article 18*  
*Amendment*

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol 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 Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. 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 Protocol present and voting at the meeting of the Conference of the Parties.

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 Protocol. 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 Protocol and any earlier amendments that they have ratified, accepted or approved.

*Article 19*  
*Denunciation*

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

*Article 20*  
*Depositary and languages*

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

## **ANNEX 7: SAARC Convention**

**SAARC CONVENTION ON  
PREVENTING AND COMBATING TRAFFICKING IN  
WOMEN AND CHILDREN FOR PROSTITUTION**

**THE MEMBER STATES OF THE SOUTH ASIAN ASSOCIATION FOR REGIONAL  
COOPERATION (SAARC), PARTIES TO THE PRESENT CONVENTION**

**EMPHASISING** that the evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honor of human beings and is a violation of basic human rights;

**RECALLING** the decision of the Ninth SAARC Summit (May, 1997) that the feasibility of a regional Convention to combat the grave crime of trafficking in women and children for prostitution should be explored;

**RECALLING ALSO** the relevant international legal instruments relating to prevention of trafficking in women and children, including the Convention for the Suppression of Trafficking in Persons and of the Exploitation of Prostitution of Others, 1949; Convention on the Elimination of All Forms of Discrimination against Women, 1979; International Covenant on Civil and Political Rights, 1966; and the Convention on the Rights of the Child, 1989;

**GIVING** due regard to the implementation of the recommendations of the various pertinent International Bodies and Conferences including the Fourth World Conference on Women at Beijing (1995);

**NOTING** with concern the increasing exploitation by traffickers of women and children from SAARC countries and their increasing use of these countries as sending, receiving and transit points;

**RECOGNISING** in this regard the importance of establishing effective regional cooperation for preventing trafficking for prostitution and for investigation, detection, interdiction, prosecution and punishment of those responsible for such trafficking;

**EMPHASISING** the need to strengthen cooperation in providing assistance, rehabilitation and repatriation to victims of trafficking for prostitution;

**HAVE AGREED** as follows:

***Article I***  
**DEFINITIONS**

For the purpose of this Convention:

- 1) "Child" means a person who has not attained the age of 18 years;
- 2) "Prostitution" means the sexual exploitation or abuse of persons for commercial purposes;
- 3) "Trafficking" means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking;
- 4) "Traffickers" means persons, agencies or institutions engaged in any form of trafficking;
- 5) "Persons subjected to trafficking" means women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage, child marriage, or any other unlawful means;
- 6) "Protective home" means a home established or recognized by a Government of a Member State for the reception, care, treatment and rehabilitation of rescued or arrested persons subjected to trafficking.
- 7) "Repatriation" means return to the country of origin of the person subjected to trafficking across international frontiers.

***Article II***  
**SCOPE OF THE CONVENTION**

The purpose of this Convention is to promote cooperation amongst Member States so that they may effectively deal with the various aspects of prevention, interdiction and suppression of trafficking in women and children; the repatriation and rehabilitation of victims of trafficking and prevent the use of women and children in international prostitution networks, particularly where the countries of the SAARC region are the countries of origin, transit and destination.

***Article III***  
**OFFENCES**

1. The State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.

2. The State Parties to the Convention, in their respective territories, shall provide for punishment of any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking.

3. Any attempt or abetment to commit any crime mentioned in paras 1 and 2 above or their financing shall also be punishable.

*Article IV*  
**AGGRAVATING CIRCUMSTANCES**

1. The State Parties to the Convention shall ensure that their courts having jurisdiction over the offences committed under this Convention, can take into account factual circumstances which make the commission of such offences particularly grave, viz.

- a) the involvement in the offences of an organized criminal group to which the offender belongs;
- b) the involvement of the offender in other international organized criminal activities;
- c) the use of violence or arms by the offender;
- d) the fact that the offender holds a public office and that the offence is committed in misuse of that office;
- e) the victimization or trafficking of children;
- f) the fact that the offence is committed in a custodial institution or in an educational institution or social facility or in their immediate vicinity or in other places to which children and students visit for educational, sports, social and cultural activities;
- g) previous conviction, particularly for similar offences, whether in a Member State or any other country.

*Article V*  
**JUDICIAL PROCEEDINGS**

In trying offences under this Convention, judicial authorities in Member States shall ensure that the confidentiality of the child and women victims is maintained and that they are provided appropriate counseling and legal assistance.

*Article VI*  
**MUTUAL LEGAL ASSISTANCE**

1. The State Parties to the Convention shall grant to each other the widest measure of mutual legal assistance in respect of investigations, inquiries, trials or other proceedings in the requesting State in respect of offences under this Convention. Such assistance shall include:

- a) taking of evidence and obtaining of statements of persons;
- b) provision of information, documents and other records including criminal and judicial records;
- c) location of persons and objects including their identification;
- d) search and seizures;
- e) delivery of property including lending of exhibits;
- f) making detained persons and others available to give evidence or assist investigations;
- g) service of documents including documents seeking attendance of persons; and
- h) any other assistance consistent with the objectives of this Convention.

2. Requests for assistance shall be executed promptly in accordance with their national laws and in the manner requested by the Requesting State. In the event that the Requested State is not able to comply in whole or in part with a request for assistance or decides to postpone execution it shall promptly inform the Requesting State and shall give reasons for the same.

*Article VII*  
**EXTRADITION OR PROSECUTION**

1. The offences referred to in the present Convention shall be regarded as extraditable offences in any extradition treaty which has been or may hereinafter be concluded, between any of the Parties to the Convention.
2. If a State Party which makes extradition conditional on the existence of a treaty, receives a request for extradition from another State Party with which it has no extradition treaty, the Requested State shall, if so permitted by its laws, consider this Convention as the basis for extradition in respect of the offences set forth in Article III.
3. Extradition shall be granted in accordance with the laws of the State to which the request is made.
4. The State Party in whose territory the alleged offender is present shall, if it does not extradite him or her, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution in accordance with the laws of that State.
5. In States where extradition of their nationals is not permitted under their law, nationals who have committed offences under the present Convention shall be prosecuted and punished by their courts.

