DIMENSIONS OF HUMAN RIGHTS IN THE ASIA-PACIFIC REGION

VITIT MUNTARBHORN

Office of the National Human Rights Commission of Thailand
Bangkok, 2002

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Foreword

The National Human Rights Commission of Thailand is an independent national institution established under Thailand's 1997 Constitution. Its key mandate is to promote and protect human rights in Thailand, and to interlink with the international community on the issue.

Improving the capacity to collect, collate and disseminate information on human rights is an essential part of the process of preventing human rights violations as well as to offer effective remedies.

I am delighted to welcome this collection of articles by Professor Vitit Muntarbhorn which provides a wealth of information. He is a Professor at the Faculty of Law, Chulalongkorn University, Bangkok. He was formerly United Nations Special Rapporteur on the Sale of Children with a global mandate under the United Nations Human Rights Commission (Geneva). He is also currently helping the National Human Rights Commission in various capacities.

This publication provides a rich tapestry of discussions on key developments in the Asia-Pacific region and will be an invaluable contribution to the international literature on human rights.

Professor Saneh Chamarik
Chairperson,
National Human Rights Commission of Thailand

Acknowledgement

The Office of the National Human Rights Commission of Thailand has a primary function to support the work of the National Human Rights Commission of Thailand. The Office is also entrusted by the National Human Rights Commission Act B.E. 2542 (1999) the duty to promote human rights education, including knowledge in the field of human rights. To this purpose, the Office selects the work by Thai academics and thinkers in the field of human rights to be published, and the compilation of Professor Vitit Muntarbhorn's articles is a series which is well worth perusing.

Professor Muntarbhorn's commitment and devotion to the promotion and protection of human rights are well recognised domestically and internationally. His knowledge and extensive experience of human rights through working with various United Nations organs, many regional mechanisms, and numerous local governmental agencies and activity groups receive no less recognition. Therefore, his articles are sought by students, academics, and practitioners in the field; many of these articles were presented at international human rights meetings.

The Office wishes to express its sincere thanks to Professor Muntarbhorn for the authorisation to publish his work, and his time to specifically edit his articles for this publication. We believe that the book will provide the international human rights community with another important record and valuable observations on human rights movements in the Asia-Pacific region.

Office of the National Human Rights Commission of Thailand

Contents

Preface

This book brings together a series of articles and studies written between 2000-2002. Many were prepared for United Nations-supported conferences in the Asia-Pacific region.

The first section of the book provides insights into various developments in the region, ranging from key perceptions to current programmes and practices. Many of these developments are inter-related with the support given to the region in recent years by the Office of the United Nations High Commissioner for Human Rights (OHCHR)(Geneva) and other United Nations agencies. Other catalysts in the region include members of civil society, prominently represented by a range of active non-governmental organisations.

The second section examines various key dimensions facing the region, such as the rights of children, refugees and women. There are also challenges related to globalisation, especially sexual exploitation and human trafficking, and to armed conflicts, especially the sensitive issues of anti-personnel mines and humanitarian intervention.

The third section offers a glance at some of the current and future directions for the region. I have also included in the appendices some key Declarations on human rights from this region.

Many friends kindly supported me in preparing the studies in this book. I am particularly grateful to OHCHR, UNESCO, UNHCR and UNICEF for supporting the work leading to some of the studies, and to the Dean of Law and the staff members of the Faculty of Law who helped to provide research assistants to facilitate the collection of some of the background material used for the studies. In particular, I am grateful to my two research assistants - Khun Jiravudh and Khun Damorn. Needless to say, all the views expressed in this book are my personal views.

I would also like to thank warmly the National Human Rights Commission of Thailand, including Prof. Saneh, Khunying Ambhorn, Dr.Choochai and Khun Atchara, for supporting the publication of this book. It is dedicated to my father, Prof. Smarn, who passed away in 2001. Also heartfelt thanks to my family, especially Arthorn. Most of all, I hope that it will inspire more dedicated work to prevent human rights violations and to provide effective help to the victims.

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Chapter I *Asian Perspective on Human Rights: Perceptions, Programmes and Practices*

Introduction:

Asia is a vast continent with a variety of countries and peoples ranging from the very big to the very small. The most populous countries in the world - China and India, are to be found in Asia. The diversity of geography and demography is rendered more complex by the variegation of political systems. Asia is host to the world's largest democracy and a number of authoritarian regimes.

These contrasting configurations indicate that it would be difficult to generalise about the human rights perspective in Asia. Asia is perhaps too heterogeneous for a unified approach to human rights. Moreover, the human rights situation varies from one country to another.

As noted by the World Report 2000 of HUMAN RIGHTS WATCH:

> "Human rights fared poorly in Asia during the year (1999), and nowhere as badly as in East Timor. No outside country and no institution, regional or global, put the necessary pressure on Indonesia to stop the deadly violence of its proxy militias until a scorched earth campaign in September left the soon-to-be-independent country a smoking ruin and virtually its entire population uprooted....The fundamental civil rights of expression, assembly, and association suffered severe setbacks during the year in Pakistan, China, Burma, Malaysia, Singapore and Cambodia....Internal armed conflicts in Sri Lanka, Afghanistan, Indonesia and Burma produced human rights violations by all parties...Governments in Pakistan and

> Afghanistan failed spectacularly to uphold women's rights, and violence against women was a pervasive problem in the region....On the positive side, economic recovery and democratization made steady progress. The more open countries in the region, Thailand and South Korea, recovered rapidly from the effects of the 1997-98 economic collapse..."

With the challenge of contrasts in the region, it would be intriguing to probe how human rights are viewed in Asia and the potential for divergence and convergence.

Perceptions:

How are human rights perceived in Asia ? The answer is that there is more than one perception. Differing perceptions are particularly to be found between governments and non-governmental organisations (NGOs). For instance, in the lead-up to the 1993 World Conference on Human Rights held in Vienna, representatives of Asia-Pacific countries met in Bangkok to concretise a regional stance on human rights. What resulted were, in fact, two stances - one highlighting the governmental viewpoint and the other underlining the non-governmental viewpoint. The former was represented by the 1993 "Bangkok Declaration"(on human rights) and the latter was represented by the 1993 "Bangkok NGO Declaration on Human Rights".

The divergence in approach can be tested from the following angles:

1. **Universality of human rights.**

   In international law, this refers to the primacy of international human rights law and principles as the basic minimum standards applicable everywhere, guaranteed by a range of international human rights instruments and mechanisms. The bottom line is that where there is a conflict between international norms and national practices, the former must prevail.

Some Asian governments, especially the less liberal ones, are uncomfortable with or do not accept the notion of universality of human rights. They advocate State sovereignty and non-interference in the internal affairs of a State as primordial. They view human rights violations as internal affairs, while the international perspective would view them as international matters of concern to the world. Moreover, these governments do not accept the primacy of international norms but are ready to subject them to regional and national "particularities". The bottom line is that for them, where there is a conflict between international human rights standards and regional/national practices, the latter should prevail over the former.

At the practical level, it means that many Asian States are reluctant to become parties to international human rights treaties which are part of such universality. Many have not acceded key international human rights treaties, such as the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and their Protocols. The only treaty to which all Asian countries are parties is the 1989 Convention on the Rights of the Child (CRC). When they accede to human rights treaties, there is also a tendency to make broad reservations to limit their acceptance of rights or reject some rights outright, e.g. in regard to the rights of refugees.

In the Bangkok Declaration, the above stance was visible in the following provisions:

"5. Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States (and the non-use of human rights as an instrument of political pressure);.....

8. Recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

By contrast, NGOs took a more universalist approach to human rights in the Bangkok NGO Declaration on Human Rights which strongly advocated the universality of international human rights standards and its primacy over regional/national particularities, such as violations of women's rights, as follows:

"1. Universality. We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures.

Universal human rights are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty."

At the 1993 World Conference itself, the compromise reached between governments globally was based upon the following provision in the Vienna Declaration and Programme of Action, confirming the primacy of universality of human rights, while bearing in mind particularities as follows:

"5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

2. Indivisibility of human rights.

This refers to the integrated interlink between civil, political, economic, social and cultural rights. In essence, it implies that civil and political rights such as freedom of expression, of thought, of religion and of association must be guaranteed concurrently with such economic, social and cultural rights as the right to education and to an adequate standard of living.

Some Asian governments are uncomfortable with or do not accept the indivisibility of human rights. In particular, they prefer to advocate economic, social and cultural rights instead of civil and political rights. Rather than guaranteeing them concurrently, they advocate that economic, social and cultural rights must be fostered first, and civil and political rights only later. This sequential approach means that "rice" comes before "rights".

NGOs are well aware that through such sequencing, rights become divisible rather than indivisible - a position which they and the international community reject. The NGO stance was underlined by the "Bangkok NGO Declaration on Human Rights" as follows:

"2. Indivisibility. We affirm our commitment to the principle of indivisibility and interdependence of human rights, be they civil, political, economic, social or cultural rights. The protec-

tion of human rights concerns both individuals and collectivities. The enjoyment of human rights implies a degree of social responsibility to the community.....

Violations of civil, political and economic rights frequently result from the emphasis on economic development at the expense of human rights. Violations of social and cultural rights are often the result of political systems which treat human rights as being of secondary importance.

Economic rights involve a fair distribution of resources and income, the right to freedom from hunger and poverty. These can only be protected where people are able to exercise their civil and political rights, for example, the right of workers to organise and form unions to protect their economic rights. Poverty arises from maldevelopment in the face of systemic denial of human rights.

There must be a holistic and integrated approach to human rights. One set of rights cannot be used to bargain for another."

The compromise reached between governments at the 1993 World Conference was based upon the passage cited above. It indicates the primacy of indivisibility of human rights , while bearing in mind regional and national particularities.

3. Rights and duties.

Another major debate in the Asian region is that concerning rights and duties: which come first ? Less liberal governments are prone to advocate that human duties or responsibilities towards the State and towards other humans come before the need to respect human rights. In 1997, a think tank tried to draft a Universal Declaration of Human Responsibilities which would have satisfied these governments, especially by implying broad powers for governments to constrain freedom of expression. The attempt failed. NGOs in the Asian region reacted by adopting the Universal Declaration on the Duties

of Governments and Other Power Groups (1998) to highlight the duty of governments and other groups such as the business sector and non-government armed groups to respect human rights. This NGO perception is illustrated as follows:

> "Article 1. All governments and other power groups, particularly non-government armed groups and business enterprises, are under a duty to guarantee that all human beings are born free and equal in dignity and rights.
>
> Article 2. All governments and other power groups are obliged to promote and protect all rights and freedoms set forth in the Universal Declaration of Human Rights and other relevant instruments, without distinction of any kind, such as race, colour, gender, sexual orientation, language, religion, political or other opinion, national, social or cultural origin, property, birth or other status."

4. Asian Values.

In recent years, the notion of Asian values has been propagated by less liberal Asian countries to indicate that marked economic growth in Asia has been due to strong leadership, diligence, deference to authority, and respect for families and communities. The bottom line of this argument is that individuals do not take precedence over the interests of the family and community and the decision-making power of governments or States. By implication, the human rights of individuals are subordinate to the collective interest.

The sense of government confidence exuding from such argument was largely influenced by the so-called Asian miracle with record growth of the Gross Domestic Product and ex-

ports. However, East Asia suffered a gigantic economic crash in 1997 and is still reeling from its consequences today. The advocacy of Asian values has thus been toned down since then in a decidedly less confident Asia, even though it still rears its head sporadically in less liberal circles.

A major concern is not only the content of what constitutes Asian values but also "who is making the argument ?". Given that Asia is so heterogeneous, it is wiser to talk of "values in Asia" rather than "Asian values". In this respect, there are many values in Asia, such as compassion, non-violence and respect for other human beings and the natural environment, which are universal in content rather than ethnocentric in emphasis. Yet, these are not recognised at all in the so-called Asian values' argument. From the angle of "who is making the argument?", the danger of this argument is that it is a viewpoint instrumentalised by less liberal or authoritarian governments or regimes for their own political ends and survival rather than the genuine interests of individuals and communities. In any case, given the aftermath of the recent economic crisis, those alleged Asian values offer neither adequate preventive medicine nor therapeutic cure for contemporary ills, especially when tested against the backdrop of human rights.

Programmes:

It is well known that there is no inter-governmental human rights system at the regional level in Asia. This differs from the situation in Europe, Africa and the Americas, all of which have such system with a variety of instruments and mechanisms ranging from regional Conventions to commissions and courts on human rights.

The only regional umbrella dealing with possible regional arrangements for the Asia-Pacific region is the periodic or annual workshop of these countries under the aegis of the Office of the United

Nations High Commissioner for Human Rights. To date, workshops have been held in the following venues: Manila 1990, Jakarta 1993, Seoul 1995, Kathmandu 1996, Amman 1997, Teheran 1998, Delhi 1999, and Beijing 2000. The approach adopted by the governments attending these workshops is a step-by-step approach under the term "building blocks" whereby various orientations are highlighted for action and cooperation without necessarily leading to a regional inter-governmental human rights system. The four key areas for such action and cooperation agreeable to these governments are:

- development of national human rights action plans;
- development of national institutions, such as national human rights commissions, for the promotion and protection of human rights;
- development of human rights education;
- strategies for the realization of the right to development and economic, social and cultural rights.

Details of the latest activities on this front at the country level are given in the section below.