*Article VIII*  
**MEASURES TO PREVENT AND INTERDICT TRAFFICKING  
IN WOMEN AND CHILDREN**

1. The State Parties to the Convention shall provide sufficient means, training and assistance to their respective authorities to enable them to effectively conduct inquiries, investigations and prosecution of offences under this Convention.
2. The State Parties to the Convention shall sensitize their law enforcement agencies and the judiciary in respect of the offences under this Convention and other related factors that encourage trafficking in women and children.
3. The State Parties to the Convention shall establish a Regional Task Force consisting of officials of the Member States to facilitate implementation of the provisions of this Convention and to undertake periodic reviews.
4. The State Parties to the Convention may also, by mutual agreement, set up bilateral mechanisms to effectively implement the provisions of the Convention, including appropriate mechanisms for cooperation to interdict trafficking in women and children for prostitution.
5. The State Parties to the Convention shall exchange, on a regular basis, information in respect of agencies, institutions and individuals who are involved in trafficking in the region and also identify methods and routes used by the traffickers through land, water or air. The

information so furnished shall include information of the offenders, their fingerprints, photographs, methods of operation, police records and records of conviction.

6. The State Parties to the Convention may consider taking necessary measures for the supervision of employment agencies in order to prevent trafficking in women and children under the guise of recruitment.

7. The State Parties to the Convention shall endeavor to focus preventive and development efforts on areas which are known to be source areas for trafficking.

8. The State Parties to the Convention shall promote awareness, *inter-alia*, through the use of the media, of the problem of trafficking in women and children and its underlying causes including the projection of negative images of women.

*Article IX*  
**CARE, TREATMENT, REHABILITATION AND  
REPATRIATION OF THE VICTIMS**

1. The State Parties to the Convention shall work out modalities for repatriation of the victims to the country of origin.

2. Pending the completion of arrangements for the repatriation of victims of cross-border trafficking, the State Parties to the Convention shall make suitable provisions for their care and maintenance. The provision of legal advice and health care facilities shall also be made available to such victims.

3. The State Parties to the Convention shall establish protective homes or shelters for rehabilitation of victims of trafficking. Suitable provisions shall also be made for granting legal advice, counseling, job training and health care facilities for the victims.

4. The State Parties to the Convention may also authorize the recognized non-governmental organizations to establish such protective homes or shelters for providing suitable care and maintenance for the victims of trafficking.

5. The State Parties to the Convention shall encourage recognized non-governmental organizations in efforts aimed at prevention, intervention and rehabilitation, including through the establishment of such protective homes or shelters for providing suitable care and maintenance for the victims of trafficking.

*Article X*  
**IMPLEMENTATION**

The State Parties to the Convention shall adopt, in accordance with their respective Constitutions, the legislative and other measures necessary to ensure the implementation of the Convention.

*Article XI*  
**HIGHER MEASURES**

The measures provided for in the Convention are without prejudice to higher measures of enforcement and protection accorded by relevant national laws and international agreements.

*Article XII*  
**SIGNATURE AND RATIFICATION**

The Convention shall be open for signature by the Member States of SAARC at the Eleventh SAARC Summit at Kathmandu and thereafter, at the SAARC Secretariat at Kathmandu. It shall be subject to ratification. The Instruments of Ratification shall be deposited with the Secretary-General.

*Article XIII*  
**ENTRY INTO FORCE**

This Convention shall enter into force on the fifteenth day following the day of the deposit of the seventh Instrument of Ratification with the Secretary-General.

*Article XIV*  
**DEPOSITORY**

The Secretary-General shall be the depository of this Convention and shall notify the Member States of signatures to this Convention and all deposits of Instruments of Ratification. The Secretary-General shall transmit certified copies of such instruments to each Member State. The Secretary-General shall also inform Member States of the date on which this Convention will have entered into force in accordance with Article XIII.

**IN WITNESS WHEREOF** the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention.

**DONE** at Kathmandu on this Fifth Day of January Two Thousand and Two, in nine originals, in the English Language, all texts being equally authentic.

M. MORSHED KHAN  
Minister for Foreign Affairs  
People's Republic of Bangladesh

JIGMI Y. THINLEY  
Minister of Foreign Affairs  
Kingdom of Bhutan

JASWANT SINGH  
Minister of External Affairs  
Republic of India

FATHULLA JAMEEL  
Minister of Foreign Affairs  
Republic of Maldives

RAM SHARAN MAHAT  
Minister of Finance and Leader  
of the Delegation of Nepal  
Kingdom of Nepal

ABDUL SATTAR  
Minister of Foreign Affairs  
Islamic Republic of Pakistan

TYRONNE FERNANDO  
Minister of Foreign Affairs  
Democratic Socialist Republic of Sri Lanka



**The Declaration of the  
Eleventh SAARC Summit of the  
Heads of State or Government of the  
Member Countries of the  
South Asian Association for  
Regional Cooperation  
issued on  
6 January 2002, in Kathmandu**

**ANNEX 8: United Nations High Commissioner's Recommended Principles  
and Guidelines on Human Rights and Human Trafficking**

## **Recommended Principles and Guidelines on Human Rights and Human Trafficking**

### **Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council Recommended Principles on Human Rights and Human Trafficking<sup>18</sup>**

#### **The primacy of human rights**

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

#### **Preventing trafficking**

4. Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.
5. States and intergovernmental organizations shall ensure that their interventions address the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination.
6. States shall exercise due diligence in identifying and eradicating public-sector involvement or complicity in trafficking. All public officials suspected of being implicated in trafficking shall be investigated, tried and, if convicted, appropriately punished.