The earlier workshops were instrumental in promoting dialogue between Asia-Pacific countries and enunciating an approach acceptable to Asia-Pacific countries with different socio-cultural and political constituents. For example, the Conclusions of the 1998 Teheran Workshop underlined the following convergent areas :

- reaffirmation of the universality, indivisibility and interdependence of human rights "in a region proud of its rich cultures, religions and diversities";
- reaffirmation of the commitment to the Vienna Declaration and Programme of Action (of the World Conference on Human Rights);
- emphasis on a step-by-step and building blocks approach;
- commitment to developing and strengthening national capacities, in accordance with national conditions, as the strongest foundation for regional cooperation;

- adoption of a Framework for Regional Technical Cooperation for the promotion and protection of human rights.

The technical cooperation element is new and is leading to more support for a programmatic response based upon activities in the region dealt with below. This was reinforced at the 1999 Delhi Workshop, particularly in terms of concrete financial allocations for the region.

In the meantime, 1999-2000 witnessed another innovation: the organisation of inter-sessional workshops for Asia-Pacific countries to deal specifically with the four key areas identified above in greater detail. The Workshop on the Development of National Plans of Action for the Promotion and Protection and Protection of Human Rights in the Asia-Pacific Region was held in Bangkok in July 1999. The Conclusions from the Workshop highlighted the following:

- the development and implementation of national human rights action plans may significantly advance human rights promotion and protection;
- broad national participation has a key role in development of such plans;
- all governments are encouraged to develop such plans, in accordance with national priorities.

The workshop also suggested possible elements of what should be included in a national human rights action plan, e.g. establishment of a national coordination committee for the development of such plans, identification of key groups and issues for action, measurable benchmarks, and monitoring and evaluation of the implementation of these plans.

With regard to national human rights institutions, the Asia-Pacific region already has a network of these institutions in the form of the Asia-Pacific Forum of National Institutions, particularly to share information and strengthen ties, and for the past few years, its mem-

bers meet annually with the support of the United Nations. It has also set up an Advisory Council of Jurists composed of eminent jurists from the region to help evolve ,in a non-binding manner, human rights jurisprudence. The Fourth Annual Meeting of the Asia-Pacific Forum of National Human Rights Institutions was held in Manila in September 1999 and its Conclusions reaffirmed the need for national human rights institutions to be independent and pluralistic. Various key issues discussed included national human rights institutions and economic and social rights; the role of national human rights institutions in advancing the human rights of women; national institutions and non-governmental organisations: working in partnership; the role of public inquiries in promoting an protecting human rights. The next meeting is due in New Zealand in August 2000.

With respect to human rights education, two workshops were organised with the support of the United Nations in 1999-2000. The Sub-regional Training Workshop on Human Rights Education in Northeast Asia was held in Seoul in December 1999. Its Conclusions underlined the need for countries to adopt a national strategy in accordance with the United Nations Guidelines for National Plans of Action for Human Rights Education and the United Nations Decade for Human Rights Education (1995-2004). It emphasised particularly:

- the need for training of teachers and other educational personnel;
- the need for curriculum development and extra-curricular activities on human rights;
- the need for laws and policies supportive of human rights education;
- the need for human rights education in the classroom, including the call for classroom/school management to ensure that a human rights culture prevail in the classroom.

The issue of human rights education was taken further, from the angle of national planning, at the Inter-sessional Workshop

on National Plans of Action for Human Rights Education in the Asia-Pacific Region held in Tokyo in January 2000. The Conclusions from the Workshop identified key orientations for the Asia-Pacific region, including the following:

- human rights education should take an integrated approach to encompass all human rights civil, political, economic, political, social and the right to development;
- it should balance between rights and responsibilities as recognised by the Universal Declaration of Human Rights and other international instruments;
- human rights education should be participatory, pluralistic and non-discriminatory;
- national human rights action plans are important for promoting a human rights culture;
- human rights education for all those involved in the administration of juvenile justice is a priority;
- the human rights education needs of the vulnerable and marginalised must be met;
- national human rights education plans should be a component of or complementary to national human rights action plans and other relevant plans;
- national plans should be based upon needs assessment and country priorities;
- human rights education should be integrated into all levels of formal education; training of professional awareness raising, and law and policy reform;
- adequate resources need to be allocated for human rights education, and this is linked with potential for assistance from the United Nations Technical Cooperation Programme in the Field of Human Rights;
- an important occasion for assessing the impact of national plans is the global mid-term review of the United Nations Decade for Human Rights Education.

In regard to economic, social and cultural rights and the right to development, the Intersessional Workhop on Economic, Social and Cultural Rights and the Right to Development in the Asia-Pacific Region was held in Sana'a in February 2000. It underlined the following concerns:

- it affirmed that effective public participation, including the full participation of women, of civil society, including NGOs and the private sector, is essential for implementing the right to development;
- it identified various key obstacles to be addressed including extreme poverty, environmental degradation, excessive foreign debt, unilateral coercive measures, unbalanced trade regime, limited access to technology and marginalisation in the social and economic fields;
- it affirmed the important role of the human rights treaty system as a legal framework for tackling economic, social and cultural rights;
- it called upon States and other actors to bear in mind human rights in national development planning;
- it affirmed the importance of international cooperation and official development assistance to address these issues.

An illustrative framework for evaluating the implementation of economic, social and cultural rights and the right to development was also evolved for the workshop. This included the interrelationship between countries and the International Covenant on Economic, Social and Cultural Rights, the current country situation in such areas as social security, education, standard of living and employment, follow-up to the World Summit on Social Development (1995) and development cooperation.

The four areas of concern addressed through these inter-sessional workshops were channeled to the most recent Asia-Pacific Work-shop - the Eighth Workshop on Regional Cooperation for the

Promotion and Protection of Human Rights in the Asia-Pacific Region held in Beijing in March 2000. The Conclusions from the Workshop reinforce measures in favour of national human rights action plans, human rights institutions, human rights education, and the realization of economic, social and cultural rights and the right to development with more targeted programming and activities linked with the United Nations-supported Framework for Regional Technical Cooperation for the Asia-Pacific Region. The new thrust is to implement more programmes based upon activities at the regional, sub-regional and national levels in the four areas mentioned over the next 24 months, taking into account the World Conference against Racism in the year 2001. Examples of these programmes include:

1. For national human rights action plans:
   - at the regional level:
     - disseminate the United Nations supported handbook on the development of national action plans;
     - promote training for reporting to human rights treaty bodies
   - sub-regional level:
     - organise a sub-regional workshop on national human rights planning with emphasis against poverty, combating racism and on women's and children's rights;
     - organise a sub-regional technical workshop on human rights for parliamentarians;
     - offer technical cooperation to states to develop such plans
   - national level:
     - provide technical support to developing countries to evolve national human rights action plans

2. For national human rights institutions:
   - regional level:
     - provide support for the annual meetings of the Asia-Pacific Forum of National Institutions, especially in the preparations for the World Conference Against Racism;

- assist the training programme on protection approaches

- sub-regional level:
  - support the inter-sessional workshop on the role of national institutions in the protection of women's rights (to be held in Fiji) and one other workshop on media and human rights education;
  - co-organise another course on economic, social and cultural rights targeted to national institutions

- national level:
  - support the strengthening of national institutions;
  - encourage activities on women's rights, child rights and the rights of vulnerable groups

3. For human rights education:
   - regional level:
     - conduct and disseminate the findings of surveys on human rights material and programmes in the region;
     - publish a study on popular and non-formal education methodologies on human rights

   - sub-regional level:
     - organise three sub-regional workshops to develop human rights training programmes, including for those in the administration of justice and for marginalised groups;
     - organise a human rights workshop for the judiciary;
     - offer technical support for programming

   - national level:
     - provide technical support for human rights education plans and sectoral-based human rights education

4. For the realisation of economic, social and cultural rights and the right to development:

- regional level:
  - organise a workshop on the impact of globalization on economic, social cultural rights and the right to development as related with vulnerable groups
- sub-regional level:
  - organise a workshop on ratification of the International Covenant on Economic, Social and Cultural Rights and related reporting obligations;
  - organise a workshop on the integration of human rights into national development plans;
  - offer technical assistance
- national level:
  - provide technical assistance and advisory services on the issue

In the future, therefore, it is expected that there will be more activities in building the capacity of key actors to respond to human rights in the region. However, as always with human rights, it is not so much the perception or the programme which is problematic but its implementation in practice.

From another angle, at the regional level, the NGO sector in Asia is active and well coordinated on many fronts. There are both NGOs dealing generally with human rights and those dealing with specific issues such as women's rights and child rights. They play a pivotal role in advocating human rights, monitoring their implementation, and assisting and protecting victims of violations. They have built a variety of networks ranging from general human rights matters to specific concerns such as women's rights and child rights. Led by the NGO called Asian Human Rights Commission based in Hong Kong, a number of NGOs adopted in 1997 the non-governmental Asian Human Rights Charter. The thrust of the Charter is to advocate various key actions including:

- strengthening of guarantees for human rights in national constitutions;

- ratifying human rights treaties;
- advocating review of domestic laws inconsistent with human rights standards;
- maximising the role of the judiciary in enforcing human rights;
- enable social organisations to litigate on behalf of the victims;
- establishing national human rights commission and other specialised institutions for human rights protection;
- setting up People's Tribunals which are not based upon adjudication but which help to raise consciousness of people's problems guided by moral and spiritual foundations.

Interestingly, this Charter does not only advocate human rights but sustainable development and other essentials such as democracy and peace. At times it posits various rights not yet recognised internationally. For example, it advocates the right to cultural identity, an element not yet clearly found in international instruments in this manner:

> "The Asian traditions stress the importance of common cultural identities. Cultural identities help individuals and communities to cope with the pressures of economic aid and social change; they give meaning to life in a period of rapid transformation."

On another front, at the sub-regional level, there are various burgeoning intergovernmental human rights systems. In West Asia, there is the Arab Charter on Human Rights (1994). It is not yet in force, although ratified by Iraq and Syria. It stipulates a variety of rights and provides for a monitoring committee. Many of the rights such as the right to life, liberty and equality before the law under the Charter are similar to international standards at first glance. However, the Charter tends to differentiate between the rights of citizens and other persons; this would counter the principle of non-discrimination which is at the

heart of international human rights norms. The Charter also fails to recognise the right to freedom from slavery and the right to change one's religion. Reference in the Charter to national security may also provide too many constraints on the enjoyment of human rights.

There are also attempts to deal with human rights issues in a more specific manner at the sub-regional level. For example, South Asia has been drafting a specific Convention against the trafficking in women and children. In the Association of South-east Asian Nations (ASEAN), there are currently attempts by NGOs to put forward a draft document to governments to establish an ASEAN Human Rights Commission which will take complaints from member States and individuals where the local remedies have been exhausted.

Practices:

In the light of the above developments, what are the practices at the national level in Asia ? On the positive front, a greater number of countries are becoming democratic and have discarded military regimes. In recent years, these include the Philippines, Indonesia, Thailand and East Timor. The right to self-determination has won, despite many traumas, in some settings such as East Timor. Many new laws and policies have been adopted in a wide range of countries to promote human rights. These range from new Constitutions to laws and policies to protect vulnerable groups such as women and children. Law enforcement has also been improved in some areas. For example, various investigations of human rights violations have led to the dismissal or resignations of key military personnel responsible for these violations, such as in Indonesia.

When tested against the four regional concerns mentioned above, progress has been made in some quarters. In regard to human rights action plans, Indonesia and the Philippines have adopted such plans and other countries, such as Thailand, are preparing to do so with the following commonalities :

- linkages between the national setting and international human rights standards, implying that the latter can help to raise standards nationally, while not forgetting local wisdom;
- coverage of at least civil, political, economic, social and cultural rights, with varying emphases on individual and collective rights, related obligations, and target issues, such as education, health, shelter, employment, poverty, and freedom of association and expression;
- target groups in vulnerable positions such as women, children, the elderly and those with disability, to be assisted and protected;
- suggested reforms of laws, policies, programmes, practices and mechanisms to improve human rights promotion and protection;
- support for national institutions, such as national human rights commissions, for the promotion and protection of human rights;
- partnership with key government agencies to implement the national human rights action plan;
- capacity-building of power groups such as the police and judiciary to respect human rights;
- cooperation with civil society, including NGOs, in the formulation and implementation of the plan;
- allocation of resources to implement the plan;
- establishment or identification of national monitoring mechanism to follow-up the implementation of the plan .

While these plans are welcome, there is much more room for their effective and sustainable implementation. A wider range of countries also need to adopt them.

With regard to national human rights institutions, this is very much the flavour of the month. A number of countries have established national human rights commissions and they include Indonesia, the Philippines, India, Sri Lanka, and most recently Malaysia. Others

about to be established include those in Thailand, Nepal, Bangladesh, Cambodia and South Korea. The Pacific is represented by commissions in Australia, New Zealand and Fiji. Several of these commissions have done good work in advocating law reform and have undertaken key investigations which have led to exposure of situations concerning human rights violations as well as accountability and an end to impunity of the perpetrators. Several have active human rights education campaigns not only for the general public but also for law enforcers, including the military, the police and the judiciary. Some have become involved in not only civil and political rights but also economic, social and cultural rights, including action against human trafficking affecting women and children. However, on the negative front, some of them are not as independent or pluralistic as they could be. There is thus the danger of manipulation by the government or existing power bases in some cases. For example, although Iran claims to have a national human rights commission, there is a lingering question concerning its independence. While Cambodia does not yet have a national human rights commission, it has a government backed human rights committee as well as two other committees in parliament, none of which adequately satisfy the test of independence and pluralism advocated by the United Nations.

With respect to national human rights education, there is greater emphasis on such education in some Asian countries. For example, four Asian countries have specifically human rights education plans, namely Japan, the Philippines, Turkey and Uzbeckistan. Thailand is finalising her plan which will go hand in hand with the other plan - the national human rights action plan. The existing human rights education plans vary in shape and content. For instance, Japan's plan is much linked with the United Nations and Japan's own history. It aims to promote human rights through the whole educational system and the issues to be addressed include women's rights, child rights and the rights of ethnic minorities. The Philippine plan is more detailed with regard to the activities to be undertaken and sets the ambitious goal of 100% human rights literacy in the country. The

target groups range from media, women, children to law enforcers and insurgents. Examples of planned programmes to integrate human rights education into the community include client-based human rights education and training programmes for the military, police and other law enforcers; for academic circles; for local government units; for national government employees; for overseas contract workers; for NGOs; for the judiciary and prosecutors; for special interest groups such as women, children and those with disabilities.

Current human rights education activities in the above countries are exemplified by the following:

- decentralisation of human rights education by means of local action plans in Japan;
- Japanese prefecture (Kanagawa)'s human rights message exhibition against bullying and discrimination;
- setting up of Barangay village level human rights action centres in the Philippines;
- production of human rights educational materials in the Philippines, such as manuals of child rights for law enforcers;
- Memorandum of Understanding between the Philippine Armed Forces and the Philippine Human Rights Commission to promote and protect human rights;
- integration of human rights and humanitarian law concerned with the protection of civilians in armed conflicts into military courses in the Philippines;
- establishment of human rights desk in the armed forces of the Philippines liaising with the Philippine Human Rights Commission;
- training of human rights' trainers in the Philippines;
- organisation of networks for human rights' defenders in the Philippines;
- integration of human rights into the educational curriculum in the Philippines;
- use of village leaders to reach out to the community in the Philippines;

- promotion of artistic and cultural campaigns for human rights in the Philippines;
- establishment of an inter-agency task force at the national and regional levels for human rights education in the Philippines;
- creation of a national association of human rights educators in the Philippines;
- cooperative agreement between the Philippine Human Rights Commission and various partners - governmental and non-governmental - to promote human rights education.

Despite these developments, a key challenge is that human rights education cannot only be based upon the quantity of the education available but must also be based upon the quality of the education. The impact on this front remains obscure in many settings. A critical question without an adequate answer so far is: have these plans and programmes, in practice, led to major changes in the poputlion's knowledge, attitudes and behaviour towards human rights ?

With regard to the fourth regional concern - the realization of economic, social and cultural rights and the right to development, the record in practice is mixed, aggravated by the aftermath of the economic crash of 1997. Poverty is the key issue facing many countries, compounded by massive rural-urban migration, huge debts, overexpenditure on arms, environmental degradation and unsustainable development patterns. While many developing countries such as India, Thailand, China and Malaysia have for long had national development plans to address some of these issues, in the past they tended to be too top-down and not human-centred enough. The mindset was much influenced by export led growth based upon the Gross Domestic Product, without adequate attention for policies of equity/social justice such as income distribution and land re-allocations. In this regard, the annual Human Development Reports published by the United Nations Development Programme illustrate a very varied panoply in

Asia, ranging from some of the world's poorest (and least liberal) countries such as Afghanistan and Burma to the better economically endowed countries such as Singapore and Brunei.

Even in the poorest settings, good practices can be identified if there is the political and social will to cater to development needs and human rights. For instance, Bangladesh has the Grameen bank which provides small loans to women, and it has been found that they are very responsible in paying back the loans. In Thailand, the Forum of the Poor has been instrumental in representing the demands of the poor, including those displaced by dams, and in ensuring improved compensation for them. Public hearings have also emerged as a way of sharing information and examining options before decisions are taken affecting people's development. In the Philippines, there is a very strong NGO lobby dealing with general development and human rights matters and specific issues such as street children which provide a voice for the poor, the dispossessed and the marginalised. In India, there is a parallel experience with strong advocacy against the constructive of massive dams such as those concerning the Narmada river which cause massive displacements of people. There are active grassroots movements representing vulnerable groups including those affected by the caste system, such as the Dalit. However, in authoritarian countries, independent NGOs are not allowed to exist or are very closely monitored by the authorities.

On another front, many Asian countries have failed to accede to the International Covenant on Economic, Social and Cultural Rights which could otherwise provide guidance for a more rights based approach leading to responsive laws, policies, programmes, practices, mechanisms and resources. Given the fact that the majority of people in Asia are still in rural areas, the challenge is much related to rural development and the shift to urbanisation with massive migrations of people and the ensuing pressures. In many countries, this is linked with the fact that wealth, including land, is in the hands of a few, often linked with the urban elite. There are few policies of equity to redistribute such wealth, while social safety nets such as state-based social security are often missing or merely nascent.

Interestingly, in principle, Asian countries are agreeable to the 1986 (United Nations) Declaration on the Right to the Development which calls for not only external restructuring but also international restructuring to respond to the human face of development. However, few countries manage to fulfil the aspirations of this Declaration which posits a comprehensive approach - based upon the totality of civil, political, economic, social and cultural rights reinforced by the precept of equity embedded in the following stipulation:

"Article 8

1. States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, **inter alia,** equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.
2. States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights."

Not only is there lax implementation at the national level in many countries, but there is also a distortion by some countries whereby they would prefer to emphasise the economic, social and cultural aspects of development to the neglect or omission of the civil and political aspects. In other words, development without genuine people's participation leading to a democratic system.

From the angle of vulnerable, disadvantaged and marginalised groups in this perspective, there is often a paradox: while progress has been made on some fronts, there are numerous lapses in practice. Progress is seen in particular through the introduction of new laws and policies in many countries with positive impact against human

rights violations, e.g. laws against human trafficking. More law enforcers are being trained on human rights. In the Philippines, there is even the condition that military officers will not be upgraded in rank unless they have done a course on human rights. Investigations by various bodies ranging from national human rights commissions to the judiciary on a variety of issues ranging from extra-judicial killings to environmental harm have led to greater accountability from the perpetrators in such countries as Indonesia and India. However, the other side of the coin is that many systems suffer from weak law and policy enforcement, replete with corruption and cronyism. This is further plagued by undemocratic regimes, armed conflicts, lack of good governance, and unsustainable development patterns.

There are other key issues/groups which are crucial for Asia today, including the following:

1. Women's rights. A greater number of countries are now becoming parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. For example, in the 10 member country ASEAN, all but one country have acceded thereto. Many countries have improved their laws to overcome discrimination and violence against women. However, in addition to the dilemma of lack of effective implementation, transgressions persist. These range from negative cultural practices such as the sale of women into sexual slavery to more modern forms of cross-border trafficking and violence. Discrimination against women is found in variety of fields ranging from family and succession to education, health care, anti-poverty measures and involvement in economic, social and political life. In many countries, access to decision-making positions including in politics is very limited.

2. Child rights. As noted earlier, the CRC is the sole human rights treaty to which all Asian countries have acceded. There have been many positive law and policy improve-

ments in recent years in many countries, e.g. laws on child welfare and against child abuse and exploitation. However, implementation is again an uphill struggle, and violations persist. These vary from discrimination against the girl child to poverty, neglect, abuse, exploitation and multiple forms of violence against children. In several countries, there is the tendency to regard child rights as the rights of the nationals/citizens of a country rather than the rights of all children in the country, thus countering the international principle of non-discrimination. Decisions affecting the lives of children also often infringe the basic tenets of the CRC, including the best interests of the child, the right to life, survival and development, and respect for the views of the child.

3. Those with disabilities. Some countries have moved towards new laws and policies to assist this group. Countries with good state welfare systems are more likely to have direct facilities for this group, but few Asian countries are in this position. Problems vary from discrimination in the form of lack of access to education , employment and health care to too much institutionalisation without adequate facilities to stay in family and community settings. There is thus lack of "inclusion" of those with disabilities in many countries in a humane setting.

4. Refugees. Asia is home to millions of refugees who cross borders in search of asylum and has largely provided commendable refuge to them. Yet, few Asian countries have acceded to the 1951 Convention relating the Status of Refugees and its 1967 Protocol. Many Asian countries also cause the massive flight of this group through persecution, warfare and human rights violations. While prevention is key, the components of prevention including respect for human rights, peace and democracy have not been fostered adequately in many settings. During flight,

refugees are also subjected at times to push-backs and deportations which endanger their lives. Upon arrival in the country of refuge, while they may enjoy temporary refuge, their access to the basics of life such as health care, education and employment is limited. In their search for long-term solutions, their options are often limited. Many countries where they seek refuge refuse to let them settle there permanently, while third countries are also reluctant to let them resettle. While voluntary repatriation to the country of origin is at times a potential maximum solution, this is not possible because the political conditions in the country of origin are not forthcoming. Precisely because they are often in a limbo status, they often find themselves discriminated against as stateless persons.

5. Internally Displaced Persons. This group has come to fore increasingly in recent years and differs from refugees in that they have not crossed borders. They may be displaced for a variety of reasons. In Asia, these range from extreme poverty to armed conflict and development induced factors, such as dam construction, but often it is warfare that pushes them to leave. While the international community has moved towards guidelines for their protection and assistance, their plight in practice is often precarious and unlike refugees, the international regime for their protection is limited in scope; there is no treaty that specifically guarantees their rights, except general human rights treaties. At the national level, the challenge is to respond to the call to prevent the conditions leading to their displacement, and these interrelate with sustainable development, human rights, democracy and peace, as well as providing protection when they are displaced.

6. Workers/Migrants. Millions of workers/migrants are on the move in Asia whether within countries or across borders. While most countries have labour laws and policies that

can accord them some protection, the situation is more complex when they enter a country illegally. This may also be due to human trafficking whereby criminal elements ply their trade of profiteering from people who are searching from employment. In cross border cases, undocumented migrants are often classified as "illegal immigrants" subject to deportation without adequate guarantees for their safety. If they manage to work in the country to which they migrate, they are also endangered by discrimination, abuse and exploitation ranging from low pay to lack of welfare. Whether or not they are documented, they should enjoy basic rights, but the fact is that most countries have not responded to these rights effectively, and they have not acceded to the main international instrument on the subject, namely the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

7. The elderly. Traditionally in Asia, it was the extended family which took care of the elderly. However, family patterns are changing, especially with continuing migration from rural to urban areas, and families are becoming more nuclear. Traditional social safety nets offered by the extended family are thus in decline. This raises a question not yet adequately answered by many countries. Will the State step in to help the elderly as part of social security? What is role of personal social insurance in preparing for one's old age ? What should be the contribution of the private sector ? These are emerging issues which will need more attention from Asia in future, granted that the region should also try to support and sustain the family and the community as the essence of traditional social safety nets.

8. Prisoners and The Administration of Justice. This heading involves not only political prisoners who are sadly rampant in many undemocratic countries but also the other prison-

ers who are affected by deficient justice systems. While guidance on this issue is offered particularly by the International Covenant on Civil and Political Rights and related instruments, many Asian countries have failed to accede to these instruments. While there have been some improvements in recent years, such as reform of the juvenile justice in some countries, problems persist. These range from the use of capital and corporal punishment to the employment of leg chains, inhumane detention facilities, torture and lack of access to a fair trial. Political prisoners are particularly affected by national Constitutions which serve the elite rather than the people, repression in the form of lack of basic freedoms such as the right to freedom of expression and assembly, and the pervasiveness of draconian national security laws which are used by governments to curb opposition, such as through preventive detention. The judiciary is also controlled in some countries by the ruling elite and there is no real independence. Some governments have also manipulated the judiciary to impose exorbitant fines on those opposed to their regimes as a way of suppressing political opponents. The challenge is much linked to lack of democracy and good governance.

9. Minorities and Indigenous Peoples. Most countries would claim that they provide for the rights of minorities and indigenous peoples in their systems. However, the practice is often deficient with rampant discrimination against these groups. Negative practices include lack of access to education, nationality, and welfare, and inadequate attention to their cultural aspirations such as the preservation of their languages and religions. There is also an unsettled issue concerning their aspirations in terms of political participation and self-determination. Precisely because these are not responded to adequately, several wars in Asia and else-

where relate to conflicts between these groups and other groups. In terms of accession to international treaties on this subject, several Asian countries have yet to accede to the Covenants mentioned above. There is also limited ratification of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

10. Those with HIV/AIDS. The advent of HIV/AIDS has posed critical challenges to Asia in recent years, with one of the faster rates of growth globally. On the constructive front, some Asian countries have been in the forefront of humane policies towards those with HIV/AIDS. These include the involvement of the business sector in promoting humane policies for those in the workplace. However, other countries are still responding in a less than humane manner by segregating those with HIV/AIDS, forcibly testing persons for HIV/AIDS, and discrimination and stigmatization. While the international standards related to the instruments above are clearly in favour of non-discrimination and humane treatment of those with the disease, there is much more room for responsive laws, policies and practices in the region.