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<sup>18</sup> The term “trafficking”, as used in the present Principles and Guidelines, refers to the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (article 3 (a)).

### **Protection and assistance**

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
8. States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.
9. Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.
10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.
11. Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.

### **Criminalization, punishment and redress**

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts<sup>19</sup> and related conduct.<sup>20</sup>
13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties. States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

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<sup>19</sup> For the purposes of the present Principles and Guidelines, the “component acts” and “component offences” of trafficking are understood to include the recruitment, transportation, transfer, harboring or receipt of persons over eighteen years of age by means of threat, force, coercion or deception for the purpose of exploitation. The recruitment, transportation, transfer, harboring or receipt of a person under eighteen years of age constitute component acts and component offences of trafficking in children. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, articles 3 (a) and 3 (c).

<sup>20</sup> For the purposes of the present Principles and Guidelines, conduct and offences “related to” trafficking are understood to include: exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery and servitude. Source: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, article 3 (a).

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.

16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.

17. States shall ensure that trafficked persons are given access to effective and appropriate legal remedies.

## **Recommended Guidelines on Human Rights and Human Trafficking**

### **Guideline 1: Promotion and protection of human rights**

**Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum-seekers.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.
2. Consulting with judicial and legislative bodies, national human rights institutions and relevant sectors of civil society in the development, adoption, implementation and review of anti-trafficking legislation, policies and programs.
3. Developing national plans of action to end trafficking. This process should be used to build links and partnerships between governmental institutions involved in combating trafficking and/or assisting trafficked persons and relevant sectors of civil society.
4. Taking particular care to ensure that the issue of gender-based discrimination is addressed systematically when anti-trafficking measures are proposed with a view to ensuring that such measures are not applied in a discriminatory manner.
5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.
6. Ensuring that anti-trafficking laws, policies, programs and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.
7. Establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programs and interventions. Consideration should be

given to assigning this role to independent national human rights institutions where such bodies exist. Non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.

8. Presenting detailed information concerning the measures that they have taken to prevent and combat trafficking in their periodic reports to the United Nations human rights treaty-monitoring bodies.<sup>21</sup>

9. Ensuring that bilateral, regional and international cooperation agreements and other laws and policies concerning trafficking in persons do not affect the rights, obligations or responsibilities of States under international law, including human rights law, humanitarian law and refugee law.

10. Offering technical and financial assistance to States and relevant sectors of civil society for the purpose of developing and implementing human rights-based anti-trafficking strategies.

## **Guideline 2: Identification of trafficked persons and traffickers**

**Trafficking means much more than the organized movement of persons for profit. The critical additional factor that distinguishes trafficking from migrant smuggling is the presence of force, coercion and/or deception throughout or at some stage in the process — such deception, force or coercion being used for the purpose of exploitation. While the additional elements that distinguish trafficking from migrant smuggling may sometimes be obvious, in many cases they are difficult to prove without active investigation. A failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.**

**States are also obliged to exercise due diligence in identifying traffickers,<sup>22</sup> including those who are involved in controlling and exploiting trafficked persons.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Developing guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons.

2. Providing appropriate training to relevant State authorities and officials in the identification of trafficked persons and correct application of the guidelines and procedures referred to above.

3. Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of

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<sup>21</sup> The human rights treaty-monitoring bodies include the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee on the Elimination of Discrimination against Women; the Committee on the Elimination of Racial Discrimination; the Committee against Torture; and the Committee on the Rights of the Child.

<sup>22</sup> The term “traffickers”, where it appears in the present Principles and Guidelines, is used to refer to: recruiters; transporters; those who exercise control over trafficked persons; those who transfer and/or maintain trafficked persons in exploitative situations; those involved in related crimes; and those who profit either directly or indirectly from trafficking, its component acts and related offences.

assistance to trafficked persons. The organization and implementation of such cooperation should be formalized in order to maximize its effectiveness.

4. Identifying appropriate points of intervention to ensure that migrants and potential migrants are warned about possible dangers and consequences of trafficking and receive information that enables them to seek assistance if required.

5. Ensuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times.

### **Guideline 3: Research, analysis, evaluation and dissemination**

**Effective and realistic anti-trafficking strategies must be based on accurate and current information, experience and analysis. It is essential that all parties involved in developing and implementing these strategies have and maintain a clear understanding of the issues.**

**The media has an important role to play in increasing public understanding of the trafficking phenomenon by providing accurate information in accordance with professional ethical standards.**

**States and, where appropriate, intergovernmental and non-governmental organizations, should consider:**

1. Adopting and consistently using the internationally agreed definition of trafficking contained in the Palermo Protocol.<sup>23</sup>
2. Standardizing the collection of statistical information on trafficking and related movements (such as migrant smuggling) that may include a trafficking element.
3. Ensuring that data concerning individuals who are trafficked is disaggregated on the basis of age, gender, ethnicity and other relevant characteristics.

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<sup>23</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), supplementing the United Nations Convention against Transnational Organized Crime, defines trafficking in persons as: "... the recruitment, transportation, transfer, harboring 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 labor or services, slavery or practices similar to slavery, servitude or the removal of organs (article 3 (a)). The Protocol further states that the recruitment, transportation, transfer, harboring 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 above (article 3 (c)).

4. Undertaking, supporting and bringing together research into trafficking. Such research should be firmly grounded in ethical principles, including an understanding of the need not to re-traumatize trafficked persons. Research methodologies and interpretative techniques should be of the highest quality.
5. Monitoring and evaluating the relationship between the intention of anti-trafficking laws, policies and interventions, and their real impact. In particular, ensuring that distinctions are made between measures which actually reduce trafficking and measures which may have the effect of transferring the problem from one place or group to another.
6. Recognizing the important contribution that survivors of trafficking can, on a strictly voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact.
7. Recognizing the central role that non-governmental organizations can play in improving the law enforcement response to trafficking by providing relevant authorities with information on trafficking incidents and patterns taking into account the need to preserve the privacy of trafficked persons.

#### **Guideline 4: Ensuring an adequate legal framework**

**The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.**

##### **States should consider:**

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labor and enforced prostitution should also be criminalized.
2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services.
3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.
4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.
6. Ensuring that the protection of trafficked persons is built into anti-trafficking legislation, including protection from summary deportation or return where there are reasonable grounds to conclude that such deportation or return would represent a significant security risk to the trafficked person and/or her/his family.
7. Providing legislative protection for trafficked persons who voluntarily agree to cooperate with law enforcement authorities, including protection of their right to remain lawfully within the country of destination for the duration of any legal proceedings.
8. Making effective provision for trafficked persons to be given legal information and assistance in a language they understand as well as appropriate social support sufficient to meet their immediate needs. States should ensure that entitlement to such information, assistance and immediate support is not discretionary but is available as a right for all persons who have been identified as trafficked.
9. Ensuring that the right of trafficking victims to pursue civil claims against alleged traffickers is enshrined in law.
10. Guaranteeing that protections for witnesses are provided for in law.
11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.

### **Guideline 5: Ensuring an adequate law enforcement response**

**Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand.**

**An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.**

**States and, where applicable, intergovernmental and non-governmental organizations should consider:**

1. Sensitizing law enforcement authorities and officials to their primary responsibility to ensure the safety and immediate well-being of trafficked persons.
2. Ensuring that law enforcement personnel are provided with adequate training in the investigation and prosecution of cases of trafficking. This training should be sensitive to the needs of trafficked persons, particularly those of women and children, and should acknowledge the practical value of providing incentives for trafficked persons and others to come forward to

report traffickers. The involvement of relevant non-governmental organizations in such training should be considered as a means of increasing its relevance and effectiveness.

3. Providing law enforcement authorities with adequate investigative powers and techniques to enable effective investigation and prosecution of suspected traffickers. States should encourage and support the development of proactive investigatory procedures that avoid over-reliance on victim testimony.

4. Establishing specialist anti-trafficking units (comprising both women and men) in order to promote competence and professionalism.

5. Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

6. Implementing measures to ensure that “rescue” operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place.

7. Sensitizing police, prosecutors, border, immigration and judicial authorities, and social and public health workers to the problem of trafficking and ensuring the provision of specialized training in identifying trafficking cases, combating trafficking and protecting the rights of victims.

8. Making appropriate efforts to protect individual trafficked persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. Appropriate protection programs may include some or all of the following elements: identification of a safe place in the country of destination; access to independent legal counsel; protection of identity during legal proceedings; identification of options for continued stay, resettlement or repatriation.

9. Encouraging law enforcement authorities to work in partnership with non-governmental agencies in order to ensure that trafficked persons receive necessary support and assistance.

## **Guideline 6: Protection and support for trafficked persons**

**The trafficking cycle cannot be broken without attention to the rights and needs of those who have been trafficked. Appropriate protection and support should be extended to all trafficked persons without discrimination.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring, in cooperation with non-governmental organizations, that safe and adequate shelter that meets the needs of trafficked persons is made available. The provision of such shelter should not be made contingent on the willingness of the victims to give evidence in criminal proceedings. Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses.

2. Ensuring, in partnership with non-governmental organizations, that trafficked persons are given access to primary health care and counseling. Trafficked persons should not be required to accept any such support and

assistance and they should not be subject to mandatory testing for diseases, including HIV/AIDS.

3. Ensuring that trafficked persons are informed of their right of access to diplomatic and consular representatives from their State of nationality. Staff working in embassies and consulates should be provided with appropriate training in responding to requests for information and assistance from trafficked persons. These provisions would not apply to trafficked asylum-seekers.

4. Ensuring that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being.

5. Providing trafficked persons with legal and other assistance in relation to any criminal, civil or other actions against traffickers/exploiters. Victims should be provided with information in a language that they understand.

6. Ensuring that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard.

7. Ensuring the safe and, where possible, voluntary return of trafficked persons and exploring the option of residency in the country of destination or third-country resettlement in specific circumstances (e.g. to prevent reprisals or in cases where re-trafficking is considered likely).

8. In partnership with non-governmental organizations, ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims.

## **Guideline 7: Preventing trafficking**

**Strategies aimed at preventing trafficking should take into account demand as a root cause. States and intergovernmental organizations should also take into account the factors that increase vulnerability to trafficking, including inequality, poverty and all forms of discrimination and prejudice. Effective prevention strategies should be based on existing experience and accurate information.**

**States, in partnership with intergovernmental and non-governmental organizations and where appropriate, using development cooperation policies and programs, should consider:**

1. Analyzing the factors that generate demand for exploitative commercial sexual services and exploitative labor and taking strong legislative, policy and other measures to address these issues.