11. Civil Society, including NGOs, human rights defenders, the media and the business sector. The important role of civil society in human rights promotion and protection cannot be underestimated in the region. At best, they are key partners with governments in helping to implement human rights. However, often they find themselves in conflict with governments in trying to protect the rights of others, and their own rights are often jeopardised. Their voices have found the need for more coordination and networking among themselves as a force to counter the malpractices of governments and other power groups. While many members of civil society manage to function quite effectively under such stress, others find themselves

oppressed and suppressed by undemocratic regimes and those antithetical to human rights.

Directions:

The above scenario paints an ambivalent picture for Asia. From the perspective of progress, many positive developments have been noted including the advent of more national human rights action plans, more national human rights institutions, more human rights education, and more laws and policies concerning development issues and a variety of rights and related groups. Yet, the negative side is all too evident from the analysis above.

With the advent of the new millennium, there are various key directions for the region which should enhance the perspective of more humane society in Asia. These include the following priorities as a pivotal Agenda of preferred practices for all countries:

- accession to international human rights instruments and effective implementation;
- withdrawal of reservations to international human rights instruments;
- democratization and multi-party system;
- people-based national Constitution and constitutional process;
- reform of national security laws to reflect human security;
- elimination of preventive detention and promotion of due process of law consistent with international standards;
- promotion of freedom of expression, assembly, religion and thought;
- accountability of public officials and an end to impunity;
- promotion of independent and transparent judiciary and other modes of dispute settlement accessible and affordable to the people;
- eradication of poverty and concretization of equitable policies to distribute land and other resources;
- development of safety nets, such as social security for those in need;

- respect for the rights of vulnerable groups including women, children, those with disabilities, workers/migrants, refugees, internally displaced persons, prisoners, minorities/indigenous peoples, the elderly, those with HIV/AIDS and members of civil society;
- improvement of the justice system and humane treatment of suspects, prisoners and detainees;
- capacity-building of law enforcers to promote integrity and counter corruption;
- promotion of community participation and that of civil society;
- elimination of capital and corporal punishment and other inhumane practices;
- eradication of negative cultural practices, especially through a wider mobilization campaign;
- protection of the environment;
- promotion of human rights education and peace studies;
- implementation of sustainable development activities;
- conflict prevention, resolution and activities, such as youth programmes, to foster cross-cultural understanding between different ethnic groups;
- dissemination of human rights to a broad public, including power groups such as government officials, politicians, religious leaders and the business sector;
- enhancement of local, national, sub-regional and regional capacities, programmes and interchanges for the promotion and protection of human rights;
- identification of and support for good practices and case profiles for human rights, peace, democracy, sustainable development and good governance, promotion of integrated actions on these issues, and elimination of malpractices.

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Chapter II

Stocktaking of On-going Asia-Pacific Initiatives:Towards Regional or Sub-regional Arrangements for Human Rights ?

Introduction:

The issue of establishing (possible) regional or sub-regional inter-governmental arrangements for the promotion and protection of human rights in Asia and the Pacific has been in the public eye for decades. The term "arrangement(s)" may be interpreted broadly and/or narrowly. For the former - broad - meaning, it may be used to imply one or more activities linked by an informal or semi-formal framework. For the latter - narrow - meaning, this can be used to refer to the need for a formal treaty and related system.

The challenge of concretising "arrangement(s)" in this region is of great international interest. This is principally due to the fact that unlike Europe, the Americas and Africa, the Asia-Pacific region has, to date, no inter-governmental human rights treaty and system on this matter. This does not necessarily imply that the human rights record in the region is better or worse than in other regions. However, it means that the political will has not been ready to make the quantum leap in the direction of an inter-governmental system.

In the late 1980s, some delegates from a non-government lawyers' organisation called LAWASIA proposed a "Pacific Charter of Human Rights" in the hope that it would become the basis for an inter-governmental system. However, this was not to be, and the initiative faded from view.

A key development in the 1990s was the World Conference on Human Rights held in 1993 in Vienna which adopted the Vienna Declaration and Programme of Action of the World Conference; Asia-

Pacific countries took part concretely in this process. Interestingly, in the lead-up to the World Conference, two historic meetings covering the Asia-Pacific region were held in Bangkok. One consisted of governments which adopted the Asia-Pacific (Governmental) Declaration of Human Rights ("The Bangkok Governmental Declaration") in relation to the Asia-Pacific setting. The other was comprised of non-governmental organisations (NGOs) which adopted the alternative Asia-Pacific (Non-Governmental) Declaration of Human Rights ("The Bangkok Non-governmental Declaration").

Both of these Bangkok Declarations were and are insightful for a number of reasons. First, they provide a linchpin for understanding the perceptions of human rights in the region. Second, they bear upon the question whether the region should have an inter-governmental system and on what conditions.

With regard to the first tenet, the Bangkok Governmental Declaration highlighted key elements which still shape governmental attitude towards human rights today. These include the following concerns in that Declaration: the Asia-Pacific governments

> "5. emphasise the principles of respect for national sovereignty and territorial integrity...non-interference in the internal affairs of States and the non-use of human rights as an instrument of political pressure;
>
> 7. stress the universality, objectivity and non-selectivity of all human rights and the need to avoid double standards;
>
> 8. recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."

By contrast, the Bangkok Non-governmental Declaration highlighted the indivisibility and universality of human rights as follows:

"1. Universality:

...Universal human rights standards are rooted in many cultures...

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty."

At the Vienna Conference, the compromise between the universality of human rights and national/regional particularities was stated as follows in the Vienna Declaration and Programme of Action :

"5: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious bàckgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."

With regard to the second tenet - targeted to the issue of an inter-governmental human rights system and the various pre-conditions concerning its establishment, it is interesting that the Bangkok Non-governmental Declaration advocated as follows:

" ix) while welcoming any initiative by governments to set up a regional mechanism for the protection and promotion of human rights in the Asia Pacific region, to ensure that it is subject to the following conditions:

- if a regional commission is set up, it should be mandated to apply without reservations the International Bill of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention against Torture, the Declaration of the Right to Development;

- member States of this regional commission must ratify or accede to the above international instruments prior to their membership;
- the right of individuals and NGOs to petition the regional Commission must be guaranteed;
- such petitions or appeals should not preclude concurrent appeals to the various UN mechanisms for the protection of human rights;
- no member of this regional Commission should hold an official position in Government concurrently, and members should be appointed in consultation with NGOs;
- there should be a regular reporting system by States on their implementation of human rights standards domestically with NGO participation in the drafting of the reports;
- meetings of this regional Commission and its deliberations should be generally open to the public;
- no aspect of government operation and no official should be immune from scrutiny or investigation, including military and security forces;
- the regional commission should have full investigative powers;
- a separate body should be set up to adjudicate complaints;
- member governments must be required to disseminate information on the regional commission and how it operates."

Recent Initiatives:

In recent times, have there been any initiatives of note to promote human rights-related arrangements in the region ? The answer can be given at three levels: regional, sub-regional and national. This study will concentrate on the first two levels.

A) Regional Initiatives

At the regional level, the UN has been supportive of annual workshops on human rights which bring together governments from the region, with some NGO access. The approach taken is step-by-step based upon "building blocks" rather than to advocate immediately the need for an inter-governmental treaty and system for the Asian or Asia-Pacific region. The four building blocks agreeable to governments are the development of national human rights action plans; the promotion of human rights education; the development of national human rights institutions such as national human rights commissions; and the realisation of the right to development and economic, social and cultural rights. The Bangkok Workshop (2001) for the Asia-Pacific region for which this study is prepared is part of this process, and an evaluation of the implementation of these building blocks for the period 1998-2000 is now available. It is worth noting also that at the Beijing Workshop in 2000, the Conclusions of that Workshop included the Beijing Plan of Action which opened the door to more parallel human-rights related activities - regional, sub-regional and national - concurrently.

On another front, a network of national human rights institutions has grown in the form of the Asia-Pacific Forum of National Human Rights Institutions open to those countries with such institutions as national human rights commissions. While not a governmental network or body, it provides an avenue for activities such as workshops on key issues of concern to the region and it holds annual meetings. In recent years, it has organised consultations on the role of NGOs and national human rights institutions, child rights and women's rights. It has established an Advisory Council of Jurists drawn from eminent human rights lawyers (from the member countries) to help evolve human rights' jurisprudence in the region, most recently with studies on the death penalty and child pornography on the Internet. The Asia-Pacific Forum is supported partly by the UN backed framework referred to above. This linkage is useful and im-

portant. For instance, in the Beijing Plan of Action, there is a call to support the annual meeting of the Asia-Pacific Forum, bearing in mind the World Conference against Racism to be held in 2001.

On another front, in 1997 the fruits of NGO cooperation appeared with the adoption by NGOs of their Asian Human Rights Charter. It is, of course, not a government document, but it posits key perspectives linked with human rights in the region. It highlights the universality and indivisibility of human rights and provides focus for the protection of specific groups such as women, children, those with disabilities, those with HIV/AIDS, and prisoners. It does not cover only human rights but also environmental protection, and underlines the right to life, the right to peace, the right to democracy, the right to development and the right to cultural identity. Interestingly, it recommends these measures for the region: **(inter alia)**

- reinforce human rights guarantees in national constitutions;
- ratify international human rights instruments;
- review domestic legislation and administrative practices for consistency with international standards;
- maximise the role of the judiciary in human rights' enforcement;
- enable social organisations to take action on behalf of the victims;
- set up national human rights commissions;
- recognise people's tribunals, not as courts but as moral instruments of pressure.

Asia-Pacific NGOs have also been active in evolving human rights standards on other fronts in a more general manner, although also pertinent to the Asia-Pacific region. For instance, a number of such NGOs adopted the Universal Declaration on the Duties of Governments and Other Power Groups in 1998. In this NGO Declaration, the duties of governments and various power groups, such as the business sector, are voiced in the realisation of human rights, peace, democracy, sustainable development and environmental protection.

The most recent initiative close to governments is the proposal by the Association of Asian Parliaments for Peace (AAPP) in the form of a draft Charter of Human Rights for Asian Nations (2000). The Draft Charter provides a list of human rights, some of which are similar to international human rights instruments, e.g. the right to life, the right against torture and the right to an adequate standard of living. However, it has been heavily criticised for introducing elements lower than international standards and would thus jeopardise human rights in reality. Some of the anomalies of the draft available in 2000, potentially in conflict with international standards, include:

- the position that it is lawful to detain persons for preventing infectious diseases;
- broad discretion to the courts to prevent the media from covering trials;
- the proposal for the establishment of an Asian Commission of Human Rights elected by the AAPP, without genuine guarantees for the independence of the members of the Commission;
- within the international human rights framework, an inter-governmental system at the global or regional level usually requires a treaty or agreement to set it up, whereas the AAPP initiative does not seem to require this.

In a report of NGOs in response to the Draft Charter in October 2000, the following principles were highlighted:

"- There should be no lowering of human rights principles and standards already adopted in international, regional and national conventions, treaties and other legal instruments;
- Principles of universality, indivisibility, interrelatedness, and interdependence, and non-selectivity, in concept and in practice, must be strictly adhered to;
- The primary objective of all regional cooperation on human rights must be the realisation of all human rights (economic, political, civil, cultural and social) for all;

- Effective implementation of all human rights instruments and provisions for ensuring timely and effective remedies for victims of human rights violations must be advanced at both regional and national levels;
- Any regional charter must reaffirm active, free, full and effective participation for all in all aspects of development;
- All processes for drafting, reviewing, adopting and enforcing such charter must also be based upon these very same principles."

Finally, **en passant,** it should be noted that although not a specific regional inter-governmental human system, one regional arm of the UN, the Economic and Social Commission for Asia and the Pacific (ESCAP), has a small human rights-related component in the form of a liaison officer on human rights issues. UN agencies as a whole in this region, of course, undertake and promote a range of human rights activities, even though not necessarily with a view to promoting the arrangements of concern to this study.

B) Sub-regional Initiatives

The Asia-Pacific region can be sub-divided into a number of sub-regions. At least three sub-regions have been witnessing initiatives calling for an inter-governmental human rights system either in a general form or a more specific form targeted to a particular issue.

First, in West Asia, there is already an Arab Charter on Human Rights 1994. While not fully in force, this Charter may be said to be a sub-regional inter-governmental human rights system. It posits various rights recognised internationally including the right to life, liberty and equality before the law. However, there are various grey areas suggesting that it is lower than international human rights standards as follows:

- the extent of freedom from slavery and of the right to change one's religion is uncertain under this treaty;

- on some fronts, it differentiates between the rights of citizens and non-citizens, whereas international human rights law advocates non-discrimination irrespective of nationality/citizenship;
- it provides for the setting up of a human rights committee, but there are no real guarantees for the independence of the committee members.

Second, South Asia provides an example of a move towards a more focused inter-governmental system - not on human rights in general but on a particular human rights issue, i.e. the trafficking in women and children. Led by the South Asian Association for Regional Cooperation (SAARC), the region has moved towards a treaty concerning this issue. The sub-regional approach can help greatly in relation to countering cross-border trafficking in humans. However, this treaty is somewhat limited to sexual exploitation, whereas there are many other forms of trafficking such as for domestic work, agricultural work, bonded labour, begging and adoptions.