2. Developing programs that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.

3. Improving children's access to educational opportunities and increasing the level of school attendance, in particular by girl children.
4. Ensuring that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) as well as avenues available for legal, non-exploitative migration.
5. Developing information campaigns for the general public aimed at promoting awareness of the dangers associated with trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
6. Reviewing and modifying policies that may compel people to resort to irregular and vulnerable labor migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labor laws.
7. Examining ways of increasing opportunities for legal, gainful and non-exploitative labor migration. The promotion of labor migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
8. Strengthening the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
9. Adopting measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

### **Guideline 8: Special measures for the protection and support of child victims of trafficking**

**The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programs and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:**

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.
2. Ensuring that procedures are in place for the rapid identification of child victims of trafficking.
3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.
5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.
6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.
7. Adopting specialized policies and programs to protect and support children who have been victims of trafficking. Children should be provided with appropriate physical, psychosocial, legal, educational, housing and health-care assistance.
8. Adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.
9. Protecting, as appropriate, the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to their identification.
10. Taking measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with child victims of trafficking.

### **Guideline 9: Access to remedies**

**Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature.
2. Providing information as well as legal and other assistance to enable trafficked persons to access remedies. The procedures for obtaining remedies should be clearly explained in a language that the trafficked person understands.
3. Making arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

## **Guideline 10: Obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel**

**The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. States, intergovernmental and non-governmental organizations are responsible for the actions of those working under their authority and are therefore under an obligation to take effective measures to prevent their nationals and employees from engaging in trafficking and related exploitation. They are also required to investigate thoroughly all allegations of trafficking and related exploitation and to provide for and apply appropriate sanctions to personnel found to have been involved in trafficking.**

**States and, where appropriate, intergovernmental and non-governmental organizations, should consider:**

1. Ensuring that pre- and post-deployment training programs for all peacekeeping, peace-building, civilian policing, humanitarian and diplomatic staff adequately address the issue of trafficking and clearly set out the expected standard of behavior. This training should be developed within a human rights framework and delivered by appropriately experienced trainers.
2. Ensuring that recruitment, placement and transfer procedures (including those of private contractors and sub-contractors) are rigorous and transparent.
3. Ensuring that staff employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect they may have been trafficked. This obligation also covers complicity in trafficking through corruption or affiliation with any person or group of persons who could reasonably be suspected of engaging in trafficking and related exploitation.
4. Developing and adopting specific regulations and codes of conduct setting out expected standards of behavior and the consequences of failure to adhere to these standards.
5. Requiring all personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions to report on any instances of trafficking and related exploitation that come to their attention.
6. Establishing mechanisms for the systematic investigation of all allegations of trafficking and related exploitation involving personnel employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions.
7. Consistently applying appropriate criminal, civil and administrative sanctions to personnel shown to have engaged in or been complicit in trafficking and related exploitation. Intergovernmental and non-governmental organizations should, in appropriate cases, apply disciplinary sanctions to staff members found to be involved in trafficking and related exploitation in addition to and independently of any criminal or other sanctions decided on by the State concerned. Privileges and immunities attached to the status of an employee should not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.

## **Guideline 11: Cooperation and coordination between States and regions**

**Trafficking is a regional and global phenomenon that cannot always be dealt with effectively at the national level: a strengthened national response can often result in the operations of traffickers moving elsewhere. International, multilateral and bilateral cooperation can play an important role in combating trafficking activities. Such cooperation is particularly critical between countries involved in different stages of the trafficking cycle.**

**States and, where applicable, intergovernmental and non-governmental organizations, should consider:**

1. Adopting bilateral agreements aimed at preventing trafficking, protecting the rights and dignity of trafficked persons and promoting their welfare.
2. Offering, either on a bilateral basis or through multilateral organizations, technical and financial assistance to States and relevant sectors of civil society for the purpose of promoting the development and implementation of human rights-based anti-trafficking strategies.
3. Elaborating regional and subregional treaties on trafficking, using the Palermo Protocol and relevant international human rights standards as a baseline and framework.
4. Adopting labor migration agreements, which may include provision for minimum work standards, model contracts, modes of repatriation, etc., in accordance with existing international standards. States are encouraged effectively to enforce all such agreements in order to help eliminate trafficking and related exploitation.
5. Developing cooperation arrangements to facilitate the rapid identification of trafficked persons including the sharing and exchange of information in relation to their nationality and right of residence.
6. Establishing mechanisms to facilitate the exchange of information concerning traffickers and their methods of operation.
7. Developing procedures and protocols for the conduct of proactive joint investigations by law enforcement authorities of different concerned States. In recognition of the value of direct contacts, provision should be made for direct transmission of requests for assistance between locally competent authorities in order to ensure that such requests are rapidly dealt with and to foster the development of cooperative relations at the working level.
8. Ensuring judicial cooperation between States in investigations and judicial processes relating to trafficking and related offences, in particular through common prosecution methodologies and joint investigations. This cooperation should include assistance in: identifying and interviewing witnesses with due regard for their safety; identifying, obtaining and preserving evidence; producing and serving the legal documents necessary to secure evidence and witnesses; and the enforcement of judgements.
9. Ensuring that requests for extradition for offences related to trafficking are dealt with by the authorities of the requested State without undue delay.
10. Establishing cooperative mechanisms for the confiscation of the proceeds of trafficking. This cooperation should include the provision of assistance in identifying, tracing, freezing and confiscating assets connected to trafficking and related exploitation.

11. Exchanging information and experience relating to the implementation of assistance, return and integration programs with a view to maximizing impact and effectiveness.

12. Encouraging and facilitating cooperation between non-governmental organizations and other civil society organizations in countries of origin, transit and destination. This is particularly important to ensure support and assistance to trafficked persons who are repatriated.

## **ANNEX 9: Selection of Relevant Conventions**

# **Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others**

**1949**

## ***Article 1***

The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.

## ***Article 8***

The offences referred to in articles 1 and 2 of the present Convention shall be regarded as extraditable offences in any extradition treaty which has been or may hereafter be concluded between any of the Parties to this Convention.

The Parties to the present Convention which do not make extradition conditional on the existence of a treaty shall henceforward recognize the offences referred to in articles 1 and 2 of the present Convention as cases for extradition between themselves.