Third, in the South-east Asian region, there is the Association of South-east Asian Nations (ASEAN) with ten member countries. In the 1980s, a group of NGOs under the title Regional Council of Human Rights in Asia came together in 1983 to adopt the Declaration of the Basic Duties of ASEAN Peoples and Governments. Interestingly, it blended the issue of rights and duties as follows:

> "1. It is the duty of every government to ensure and protect the basic rights of all persons to life, a decent standard of living, security, dignity, identity, freedom, truth, due process of law, and justice; and of its people to existence, sovereignty, independence, self-determination, and autonomous cultural, social, economic and political development....
>
> 3. It is the duty of all individuals and peoples to exercise their rights and freedoms in the spirit of human solidarity, respecting and defending the rights and freedoms of others. It is likewise the duty of all individuals and peoples to assert,

defend and protect their sovereignty, to preserve and enhance their culture and identity, to develop and use their native talents, abilities and resources for the betterment of society, to respect and obey the laws which accord with this Declaration, and to denounce and resist persistent violations of their basic rights and freedoms."

In the 1990s, parliamentarians from ASEAN in the ASEAN Inter-parliamentary Organisation (AIPO) adopted the AIPO Human Rights Declaration which called for the possibility of a human rights mechanism. However, the content of the AIPO Declaration was heavily criticised by NGOs for being lower than international standards.

On the governmental front, at the ministerial level in 1993, ASEAN Foreign Ministers voiced in their joint communique the following:

"ASEAN should also consider the establishment of an appropriate regional mechanism on human rights".

Effectively, it was referring to the ASEAN sub-region. However, since then, the ministers themselves have not suggested how to establish such a mechanism. Parallel to this, in the latter half of the 1990s, civil society groups at times linked with national human rights commissions formed a Working Group for an ASEAN Human Rights Mechanism.

In 2000, it was this group which drafted and proposed to the governments the Draft Agreement for the Establishment of an ASEAN Human Rights Commission. The Draft Agreement does not define or list human rights but cross-refers to international human rights law and related instruments, including those favoured by ASEAN countries, e.g. the 1948 Universal Declaration of Human Rights, the 1986 UN Declaration on the Right to Development, and the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights. In addition, it refers to regional/national standards consistent with international law and the human rights treaties

to which the member States are parties. With regard to the latter, the Convention on the Rights of the Child is the sole treaty to which all these countries have acceded.

The Draft Agreement concentrates on the modalities of establishing such Commission and its operationalisation. First, it would be an inter-governmental sub-regional body vested with the power to promote and protect human rights in the sub-region. As drafted, it would only bind those ASEAN countries which sign and ratify the Agreement. Second, it would be a seven-member Commission to be elected by the Ministers of Foreign Affairs of the countries which have ratified the Agreement from a list proposed by governments. However, members of civil society such as NGOs must be consulted in regard to the candidates. Gender balance should be borne in mind. Third, once elected, the members must act independently of the governments, and their mandate is for a five year single term. Fourth, the Commission would have the power to promote human rights such as awareness campaigns and the preparation of human rights studies and annual reports. It would have the power to protect human rights such as to investigate complaints of violations. Individuals, NGOs and the countries which have ratified the Agreement would be able to lodge complaints with the Commission to seek redress in the case where a State has allegedly been in breach.

Fifth, as for the remedies, the Commission's role is based upon amicable settlement first. Where amicable settlement fails to work, then the Commission can make a finding as to whether a State has violated human rights under the Agreement. While the Commission is not a court of law and cannot render binding judgement, it can make highly persuasive recommendations and publish a report on its finding. For additional pressure, it can cross-refer the case and its recommendations to the Ministers of Foreign Affairs of the countries which have ratified the Agreement. There can be subsequent cross-referral to their Heads of State/Government for further action.

However, the Working Group did not yet think it timely to suggest a human rights Court for the sub-region.

The draft is now with the Ministers and there has been muted response to it. It would thus be useful to establish a joint task force or joint working group between the representatives of ASEAN governments and the Working Group mentioned to consider the draft Agreement in depth.

Future Options:

What are some of the options available to concretise initiatives for possible regional or sub-regional arrangements on human rights for Asia and the Pacific?

Before answering this conundrum, it is important to bear in mind certain imperatives. Perhaps the first principle at hand is to create more confidence among governments concerning the pros and cons of such arrangements and not to be dogmatic. Second, one can take a step by step approach in inviting governments to come on board gradually, even using the x minus y formula now used in ASEAN whereby an agreement can be considered sub-regional even if not immediately adhered to by all ASEAN countries. Third, it is important not to lower international standards but to provide "value added" from the region or sub-region. Fourth, it is advisable to enable civil society to participate in the process towards such arrangements. Fifth, the process towards these arrangements as well as after their establishment, e.g. in regard to accessibility to the general public, is as important as the content of the arrangements, e.g. rights needing implementation and groups needing protection. Sixth, whatever mechanism is established as part of the arrangements, this needs to be independent and transparent in operation.

What then are some of the options for the future ?

a. **Option 1: No need for an inter-governmental treaty/ system, but maximise networking between human rights activities at the regional level - between Asia-Pacific Governments and/or between these Governments, civil society and/or national human rights insti-**

tutions. This approach would be similar to the current building blocks approach based upon the four concerns noted above, e.g. development of national human rights action plans and human rights commissions, but would call for closer networking and more effective implementation of activities.

b. **Option 2: No need for an inter-governmental treaty/ system, but maximise networking between human rights activities at the sub-regional level with components similar to Option 1.**
c. **Option 3: Promote an Asian or Asia-Pacific treaty not on human rights generally but on specific human rights issues,** e.g. child rights and/or women's rights.
d. **Option 4: Promote (a) sub-regional treaty or treaties not on human rights generally but on specific human rights issues similar to Option** 3.
e. **Option 5: Promote an Asian or Asia-Pacific Treaty/ Charter on Human Rights.** (However, the very size, heterogeneity and political diversity of the region may pose problems.)
f. **Option 6: Promote (a) sub-regional treaty/treaties on human rights.** (As an example, this already exists in West Asia in the form of the Arab Charter already noted).

These options are not mutually exclusive or exhaustive. In considering the steps to the future, it would be useful to set up a working group to consider the viability of these options, perhaps along the line of Eminent Persons Group already used in the region on various issues, and to report back to the next Asia-Pacific workshop under the UN umbrella. What is clear, in this setting, is that, whatever the advocacy for arrangements at the regional and/or sub-regional level, the greatest challenge still remains the effective implementation of human rights at the national/local level.

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Chapter III

National Plans for the Promotion and Protection of Human Rights and the Strengthening of National Human Rights Capacities

The seeds for developing national plans for the promotion and protection of human rights were sown at the 1993 World Conference on Human Rights. A key recommendation from the Conference was that " each State consider the desirability of drawing up a national plan identifying steps whereby that State would improve the promotion and protection of human rights."

Since then, the growth of these plans in the Asia-Pacific region has been propelled particularly by the Asia-Pacific workshops on human rights which are held annually under the umbrella of the Office of the United Nations High Commissioner for Human Rights (OHCHR). The development of national human rights plans is one of the four building-blocks to which participating Asia-Pacific countries are agreeable, the other three building-blocks being the development of national human rights institutions, human rights education and the realisation of economic, social and cultural rights and the right to development - inevitably with impact on national capacities. The impetus was provided further in 1999 when an intersessional workshop for the Asia-Pacific region took place in Bangkok on the theme of development of national human rights plans.

At the outset, these observations are especially pertinent. First, even prior to the advent of national human rights plans, several countries already had various national economic and social development plans and other national plans such as on the issue of women and children which were interrelated, to a greater or lesser extent, with human rights. These plans still exist today and any proposal for

the formulation of a specific national human rights plan needs to be complementary to them, and vice and versa. Second, side by side with the rise of national human rights plans, national human rights education plans are now emerging, and each has a "value added" to be identified. Third, even without national plans, much can be done to promote and protect human rights, if there is the political and social will to do so. Fourth, the mere fact of having a national plan of any kind should not obscure the many obstacles - and failings- facing the implementation of human rights at any level. The plan cannot be seen as a panacea, and it needs to be credible. Fifth, the adoption of any plan needs to be participatory and oriented to effective implementation, but the realities often indicate otherwise. Sixth, many of the plans which pre-existed the arrival of national human rights plans provide a key lesson in terms of grand aspirations which sometimes lack the necessary resources for effective reforms and sustainability of actions.

These **caveats** offer an initial tonic in relation to the call for national human rights plans. Why should there be national human rights plans ? There are several positive aspects which needs emphasis. First, the development of a national human rights plan helps to provide legitimacy to the advocacy of human rights-related actions. It provides a mind-set responsive to human rights at the national level. Second, the adoption of such plan helps to provide a framework for targeting activities on human rights, especially if there is a defined time frame for operations. Third, it helps to identify the various target groups needing help, as well as the various authorities needing to commit themselves to help others. Fourth, it helps to focus priorities for action on human rights and to mobilise resources accordingly. Fifth, it provides a process for networking and fostering cooperation and coordination between different sectors, both governmental and non-governmental. Sixth, it offers room for a more systematic approach to human rights-related activities with the possibility of more concrete data collection, evaluation and impact assessment with a view to constructive reforms.

Evolving National Human Rights Plans:

By 2000 a number of Asia-Pacific countries had adopted various national human rights plans. These included Australia, Indonesia, Philippines and Thailand. In 2001 the possibility of preparing such plans was being discussed by the following: Mongolia, Nepal, Jordan, Gaza and New Zealand.

How do they converge ? While, of course, national plans vary according to their specific situations, there are some areas where they share common ground, including the following:

1. Linkages between the national setting and international human rights standards, implying that the latter can help to raise standards nationally, while not forgetting local wisdom;
2. Coverage of at least civil, political, economic, social and cultural rights, with varying emphases on individual and collective rights, related obligations/duties, and target issues, such as education, health, shelter, employment, poverty, and freedom of association and expression;
3. Target groups in vulnerable positions, such as women, children, the elderly and those with disability, to be assisted and protected;
4. Suggested reforms of laws, policies, programmes, practices and mechanisms to improve human rights promotion and protection;
5. Support for national institutions, such as national human rights commissions for the promotion and protection of human rights;
6. Partnership with key government agencies to implement the national human rights plan;
7. Capacity-building of power groups such as the police and judiciary to respect human rights;
8. Cooperation with civil society, including non-governmental organisations (NGOs), in the formulation and implementation of the plan;

9. Allocation of resources to implement the plan;
10. Establishment or identification of a national monitoring mechanism to follow-up the implementation of the plan.

The emergence of these plans highlights various challenges as follows:

1. The preparation phase. The period for preparing the national human rights plan demands a participatory process whereby NGOs, members of civil society, government personnel and other actors need to be well consulted. The national experiences vary on this. The preparation of some of the national plans mentioned above was participatory, e.g. one draft plan was subjected to public hearings throughout the whole country before it was adopted. Yet, another national plan mentioned above was formulated by the government sector rather than by a participatory process.
2. The implementation phase. The issue here is how to implement the plan effectively. Several of the plans mentioned above have led to key law and policy reforms, and these are much welcome. However, the implementation is at times weak and lacks adequate participation from the general public. The resources for effective implementation have not been forthcoming on some fronts.
3. The evaluation phase. A key concern is to have a monitoring mechanism to trace and track the implementation of the plan, and to ensure transparent evaluation. While some of the plans mentioned have such mechanism, evaluation has not been systematic or participatory enough in some areas.
4. The follow-up phase. This implies the need for follow-up activities, such as reforms, which are recommended by the evaluation. On a positive note, some countries have extended the period of their national plans, or adopted

new plans to follow the initial plans, so as to provide opportunities for more follow-up. However, this process is dependent upon the quality of the implementation of the plans and related evaluation. The impact of the plans has to be tested qualitatively rather than quantitatively.

In this regard, it is worth noting that the OHCHR has supported the preparation of a handbook which helps to indicate the various steps in the development and implementation of such plans.

Recent examples of the evolution of national plans can be seen from two countries. First, the example of Thailand. The 5-year plan was adopted by the Thai Cabinet in 2000. It lists nine orientations as follows:

- enhance respect for human rights under the Thai Constitution (1997);
- integrate human rights in the national political, economic and social development;
- take measures to promote people's understanding concerning human rights and duties, responsibilities and ethics;
- promote the universality, indivisibility and interdependence of human rights;
- support the implementation of human rights treaties to which Thailand is a party;
- foster cooperation at all levels to promote and protect human rights;
- improve laws and regulations to promote and protect human rights;
- support NGOs and people's organisations at all levels;
- improve government organs, especially the bureaucracy, to use power democratically.

The Thai plan targets for action many marginalised sectors, e.g. women, children, those with disability, those with HIV/AIDS, state-

less persons and prisoners. It even covers some groups not traditionally found in general human rights discourse at the international level, e.g. consumers. However, it shies away from identifying certain groups for protection, e.g. indigenous communities and refugees.

Currently, there are various challenges facing the Thai Plan. Is it being well implemented ? The Plan was adopted by the previous government, and there is now a new government. A key test is to ensure that the plan is seen as non-partisan and that it pertains to all governments. Second, while there have been some reforms pursuant to the Plan, e.g. reform of the Anti-Communist law, it is not altogether clear how the totality of the Plan is being implemented. The Plan is supposed to be monitored by an inter-sectoral group, but this still needs to be activated. Third, with the recent establishment of the National Human Rights Commission, a question has arisen concerning to what extent this Commission is bound to follow the Plan. The Commission is working on its own strategic plan, and while the national human rights plan will be borne in mind, the Commission is likely to follow an independent line. Fourth, many government ministries are still not well briefed about the national plan, thus indicating the need for more dissemination of the plan, related dialogues and sustainable follow-up activities based on more capacity-building and reforms.