Extradition shall be granted in accordance with the law of the State to which the request is made.

## ***Article 17***

The Parties to the present Convention undertake, in connection with immigration and emigration, to adopt or maintain such measures as are required, in terms of their obligations under the present Convention, to check the traffic in persons of either sex for the purpose of prostitution.

In particular they undertake:

- (1) To make such regulations as are necessary for the protection of immigrants or emigrants, and in particular, women and children, both at the place of arrival and departure and while en route;
- (2) To arrange for appropriate publicity warning the public of the dangers of the aforesaid traffic;

(3) To take appropriate measures to ensure supervision of railway stations, airports, seaports and en route, and of other public places, in order to prevent international traffic in persons for the purpose of prostitution;

(4) To take appropriate measures in order that the appropriate authorities be informed of the arrival of persons who appear, prima facie, to be the principals and accomplices in or victims of such traffic.

### ***Article 20***

The Parties to the present Convention shall, if they have not already done so, take the necessary measures for the supervision of employment agencies in order to prevent persons seeking employment, in particular women and children, from being exposed to the danger of prostitution.

## **Slavery Convention 1926**

### ***Article I***

For the purpose of the present Convention, the following definitions are agreed upon:

(1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.

(2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

### ***Article 2***

The High Contracting Parties undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, so far as they have not already taken the necessary steps:

(a) To prevent and suppress the slave trade;

(b) To bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.

### *Article 3*

The High Contracting Parties undertake to adopt all appropriate measures with a view to preventing and suppressing the embarkation, disembarkation and transport of slaves in their territorial waters and upon all vessels flying their respective flags.

The High Contracting Parties undertake to negotiate as soon as possible a general Convention with regard to the slave trade which will give them rights and impose upon them duties of the same nature as those provided for in the Convention of June 17th, 1925, relative to the International Trade in Arms (Articles 12, 20, 21, 22, 23, 24 and paragraphs 3, 4 and 5 of Section II of Annex II), with the necessary adaptations, it being understood that this general Convention will not place the ships (even of small tonnage) of any High Contracting Parties in a position different from that of the other High Contracting Parties.

It is also understood that, before or after the coming into force of this general Convention, the High Contracting Parties are entirely free to conclude between themselves, without, however, derogating from the principles laid down in the preceding paragraph, such special agreements as, by reason of their peculiar situation, might appear to be suitable in order to bring about as soon as possible the complete disappearance of the slave trade.

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

### *Article 1*

Each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices, where they still exist and whether or not they are covered by the definition of slavery contained in article 1 of the Slavery

Convention signed at Geneva on 25 September 1926:

(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render

some determinate service to such other person, whether for reward or not, and is not free to change his status;

(c) Any institution or practice whereby:

(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) A woman on the death of her husband is liable to be inherited by another person;

(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

## ***Article 2***

With a view to bringing to an end the institutions and practices mentioned in article 1 (c) of this Convention, the States Parties undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages.

## **Section II.—The Slave Trade**

## ***Article 3***

1. The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties.

2. (a) The States Parties shall take all effective measures to prevent ships and aircraft authorized to fly their flags from conveying slaves and to punish persons guilty of such acts or of using national flags for that purpose.

(b) The States Parties shall take all effective measures to ensure that their ports, airfields and coasts are not used for the conveyance of slaves.

3. The States Parties to this Convention shall exchange information in order to ensure the practical co-ordination of the measures taken by them in combating the slave trade and shall inform each other of every case of the slave trade, and of every attempt to commit this criminal offence, which comes to their notice.

## **Convention on the Rights of the Child 1989**

### ***Article 4***

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

### ***Article 5***

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

### ***Article 11***

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

### ***Article 21***

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

### ***Article 32***

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

### ***Article 33***

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

### ***Article 34***

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

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

### ***Article 35***

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

**Article 36**

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

**ILO Convention Number 182 on the Worst Forms of Child Labor  
1999**

**Article 1**

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

**Article 3**

For the purposes of this Convention, the term *the worst forms of child labour* comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

**Article 7**

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.

2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

- (a) prevent the engagement of children in the worst forms of child labour;

(b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

(c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

(d) identify and reach out to children at special risk; and

(e) take account of the special situation of girls.

3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

**ANNEX 10: Recommendations drawn from the Background Paper on Trafficking by Ms  
Anne Gallagher**

## **RECOMMENDATIONS OF ANNE GALLAGHER FROM HER BACKGROUND PAPER**

We set out below some more detailed recommendations suggested by Anne Gallagher in her background paper provided to the Council. The Council endorses these recommendations. They are set out using the headings we have used in our report.

### **Implementation**

- National Institutions should use their position, resources and authority to provide governments with information which will enable them to make wise legislative and policy choices. They can also be influential in shaping and directing a government's overall approach to the trafficking issue, in ensuring, for example, that trafficking is perceived and responded to as a human rights problem and not just as an issue of migration, of public order or of transnational organized crime.
- Priority should be given to reviewing relevant domestic laws with a view to identifying gaps and weaknesses, in particular, with reference to international human rights principles and standards.
- The APF could consider, as a body, taking up the suggestion of the High Commissioner for Human Rights and endorsing or adopting the *Recommended Principles and Guidelines* as a framework and reference point for its work and that of its member institutions in this area.
- In addition to specific anti-trafficking legislation, attention should be paid to laws relating to immigration, emigration and prostitution.
- Other possible areas of attention for review would include the issue of extraterritorial legislation (to facilitate the prosecution of traffickers); birth registration and citizenship requirements (immediate registration and citizenship at birth in order to ensure that victims, particularly children, may exercise their right to return to their home countries); and laws relating to marriage, inheritance and labor conditions.