Second, the example of the Philippines. The Philippine Human Rights Plan was for the period 1996-2000, and it has now been extended to 2002. It is a detailed plan with many target groups such as women, children, indigenous communities, Muslims, the urban poor and rural workers. The targets set by the Plan have helped to promote law and policy reforms. However, the key test is not so much in the passage of new laws, but in their effective implementation. The implementation process has been assisted by inter-agency "sectoral working groups"(SWG) consisting of both government personnel and NGOs, and the whole process is closely linked with the Philippine Human Rights Commission. The 1999-2000 report of this Commission notes as follows:

"Under the legislative agenda, nine laws covering 30 measures for children, women, prisoners/detainees, informal labour workers, urban poor and indigenous peoples, were passed. 77% of the proposed measures are ongoing and are covered by 116 Senate and House Bills/Resolution pending in Congress. However, 28 new legislative measures filed in Congress were added to the original plan. However, there are still 20% of the original measures, which have not been translated into actual bills.

Under the administrative and programme agenda, 43 measures covering children, youth, women, elderly, urban poor, prisoners/detainees and migrant workers, have been completed, while 175 others are still being worked out.

At the regional level, ordinances and resolutions on human rights passed by the local government units at various levels are now being implemented and are being monitored by the regional SWG. Primarily, the measures provide policy, local funding, logistics and other support for the implementation of human rights programs, projects and activities for the local areas' priority sectors, such as the creation of women and children's desks in police stations, establishment of Barangay(village/district level) Human Rights Action Centres, implementation of the Philippine Human Rights Plan, creation of Human Rights Councils at different levels, expansion of prison facilities and construction of separate cells for women and children; creation of Human Rights/Desks, nutrition and health care programs for elderly, ...training...."

Given the difficult current political situation facing the country, the implementation of the Plan is faced with many obstacles - not because of the Plan itself but because of the environment around the Plan. Interestingly, the implementation of the Plan is now being evaluated, and the United Nations Development Programme is helping to support this. The lessons learned from such evaluation need to be

used well to propel more sustainability of actions at the national and local levels.

These experiences attest to the fact that the formulation of national human rights plans needs to bear in mind a variety of potential challenges in the implementation process, and those stakeholders with the power to help implement them need to coordinate well to build the capacity for effective actions.

Directions:

The above analysis has endeavoured to provide a brief overview of national human rights plans in the Asia-Pacific region - in a realistic manner. There is a need to promote such plans precisely because they provide focus and targets for actions. However, the quality of their implementation needs to be ensured. The credibility of such plans is based upon the basics of any developing planning - integrated planning, implementation, evaluation and follow-up, with adequate resources, responsive to the needs of the target groups in a feasible time frame.

It is worth harking back to the Asia-Pacific intersessional workshop on national human rights plans where the participants shared their wisdom on such plans and identified possible elements inherent in the evolution of such plans. They include the following:

1. Purposes of national human rights plans. These should cover the need to promote the universality, interdependence and indivisibility of human rights, encourage ratification of international human rights instruments and related reporting, strengthen national capacity for the promotion and protection of human rights, including national human rights mechanisms, adopt effective steps to help vulnerable groups, and enhance cooperation and education on human rights, with gender sensitivity.
2. Possible steps in formulating national plans. These should entail eight steps as follows:

- the establishment of a national coordination committee for the development of the national human rights plan;
- the conducting of a baseline study on the promotion and protection of human rights in the country to facilitate the formulation of the plan;
- the inclusion of key components such as the international framework, international cooperation, the national legal and institutional framework, national human rights mechanisms, human rights education, vulnerable groups, and the indivisibility of human rights in the national plan;
- the development of priorities and strategies such as partnership-building, awareness campaigns, legislative reform, national capacity building to promote and protect human rights, and benchmarks to measure progress;
- the drafting of the national plan with clear objectives, time frame and implementation strategies;
- the implementation of the national plan, including resources mobilisation and dissemination of the plan;
- the monitoring and evaluation of the national plan;
- the review and revision of the national plan targeted to further improvements.

The final challenge is to bear in mind consistently that the national human rights plan is merely a means to an end, and not an end in itself; it needs to be process-oriented and outcome-oriented. In this perspective, the plan has to embody "national", as contra-distinguished from "governmental", aspirations. Hence, the call for a genuine and persistent commitment to be non-partisan, participatory, accessible, transparent and sustainable.

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Chapter IV

Human Rights and A Human Rights Mechanism for ASEAN: A Constructively Engaging Challenge ?

Introduction:

The year is 2002, and the Association of Southeast Asian Nations (ASEAN) is in the news for a variety of reasons.[1] Currently, it consists of ten countries: Brunei Darussalam, Cambodia, Indonesia, Malaysia, Lao People's Democratic Republic (PDR), Myanmar, Vietnam, the Philippines, Singapore and Thailand. The ASEAN Free Trade Area(AFTA) is due to be fully implemented this year - for the older members of ASEAN, this implies that they must reduce import duties to 5-10% for a large list of products, with a more flexible timetable for the newer members . ASEAN has also negotiated a free trade area with China, and has made a similar proposal to Japan, although there seems to be a greener light for the former than for the latter.

The consequences of the latest Summit of Heads of Government of ASEAN are also starting to be felt. That Summit was held in November 2001 in Brunei.[2] Like many other corners of the world, everyone was pre-occupied with the issue of terrorism, especially in the wake of the terrorist attacks in New York on September 11. The main product of the Summit was the 2001 ASEAN Declaration on Joint Action to Counter Terrorism, calling for a number of measures including ratification of key treaties against terrorism, more cooperation among law enforcement agencies and sharing of best practices, more interchange of information and intelligence, and more action against terrorist organizations and their funding, as well as to bring the perpetrators to justice and to develop regional capacity-building to detect terrorist acts.

The mood for (early) 2002 is thus one of economic targeting, on the one hand, exemplified by the implementation of AFTA, and security targeting, on the other hand, in the face of global terrorism.

Where do human rights issues and the potential for an ASEAN Human Rights mechanism figure in all this ?

The Human Rights Outlook:

The word "ambivalence" is most apt to describe the physiognomy of human rights in ASEAN. The list of ASEAN countries above speaks for itself: it ranges from democratic countries to less-than-democratic countries, from relatively developed countries to relatively underdeveloped countries, from countries with an openness to human rights to countries cloaked with a denial syndrome towards (some) aspects of human rights. In discussing the outlook for human rights in the region, it is worth remembering that the political culture of each country is different. Intriguingly, while a favourite maxim for many ASEAN policy makers has been "Unity in Diversity", the scenario for human rights is perhaps best described as "Diversity in Unity". There is room for both pluralism and eclecticism - good and bad.

On the positive side, the following may be noted:

First, the past decade has witnessed greater democratisation in parts of ASEAN. This pertains particularly to Thailand, Indonesia and the Philippines - although at times there has been backtracking. The positive side also relates to redress for the conduct of one member of ASEAN towards a territory which it occupied in breach of United Nations resolutions for a long while. Happily, that territory - East Timor - has now been liberated and is emerging as a new State, based upon the aspirations of self-determination and democracy. Some ASEAN countries have constructively provided peace-keeping personnel and other resources for the International Force for East Timor (INTERFET) and the United Nations Transitional Administration in East Timor (UNTAET).

Second, all countries in ASEAN participate annually in a United Nations (UN)-backed process for a regional arrangement in the Asia-Pacific region. Initiated by the Office of the UN High Commissioner for Human Rights, the process adopts a step-by-step approach, labelled " the building blocks" approach, which promotes a variety of activities in which there is common interest, without necessarily making a quantum leap towards an inter-governmental human rights system or mechanism for human rights protection in the region. Basically, the four pillars of the building blocks are :

- the development of national human rights action plans;
- the promotion of human rights education;
- the establishment of national human rights institutions (commissions);
- the realisation of economic, social and cultural rights and the right to development.[3]

Some of these blocks have been implemented quite well in some ASEAN countries. For instance, Thailand, Indonesia and the Philippines now have human rights action plans, supplemented at times by human rights education plans. All countries claim that they are promoting human rights education - to a lesser or greater extent. National human rights commissions are now found in four countries: Thailand, the Philippines, Malaysia and Indonesia. All ASEAN countries are favourable to economic, social and cultural rights and all are interested in pursuing the universally espoused right to development. Yet, the issue is not so much that of "quantity" but more of "quality", not so much that of "form" but more of "substance".

Third, the track record for signing or ratifying international human rights treaties by ASEAN countries has been improving. Of the six key human rights treaties which form the backbone of the universal human rights system, there have been more signatures or ratifications by ASEAN countries as follows (2001)[4] :

- International Covenant on Civil and Political Rights (ICPR): Cambodia, Thailand, Lao PDR, the Philippines and Vietnam;

- International Covenant on Economic, Social and Cultural Rights (ICESCR): Cambodia, Thailand, Lao PDR, the Philippines and Vietnam;
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD): Cambodia, Indonesia, Lao PDR, and the Philippines;
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW): Cambodia, Thailand, Lao PDR, the Philippines, Vietnam, Myanmar, Indonesia, Singapore and Malaysia;
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT): Cambodia, the Philippines and Indonesia.
- Convention on the Rights of the Child (CRC): all ten ASEAN countries.

While these formal commitments from ASEAN countries are welcome, the key test is obviously in their effective implementation at the national level, and this is still lax in a number of countries.

Fourth, the term "human rights" has been gaining a higher profile and legitimacy in the governmental discourse on human rights in ASEAN. For instance, at the Hanoi Summit of Heads of Government in 1998, the leaders of ASEAN adopted the Hanoi Plan of Action which listed as activities to be accomplished in a given timeframe in ASEAN countries[5] :

- implementation of the CEDAW and CRC;
- exchanges of human rights information.

Likewise, the idea of an ASEAN human rights mechanism has been creeping gradually into the statements of ASEAN foreign ministers and this is dealt with in greater detail below.

Fifth, in the law, policy and information field, there have been a number of improvements in favour of human rights in a number of countries in the past decade. These include more human rights-

based Constitutions, such as in Thailand and Cambodia; a number of new laws and policies to protect women and children, such as on the issue of human trafficking in a number of ASEAN countries; laws against impunity in Cambodia, thus opening the door to prosecutions of the Khmer Rouge for genocide, and in Indonesia which provides for coverage of human rights violations. Many countries have introduced human rights education to a broader range of actors, including the military, the police, the judiciary and other law enforcers. Development plans have also become more sensitive to the issue of human development and environmental protection.

Sixth, there is a strong civil society and a vast range of non-governmental organisations in a number of ASEAN countries. These are backed by various regional networks propelled by civil society such as Forum-Asia.

Seventh, in terms of programming, ASEAN has become more open to various concerns related to human rights. For instance, in 1993 ASEAN adopted a Plan of Action on child survival, development and protection, complemented by another Declaration on child welfare in 2001. This has led to some programming such as the Singapore-led initiative to train child carers in early child care and education. There are also programmes on the advancement of women, anti-drugs activities and some cross-border cooperation on environmental problems, such as implementation of a regional plan to tackle transnational haze pollution and coastal zone management. These have been bolstered by the 1999 ASEAN Plan of Action to Combat Transnational Organised Crime. There is also an ASEAN Regional Programme on HIV/AIDS.

Eighth, since the economic crash of 1997, an increasing number of countries are realising the need to tackle the negative side of globalization, particularly the impact of over-expenditure and opaque financial practices. ASEAN has set up a surveillance mechanism to monitor the negative impact of financial practices and has bolstered a pool of funds to shore up each other's currency in times of crisis.

This goes hand in hand with the realisation that poverty and inequity still pervade many parts of the region. Various projects to promote employment, manpower planning, skills training and safety nets are being undertaken under the ASEAN Plan of Action on Rural Development and Poverty Eradication and the ASEAN Action Plan on Social Safety Nets.

On the negative side, the following may be noted:

First, ASEAN seems to be plentiful in words, Declarations and Plans of Action, but slow in implementation. This is to some extent, influenced by the ASEAN way of decision-making - by consensus which is often long-winded. ASEAN often puts as much (or more) emphasis on the form than on the substance.

Second, whatever the discourse on human rights, ASEAN still tends to treat the issue of human rights as one of internal affairs rather than of international jurisdiction. Hence, the non-interference argument emerging consistently from ASEAN, i.e. it views the international advocacy of human rights as interfering in the internal affairs of this region. This is in stark contrast with the international perspective which views that human rights protection is a matter of international concern - it cannot be relegated to the realm of internal affairs, precisely because often there are no adequate remedies at the national/internal level.

Third, several members of ASEAN are key proponents of the "Asian values" ("ASEAN values") concept which advocates strong government, deference to authority and the predominance of the rights and interests of the community/family (**alias** the State/Government) over the individual. Basically, this approach is adverse towards the claims of the individual - a key rationale for human rights protection.

Fourth, ASEAN countries tend to side with the relativist argument that universal human rights standards ("universality") should bend to, if not yield to, national and regional "particularities"

if there is a conflict between them. Conceptually, this was most evident in the lead-up the 1993 World Conference on Human Rights held in Vienna. At the Asia-Pacific conference held prior to the World Conference, ASEAN governments, together with other Asia-Pacific countries, espoused this conceptualisation in the Asia-Pacific Declaration on Human Rights:

> "8. (Asia-Pacific countries) Recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds."[6]

Yet, the final Declaration and Programme of Action of the 1993 World Conference on Human Rights implied that the universality of human rights should prevail over national and regional particularities as follows:

> "5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[7]

What are the "particularities" which are close to ASEAN's heart? Often, they are the same elements as the Asian values noted above and the anomalies noted below.

Fifth, linked with the Asian values argument and the particularities mentioned, there is reticence on the part of many ASEAN countries towards civil and political rights. There is a simple reason for this - as civil and political rights, such as freedom of expression

and association, are often the foundations of a democracy, undemocratic governments in ASEAN are fearful of the threat that these rights pose to their power base and status quo. Even among democratic governments, there are at times also violations of such rights, e.g. threats to freedom of the press. This is linked with the pervasive and broad notions of national security which persist in the region, as noted below.

Sixth, although it has become fashionable to speak of human security globally and in ASEAN, it is, in effect, national security which often prevails locally. The notion of national security is linked with the issue of threats to society. Yet, therein lies the danger - such threats may be actual, potential, or fictitious, with a degree of manipulation by illicit regimes to maintain their stranglehold over society. A major irony emanating from this discrepancy is the use of national security laws, such as internal security legislation, to clamp down on dissidents or human rights defenders. Several of these laws in ASEAN were originally the tools used by the colonial era to suppress aspirants of self-determination, some of whom or whose descendants are now in power in ASEAN. Yet, in this post colonial era, as a travesty of good faith, the same tools are being used to suppress human rights defenders, whereas such tools should have been abolished or abrogated a long time ago.

Seventh, while all ASEAN countries are concerned with the need to tackle poverty and promote sustainable development and while they are willing to espouse economic, social and cultural rights and the right to development on this front, they are less willing to espouse civil and political rights, on the one hand, and the political component of the right to development, on the other hand. Often, they veer towards the premise that economic, social and cultural rights should be promoted first and foremost, and civil and political rights should be promoted only later. This goes against the international tide which advocates the indivisibility of civil, political, economic, social and cultural rights and their interconnectedness and interdependence.

Eighth, the governmental perception is often one based upon the rights of one's citizens (nationals) rather than rights inclusive of aliens and non-citizens. This is evident in several Constitutions and laws in ASEAN which underline the rights of the former rather than the rights of all persons in the pursuit of non-discrimination. There is thus some divergence between such national setting and the international perception of human rights based upon the rights of all persons irrespective of his/her origins.

Ninth, there is a tendency on the part of ASEAN to raise the issue of human duties and responsibilities as counterparts of human rights. In reality, while there is always a need to balance between rights and duties, the reason why the international community has placed great emphasis on "human rights" since the Second World War is precisely because human duties and responsibilities are already highlighted by many national and local laws and practices, and the power structure is already weighted in favour of the State and other power groups rather than the human rights of individuals and communities under their control. Human rights help to redress the balance of power by underlining the entitlement of individuals and communities in the face of the omnipotent State and other power groups.

Tenth, while many members of civil society and NGOs are able to flourish in a number of ASEAN countries, others are heavily suppressed by less-than-democratic regimes in ASEAN. Human rights defenders are often persecuted in both democratic and undemocratic countries, although there are more violations in the latter. Interestingly, in the ASEAN setting, while there are now two well-established tracks of dialogues - Track I between the Governments, and Track II between the various security "think-tanks" in ASEAN, Track III dialogue involving civil society has been emerging only slowly. While the first two tracks are officially accepted by ASEAN, the first attempt to have a Track III process (with some governmental acknowledgement ?) was in 2000 when the First ASEAN People's Assembly met.[8] This has to be integrated more officially into the ASEAN agenda.

This would also add meaning and substance to enrich the ASEAN Vision 2020 adopted by ASEAN in 1997 which set the tone for ASEAN's development in the next 20 years aimed at "vibrant and open ASEAN societies consistent with their respective national identities, where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background."[9]

ASEAN Human Rights Mechanism: An Engaging Challenge

Given the above ambivalence on the part of ASEAN towards human rights, one corollary is clear: it is not sufficient to rely upon national/local mechanisms and institutions for the promotion and protection of human rights, precisely because such mechanisms/ institutions are often weak, inadequate or simply on the side of the power groups that violate human rights.

The first official opening towards a regional mechanism for the protection of human rights was in 1993 when ASEAN Foreign Ministers stated the following in their joint communique:

> "18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its people from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights."[10]

Civil society members from ASEAN then started to consult each other on the issue in 1993. This led to the formation of the Working Group for an ASEAN Human Rights Mechanism ("The Working Group"), with a secretariat in Manila. It provides this rationale for a regional mechanism:

> " These welcome developments should be seen as an emerging process toward the establishment of a regional human rights system. The Asian region, including ASEAN, is the sole region in the world without such a system. ASEAN has yet to establish a regional human rights mechanism pursuant to the ministerial statement of 1993.
>
> This issue is most pertinent at a time when there is already much monitoring of human rights developments in ASEAN from organizations outside the ASEAN region, including the United Nations. The lack of an ASEAN mechanism implies that while the region is exposed to monitoring from sources outside the region, there are few opportunities for the region to take stock of human rights developments in the region from the standpoint of ASEAN. The establishment of an ASEAN human rights mechanism with governmental support should help to redress this situation so that the ASEAN perspective is better understood by outsiders. This should complement the need to promote international human rights standards in the region."[11]

National working groups linked with the Working Group have been formed in six countries, namely, Thailand, Cambodia, Indonesia, the Philippines, Singapore and Malaysia.

Pursuant to the ministerial statement in 1993, what was lacking was the shape and form of a potential human rights mechanism for the region. The Working Group thus drafted a document - the draft Agreement on the Establishment of the ASEAN Human Rights Commission - proposing the establishment of the ASEAN Human

Rights Commission, which it then presented to the ministerial meeting in the same year (2000), hoping that it would be able to engage ASEAN on the issue. What are the components of such a mechanism ?

First, the main aim of the proposed ASEAN Human Rights Commission would be to promote and protect human rights. The draft agreement focuses on the establishment of a regional human rights mechanism rather than a general human rights treaty, while not ruling out the latter eventually. It needs the ratification of at least three ASEAN member countries to ensure its entry into force.

Second, while the draft Agreement does not provide an explicit list of the rights to be respected, it states as follows (Article 2):

> "Inspiration shall be drawn from international law on human rights, universally recognised human rights standards and principles, and regional and national laws, policies and practices consistent with international law. The relevant instruments of international law include the 1948 Universal Declaration of Human Rights, the 1986 United Nations Declaration on the Right to Development, the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights, and the treaties to which the Contracting States have acceded."[12]

During the drafting phase, members of the Working group discussed whether there should be a comprehensive listing of all the rights to be protected by the proposed mechanism. Eventually, it was felt that this would take too much time to evolve and that it would be better to use the more succinct formulation above. This does not rule out a more comprehensive listing in future, e.g. through an ASEAN Human Rights Treaty or Convention.

Third, the proposed ASEAN Human Rights Commission is to have seven members who are to act independently. Its work and mandate covers only those ASEAN countries which have ratified the Agreement. The Commission members are to be elected by the

Ministers of Foreign Affairs of the Contracting States which have ratified this Agreement from a list of candidates proposed by the governments in consultation with civil society, including non-governmental organizations.

Fourth, the Commission members are elected for a single, non-renewable term of five years, bearing in mind gender balance.

Fifth, the functions of the Commission include the preparation of reports on human rights, investigations on its own initiative of human rights violations, and action in response to petitions and communications from States and individuals/groups concerning allegations of human rights violations.

Sixth,as the Commission is not a court of law, it can only mediate and make recommendations, and not binding judgements, in regard to petitions and communications. Its competence relate to the following entities:

> "Article 12
>
> Any person or group of persons, or any non-governmental organization recognised in one or more Contracting States which have ratified this Agreement, may lodge petition(s) with the Commission containing complaints of violation of human rights by a Contracting State or States which have ratified this Agreement.
>
> Article 13
>
> Any Contracting State which has ratified this Agreement may send communication(s) to the Commission alleging that another Contracting State which has ratified this Agreement has committed a violation of human rights."[13]

Access to the Commission is subject to the exhaustion of local remedies in accordance with international law. This means that petitioners should try to use local remedies before resorting to the

Commission. However, if the local remedies are ineffective or corrupt, this leads to "denial of justice" in the eyes of international law, and the petition can leap-frog directly to the Commission.

Seventh, where the Commission finds that there has been a violation of human rights, it can make recommendations as appropriate, and it must also publish its findings and send a report on the matter to the Ministers of Foreign Affairs of the countries which have ratified the Agreement.

Eighth, it can request the Foreign Ministers above to take appropriate action to ensure compliance with its recommendations. There can then be cross-referral to the Heads of Government for final action to ensure compliance.

What has been the reaction to this proposal ? When the proposal was submitted to the Foreign Ministers in 2000, the ministerial response was muted, and the ministerial communique did not mention such proposal. However, it did acknowledge the work of the Working Group as follows:

> "33. In recalling the decision of the 26th ASEAN Ministerial Meeting held in Singapore on 23-24 July 1993 to consider the establishment of an appropriate regional mechanism on human rights, the Foreign Ministers noted with appreciation the consultations between the ASEAN Senior Officials and the Working Group for an ASEAN Human Rights Mechanism. They also noted the establishment of a national mechanism on human rights in some ASEAN countries."[14]

In 2001 the initiative was taken further by the holding of a workshop on the issue in Jakarta with the support of the Indonesian Ministry of Foreign Affairs. The workshop noted that a number of activities could be explored in addition to the proposed Commission. These could include, for example, the development of national human rights commissions and more activities and mechanisms targeted to more specific groups, e.g. women and children. Consequently, a del-

egation from the Working Group was sent to meet the ASEAN Foreign Ministers in Hanoi, and the discussions resulted in the orientation noted in this ministerial communique:

> "30. We recalled the decision made by the 26th ASEAN Ministerial Meeting held in Singapore on 23-24 July 1993 to consider the establishment of an appropriate regional mechanism on human rights and noted the consultations between the ASEAN Senior Officials and the Working Group for an ASEAN Human Rights Mechanism. We acknowledge the efforts of the Working Group in realising this objective, including the convening of a Workshop for an ASEAN Human Rights Mechanism in Jakarta, Indonesia on 5-6 July 2001. In this connection, we agreed that ASEAN-ISIS should also be involved in the discussions especially in the broader context of a People's ASEAN".[15]

How should this orientation be interpreted ? The constructive interpretation is to suggest that ASEAN wishes to open the door to broader discourse on the proposed Commission, particularly with the involvement of the Track II noted above through various security think tanks forming the network of ASEAN Institutes of Security and International Studies (ISIS). The less constructive interpretation is that ASEAN is merely procrastinating in its commitment.

In this engagingly ambivalent process, the public should perhaps take heart in the fact that at least, there is now a kind of a sample mechanism available in the form of the ASEAN Human Rights Commission. Since the Ministers themselves have never (to date) proposed the shape and form of such a mechanism, at least civil society has tried to do its homework by constructing the first prototype of what such mechanism should look like, and, of course, there is room for streamlining.

In early 2002, two other "demarches" are of note. The Working Group has been sending out teams to brief government directly on

the proposed mechanism. The latest country to be visited by the team is Lao PDR in January. ASEAN ISIS is also opening the door for more discourse on the proposed mechanism. In its ASEAN ISIS Colloquium on Human Rights to be held in Manila in February, there will be a special session on a regional human rights mechanism for ASEAN and the linkage between such mechanism with Track II in promoting social development in Southeast Asia.

The ball is thus now in a number of courts.

An Engaging Future:

In retrospect, it should be recognised that there have been a variety of positive developments in ASEAN in the field of human rights in the past decade. However, there are various lacunae which still need to be attended to. These vary from lack of democratisation to violence, from unsustainable development to violations of civil, political, economic, social and cultural rights. Prominently there are the unfulfilled promises in favour of various groups ranging from women to children, from the poor to marginalised communities.

From the angle of the call for a human rights mechanism, the future advises that the proponents of such mechanism and their friends remain persistent in being patient and patient in being persistent. Some of the potential steps to engage the Governments and other partners in this process include the following:

- the call to ASEAN to establish a joint working group or task force involving both governments and civil society in addressing the issue of human rights and a human rights mechanism for the region, possibly complemented by an ASEAN Eminent Persons Group on the issue;
- the establishment of a national focal point in every ASEAN country on the proposed mechanism;
- the development of activities and mechanisms complementing the proposed regional human rights mechanism, including national human rights commissions, national

human rights action plans, human rights education and more concrete measures to counter poverty and ensure income distribution in ASEAN, as well to focus on the rights of various groups such as women and children who are of common concern to all ASEAN countries.