### **Enforcement**

- It should be remembered that not all measures designed to prevent trafficking are legal, fair or successful. Anti-trafficking interventions can sometimes result in violations of basic human rights including the right to freedom of movement and the prohibition of discrimination on the basis of race, nationality and sex.
- National institutions should also monitor and warn against “knee-jerk” reactions from governments such as a denial of due process rights and draconian penalties for traffickers. A genuine rights-based approach demands that the human rights of all persons, including those suspected of trafficking, are respected and upheld.

## **Protection of Victims**

- Trafficking is essentially a gendered issue in that it reflects gender-based imbalances between men and women and disproportionately affects women and girls. National Institutions will not be able to deal with this problem effectively unless they have integrated a gender perspective into their own programs and methods of work.
- All APF member institutions are mandated to receive and act upon complaints of human rights violations. Most are also empowered to undertake enquiries, on their own initiative, into particular human rights situations or issues. Both of these powers can be extremely important in highlighting the problem of trafficking and in providing redress to victims.
- In relation to individual complaints, National Institutions must remain aware of the fact that the type of complaint received will usually reflect public perception of the institution's functions and principle areas of concern. A Commission which has never issued a public statement on trafficking; never included trafficking related issues in its training or dissemination programs; and never provided relevant policy advice to government should not be surprised if it receives no complaints on this issue.
- Considerations to be kept in mind include the fact that most trafficked persons are illegal or irregular immigrants. National Commissions should make special efforts to reach out to the immigrant community as normal communication channels are likely to be ineffective. The irregular status of most trafficked persons will also mean that they are wary of "official" channels. National Commissions should ensure confidentiality in the complaint procedure in order to encourage trafficked persons to come forward.
- General Enquiries have proved to be a particularly useful way of gathering information on difficult or sensitive issues. National Commissions in major sending or receiving countries could consider undertaking such an enquiry into trafficking. The results from a study of this kind would provide valuable information on critical but often overlooked human rights issues.

## **Research and Policy Making**

- It is important for national institutions to also go beyond the law by including consideration of related policies and practices. General policy advice to government on the problem of trafficking can be extremely useful. National Commissions could, for example, propose that governments include the issue of trafficking in national development and poverty alleviation programs as well as in National Plans of Action for Human Rights.
- In countries of origin they could promote specific preventive initiatives aimed at increased access of vulnerable women and girls to education and genuine alternative job opportunities.
- In destination countries they could propose that industries which could have a connection to trafficking, such as leisure, tourism, media and computer communication industries be encouraged to develop codes of conduct - with clauses specifying monitoring and reporting

mechanisms, to prevent direct or indirect involvement with trafficking. National institutions could also encourage governments in destination countries to investigate the “demand” side of trafficking. What are the factors that create and sustain demand for cheap exploitative sex and unregulated, exploitative labor?

## Education

- Integration of trafficking issues into training and dissemination programs should be a priority in significant source and destination countries. Key target groups for sensitization and training in the human rights aspects of trafficking (both causes and responses) include public officials (police, prosecutors, the judiciary, immigration officials, consulate staff) as well as civil society groups including the media, educators, NGOs and community leaders.
- Consideration could usefully be given to undertaking training-of-trainers programs in order to empower local community groups to conduct sensitization activities - as it is these groups who are often in closest contact with victims and potential victims of trafficking.
- A contextual approach should be taken to training and sensitization activities in order to properly incorporate and reflect the human rights and gender aspects of trafficking. This means that trafficking should not be considered as a separate or distinct “issue” but rather understood within the broader context of human rights, particularly the rights of women and children.
- The capacity for different groups to aggravate further the violations already suffered by trafficked persons should be highlighted and explored through the training process. Law enforcement practices, for example, can hinder rather than support trafficked persons in their attempts to escape an exploitative situation or seek redress for damage.
- Rather than promoting community understanding of the trafficking phenomenon, the media in many countries has contributed towards simplifying the issue and preventing debate about the structural and political factors which sustain trafficking and related exploitation. National institutions have a role to play in showing these and other groups a different way of doing their job.

## Cooperation

- While trafficking does occur between continents it remains essentially a regional issue. There is a consequential need to focus on regional and sub-regional approaches which aim, *inter alia*, to coordinate legislation and to improve cross-border cooperation - particularly as this relates to law enforcement and victim protection.
- National Institutions within the Asia Pacific region are uniquely placed to contribute to regional and cross-border efforts to eliminate trafficking. The critical link between

trafficking and human rights makes national institutions especially relevant players in relation to this issue. In some instances, national institutions cooperating together may well be providing important leadership to other key players including police, judicial and immigration authorities which often find it difficult to move from expressions of intent to action. Cooperation between national institutions could be both bilateral and multilateral and could range from information exchange to joint projects aimed at preventing trafficking (by addressing both demand and source factors) and protecting the rights of persons who have been trafficked.

- The Asia Pacific Forum of National Human Rights Institutions, as the body representing and working for the national institutions of the region, also has an important role to play. In addition to promoting and coordinating cooperation between national institutions on this issue, the APF could decide to contribute, substantively, to the development of international law and policy as it relates to trafficking. The follow-up which this initiative receives will be critical to determining its eventual influence both within and beyond the region.

**ANNEX 11: Resolution of the Pre Forum NGO Consultation on Trafficking and National  
Institutions**

## **Seventh Annual Meeting On The Role of the Asia Pacific Forum**

### **In the Protection and Promotion of Human Rights**

*New Delhi, India, 11 – 13 November 2002*

### **Resolution of the Pre Forum NGO Consultation on**

### **Trafficking and National Institutions<sup>24</sup>**

Trafficking of women and children is a serious problem facing the Asia Pacific region, which requires affirmative and comprehensive attention by all State parties. National Human Rights Institutions (NHRIs) have an essential role to play in the development of strategies to eliminate discrimination and exploitation of women and children.

The cross-border nature of the issues involved present a challenging inter-jurisdictional problem for regional lawmakers. At its core, the international trafficking in women and children is about exploitation, violence, forced prostitution, abduction and fraudulent coercion of the most reprehensible kind. Despite numerous useful international efforts to combat trafficking, two significant gaps remain (1) law enforcement and adjudication, and (2) cross-border co-operation. Even though a variety of existing legal provisions already proscribe the activities of traffickers and their agents, existing anti-trafficking initiatives have not prioritised the apprehension and prosecution of these individuals, who are often known within their communities.

Under current circumstances, trafficking has proliferated without any serious challenge from law enforcers. Clandestine activities will continue to proliferate unless the stakes are raised significantly. Law enforcement and the judiciary must act aggressively and comprehensively to put an end to this culture of impunity and to instil a real fear of apprehension, prosecution and conviction in traffickers, their agents and their supporters.

At the Sixth Annual Meeting of the Asia Pacific Forum, held in September 2001 the Pre Forum NGO Consultation made recommendations to NHRIs in their strategies to *address* the issue of trafficking. This year the Pre Forum NGO Consultation offers the following recommendations to serve as guidelines for NHRIs in their strategies to *enforce* legal mechanisms. This enforcement initiative will eventually be supplemented by an intensive effort to attack poverty and gender inequality, due to caste and cultural practices that are the underlying root causes of trafficking. Specifically we recommend that:

1. NHRIs should establish the office of a National Rapporteur on Trafficking and establish a specialised nodal agency designed to address the issue of trafficking.
2. NHRIs should review existing legislative or administrative provisions and assess their humanitarian impact when implemented in relation to victims of trafficking, and make

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proposals where appropriate in order to ensure that these provisions conform with the fundamental principles of human rights both in their direct and indirect application.

3. The APF should commission two of its member institutions (one from a source State and other from the host State) to undertake a pilot project to work together on the issue of trafficking and to use the results of the projects to develop a broad framework for regional co-operation. The pilot project should be designed with a long-term perspective to ensure sustainability of interventions.
4. NHRI's should review the responses of governmental agencies to the proposed project and should encourage governments to develop inter-agency strategies to ensure a co-ordinated and effective approach by the various agencies involved.
5. NHRIs should urge State parties to create a Specialised Task Force that shall bring together all appropriate and relevant Ministries, departments and representatives of the civil society and victims to address the issues surrounding trafficking.
6. NHRIs should encourage governments to establish Specialised Investigative Units within the Police devoted entirely to anti-trafficking enforcement efforts. Special Officers of the NHRC should be recruited in the same.
7. NHRIs should develop systems of regional co-operation by encouraging States to develop a bilateral or regional database on trafficked persons and bilateral arrangements to facilitate exchange of information and repatriation.
8. NHRIs should encourage governments to establish special procedures within the judicial system such as courts with Special powers to ensure that prompt prosecutions of traffickers are heard without any adjournment except in the most exceptional of circumstances, and measures that would ensure that victims of trafficking are not removed by way of deportation from the jurisdiction of the prosecutorial Court before the conclusion of criminal proceedings against traffickers.
9. NHRIs should encourage governments to ensure that courts with Special powers are established at the local and district levels.
10. NHRIs should help develop a Code of Conduct within the context of the UN Guidelines and Principles on Human Rights and Human Trafficking:
  - places for trafficked women to stay pending deportation with adequate access to services such as legal aid, counselling, medical and other essential services;
  - ensuring that trafficked women have access to their country's diplomatic representation in compliance with the Vienna Convention on Consular Access;
  - an avoidance of mandatory deportation in circumstances where a return to the original State may expose victims of trafficking to further exploitation and persecution, and where premature expulsion from the host State may jeopardize victims' access to civil redress for loss of income and other entitlements owed to them in return for their labour;

- provisions for the granting of asylum and access to authorities concerned including the opportunity to contact a representative of the UNHCR. Provision should also be made for asylum visas for victims who provide information to police or who testify in criminal prosecutions.
11. NHRIs should develop and conduct awareness programmes with agencies that deal with victims of trafficking, including NHRC officials, premised on an approach that takes into account the human rights of victims as well as the law enforcement issues involved.
  12. NHRIs should encourage governments to assign officers of integrity, a substantial number of who are female officers, to the border Police and regular Police within the border district of both host and Source State. A legal consultant may be retained on a fixed-term contract to identify and resolve any legal hurdles that serve as barriers to successful prosecution of trafficking cases.
  13. NHRIs should encourage governments to hold biannual meetings between the Co-ordinators, the District Superintendents of Police from the border districts, and officers from the Interpol Divisions of the Intelligence Bureau of countries to exchange information and co-ordinate anti-trafficking enforcement efforts.
  14. NHRIs should develop comprehensive strategies to monitor on fortnightly basis cross-border operations and prepare quarterly reports on cross-border enforcement activities for the respective Home Ministries, NHRIs and OHCHR. These reports shall serve as the basis for agenda items to be included in the regular meetings between respective Home Secretaries.
  15. NHRIs should encourage governments to establish a pilot witness protection programme, which could operate under the expertise of personnel from the NHRC and relevant NGO networks.
  16. NHRIs should use their expertise in human rights to assist governments in drawing up guidelines/codes of conduct to combat discrimination on the basis of actual, perceived or suspected HIV status in its dealings with victims of trafficking. These codes should translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.
  17. NHRIs should encourage and assist governments to develop and incorporate within the National Plans of Action on Trafficking measures to combat HIV/AIDS, which incorporate international human rights standards. These measures should be participatory and transparent.