These could be coupled with other initiatives gradually forming the basis for longer-term constructive engagement with ASEAN, in the best sense of the term, as follows:

- more accessions to international human rights treaties and their effective implementation in a spirit of democracy;
- the adoption of an ASEAN Human Rights Agenda with a time-frame for the realisation of various targets, e.g. reform of draconian laws and promotion of key reforms such as in the criminal justice system and to counter the culture of impunity;
- capacity-building of the judiciary to be independent and transparent;
- promotion of checks-and-balances to monitor against human rights violations, e.g. civil society groups as vigilant groups to protect human rights;
- training of various power groups to respect human rights and awareness-raising among all groups to prevent violations and to access remedies;
- shifting of military expenditure to expenditure on human rights, peace and sustainable development;
- enhancement of good government at all levels and to counter corruption;
- legitimisation of civil society groups and facilitation of the work of human rights defenders;
- fostering of non-violent means and nurturing of a caring spirit to respond to human rights and peace from a young age, such as through programmes involving the youth of different ethnic communities to promote a hu-

mane society across social and ethnic divides, and social work to reach out to disadvantaged groups;

- addressing of the challenge of not only State actors but also non-state actors and their impact on human rights, tapping their capacity and capability for human rights protection and countering those involved with violations and violence, such as terrorism;
- promotion of the rights of not only individuals but also communities in the face of transgressions from various power groups, such as in the environmental field where big commercial interests encroach upon the resources of individuals and communities;
- enhancement of more people's participation and empowerment in human rights protection, such as through decentralisation with modalities for checking against abuses of power and to ensure accountability.

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Notes

1. For general reading on ASEAN and Human Rights, see: **Towards an ASEAN Human Rights Mechanism** (Manila: Working Group for an ASEAN Human Rights Mechanism,1999); V.Muntarbhorn, "Towards an ASEAN Human Rights Mechanism", **ibid.,** pp. 6-28.

2. htpp://www.aseansec.org

3. See further, V.Muntarbhorn, "Asia, Human Rights and the New Millennium: Time for a Regional Human Rights Charter ?", **Transnational Law and Contemporary Problems,** Vol.8(1998)2, pp.406-421.

4. Adapted from **Human Rights in Asia: Annual Human Rights Report 2000** (Bangkok:Forum-Asia, 2001), p.129.

5. **Sixth ASEAN Summit** (Jakarta: ASEAN Secretariat, 1999).

6. **Our Voice:Bangkok NGO Declaration on Human Rights** (Bangkok: Asian Cultural Forum on Human Rights, 1993), pp. 242-244; 244.

7. UN, **World Conference on Human Rights: The Vienna Declaration and Programme of Action, June 1993** (New York: UN, 1993), p. 30.

8. **An ASEAN of the People, by the People and for the People: Report of the First ASEAN People's Assembly, Batam, Indonesia, 24-26 November 2000**(Jakarta: Centre for Strategic and International Studies, 2001).

9. See further, **Handbook on Selected ASEAN Political Documents** (Jakarta: ASEAN Secretariat, 1998).

10. **Towards an ASEAN Human Rights Mechanism, op.cit.,** pp.43-52;48.

11. **Ibid.,** p.2.

12. Draft Agreement on the Establishment of the ASEAN Human Rights Commission, drafted by the Working Group for an ASEAN Human Rights Mechanism, 2000.

13. **Ibid.**

14. htpp://www.aseansec.org

15. **Ibid.**

Chapter V "Persons in Need of Protection" and Migration in the Asia-Pacific Region: The Refugee Phenomenon and Beyond

Introduction:

For centuries, Asia and the Pacific have been a major source, transit and destination region for migration. The 19th and early 20th centuries witnessed the outflow of millions of Chinese and Indians in search of livelihood within the region and in other parts of the world. In the second half of the 20th century, a huge number of migrant workers from South-east Asia went to the Gulf countries and other countries as contract workers, while a myriad of others left their countries in search of refuge in neighbouring countries and beyond. Today, as the new millennium progresses, migrants from Asia and the Pacific constitute a sizeable proportion of those who are exiting and entering other countries as part of the increasing globalization of movements of persons, sometimes in the quest for work and at other times in the search for safety. This should be seen in the light of this observation from the World Migration Report 2000:

> " (Globally) An estimated 150 million people live outside their countries of birth or citizenship, while many others are not counted as international migrants because they live and work in another country illegally, whether on a permanent or temporary basis."

Particularly since the middle of the 20th century, a major preoccupation for the region has been the outflows of refugees in search of refuge or asylum in other countries. In the final decades of the century, the massive outflows included the exodus of Indochinese (Lao, Vietnamese and Cambodian), Burmese and Afghans. At the end of that period, the traumas of political change in East Timor led to the

massive exodus of East Timorese into neighbouring West Timor. With the dawn of the new century and new millennium, while many refugee outflows, such as those pertaining to the Indochinese, have been solved, others persist, most notably some three million Afghans, over 100,000 Burmese and a parallel number of Timorese who have sought refuge in other countries. There are also millions of internally displaced persons who have not yet crossed borders in the region, visibly in various parts of Central Asia, South Asia and South-east Asia.

Some of the features facing the current migration pattern include the following:

1. Conceptually, there is a distinction between voluntary migration and forced migration, although the line is often blurred in practice. With regard to the former, migrant workers and those leaving their homesteads in search of employment elsewhere - "economic migrants" - may be said to be leaving of their own volition, although there are some economic and social pressures behind such movement, most ostensibly poverty and underdevelopment as the underlying factors. By contrast, there are those who are coerced/forced to leave, such as through persecution in the country of origin, armed conflicts, political tensions and human rights violations. The refugee phenomenon falls under the latter category, although often the admixture of political and economic considerations makes the distinction between voluntary and forced migration difficult and not entirely convincing.

2. More often than not, the outflows of people are caused by a variety of factors - social, economic, political, environmental and beyond. These "composite" flows do not lend themselves easily to neat categorization of persons in need of protection. Yet, the international regime according protection to persons on the move, requires some categorisation,

given the fact that generally countries do not yet accept the unrestricted influxes of people into their territory and that there needs to be some prioritising in terms of the groups to be admitted and protected.

3. Since 1950, there has been an international juridical regime according specific protection to refugees. First, the Office of the United Nations High Commissioner for Refugees (UNHCR) was established by a United Nations (UN) General Assembly Resolution in the form of a Statute in 1950, as the key operational agency offering protection and assistance to refugees. Second, two key treaties on refugees were concretised in 1951 and 1967, namely the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees respectively, as the cornerstone of the protection framework. Under these instruments, the "refugee" is defined as a person who leaves the country of origin (i.e. country of nationality or of former habitual residence) for a "well-founded fear of persecution" in relation to "race, religion, nationality, membership of a particular social group or political opinion" (Article 1(A)(2) of the Refugee Convention as amended by its Protocol). That mandate has been extended by UN General Assembly resolutions to cover victims of man-made disasters, in particular victims of war/armed conflict who cross borders. Regional instruments in Africa and Central/South America have reinforced this and have extended the term to cover victims of armed conflicts and of massive human rights violations. In this setting, a key principle of international protection is "non-refoulement", i.e. countries to which the refugees come must not "expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened and on account of his race, religion, nationality, membership of a particular social group or political opinion." (Article 33 of

the 1951 Refugee Convention). Crucially, this implies that there is to be no push-back of refugees to areas of danger. This covers also non-rejection at the frontier for someone coming in search of refuge or asylum.

4. The situation has been complicated by mass influxes of peoples as contradistinguished from individuals seeking refuge. The Refugee instruments above were somewhat Eurocentric in their inception and were oriented to addressing the individual refugee rather than the massive group situation. This was complemented by the need for countries to establish refugee status determination procedures to enable individuals to be screened to see if they would fall under the definition of the "refugee" or not. In mass influx situations, the practice has been to provide group determination of status based upon **prima facie** claims and a rather objective assessment of the situation leading to exodus . Also the protection accorded may be different. While in relation to individuals seeking refugee status, the premise of the refugee status determination procedures of countries which are parties to the Refugee instruments is to open the door to asylum in the long-term sense, increasingly the group type of situation has been offered temporary refuge and temporary protection rather than asylum as mentioned. Mass influx situations have also raised various concerns which were not addressed adequately in the Refugee instruments, including family unity, assistance for tracing of relatives, protection of women and children, including unaccompanied children, and the need for more equitable burden-sharing/responsibility-sharing among the international community.

5. Most Asia-Pacific countries have not yet acceded to the above instruments. In reality, at the national level, a variety of terms have arisen to cover those who would otherwise be classified as refugees internationally. The varied national

nomenclature includes "illegal immigrants", "displaced persons", "border-crossers" and "those fleeing from fighting". It is the national immigration law which has the most immediate impact on those seeking refuge, and the excesses of these laws, e.g. the threat of widespread deportations tantamount to "refoulement" affecting those seeking refuge, have been attenuated by national policies in favour of granting temporary refuge. Despite non-accession to the international refugee instruments, these countries have, to a large extent, provided temporary shelter to those seeking refuge and have generally abided by the principle of non-refoulement, although at times there have been lapses in practice.

6. The UNHCR, the primary agency involved with refugee protection and assistance, has been able to operate even in countries which have not acceded to the Refugee instruments. This is due to its flexible mandate and consent from the country concerned, including States which are not parties to those instruments. A related issue is this. Although the countries which have not acceded to the Refugee instruments are not obliged to establish refugee status determination procedures as posited by the Refugee instruments, have they done so with monitoring by the UNHCR to ensure a sense of justice and transparency? The practice has varied. At times, these countries have been willing to establish such procedures for some groups of those seeking refuge, while at times they have been unwilling to do so. This has been complemented by the UNHCR's own role in establishing its own screening procedures where the national authorities are unable or reluctant to do so. This may lead to the recognition of a status akin to refugee status - "Persons of Concern", falling under the umbrella of UNHCR protection, despite the vacuum on the part of the national authorities of the country of ref-

uge. However, despite this classification, there is at times a conflict between protection accorded by this classification and the national authorities who prefer unfettered discretion in deciding what to do with those entering without their authorisation.

7. The long-term or durable solution for the refugee problem adopted by most Asia-Pacific countries in recent decades has been either resettlement in third countries (these Asia-Pacific countries envisioning themselves principally as countries of first asylum and as countries of temporary refuge) and/or voluntary repatriation to the country of origin. For the most part, they have not been willing to offer local settlement or assimilation of refugees unless these is an ethnic link with these countries or where it is politically expedient to do so. This position contrasts with the need for another option: local settlement or assimilation.

8. While the refugee phenomenon has been in the public eye for many decades, increasingly attention is being paid to the phenomenon of irregular migration linked with trafficking and smuggling of migrants. Refugees may at times fall into the trap of becoming victims of trafficking and smuggling, although the latter is not synonymous with the former. The profile of human trafficking and smuggling has been raised in recent years due to the finalisation of a new international treaty on the issue (dealt with below). There is also now greater international coverage and political will to counter criminal networks preying on the victims. In this process, it is important to ensure that the victims are treated in a humane manner and are not incriminated by the process of law enforcement. On another front, there is the question of how to assist and protect those who do not cross borders and are internally displaced. This is elaborated below.

"Persons in Need of Protection":

This term or "Persons in Need of International Protection" has appeared more frequently recently to highlight the fact that there is a broad group of persons deserving international protection, including but not restricted to those falling under the definition of the term "refugee" covered by the Refugee instruments above. Before identifying such group, it may be asked what is meant by the term "protection".

On the one hand, there is the most immediate sense of physical protection and access to help protect victims from dangers. On the other hand, there is the more normative side in terms of juridical standards - notably human rights, their effective implementation and related monitoring.

Here, the term "protection" denotes the fact that while national protection for the peoples of the Nation State is important, the international community is empowered to offer protection to such peoples where national protection is ineffective or inadequate. With regard to the refugee, this international aspect of protection, **alias** "international protection", is related to the fact that he/she has fled from his/her country of origin - the country of origin is unable or unwilling to protect him/her. The principle of non-refoulement is a key consideration in this regard, and it is the helping hand of the international community which protects the refugee from being pushed back to face dangers in the country of origin. This differentiates refugees from other migrants who come of their own free will, since, unlike refugees, other migrants remain (in principle at least) protected by the country of origin and can return there without the threat of harm or danger from the latter.

However, the term " protection" may also be used in a slightly different sense as an advocacy tool to the effect that all migrants - voluntary, coerced or otherwise - are entitled to protection from human rights violations based upon international standards, wherever they are and whether or not they are in the country of origin, transit or destina-

tion. For example, migrant workers coming as part of voluntary outflow/influx are entitled to protection from abuse and exploitation at work. Likewise, such entitlement pertains to those who come through coercion (e.g. trafficked victims), and to those who having come voluntarily later find themselves in coercive situations (e.g. migrants who, having come voluntarily through official channels from the country of origin, later find themselves in slavery-like working conditions in the destination country).

With regard the groups falling under the term "persons in need of protection", the following were identified for discussion at the 2001 regional meeting on international protection held in Macao with the support of the UNCHR and by other international dialogues:

1. Refugees
2. Asylum-seekers
3. Externally displaced persons (**viz.** Persons in refugee-like situations)
4. Persons forced to leave or prevented from returning because of natural or ecological disasters or extreme poverty
5. Persons forced to leave or prevented from returning because of man-made disasters
6. Internally displaced persons
7. Stateless persons
8. Returnees (refugees/displaced persons who voluntarily repatriate to their country of origin)

1. Refugees

This group has already been referred to, **in extenso,** by the previous analysis. In the strict sense of the term, the word "refugee" covers the political persecutee/dissident who crosses a border. While this group is important in the Asia-Pacific region, it is incomplete. For instance, an equally important group needing protection is victims of war/armed conflict, not covered by the strict sense of the term "refugee". On the positive front, those Asia-Pacific countries

which have acceded to the Refugee instruments are increasingly adopting implementing legislation to comply with the instruments. However, among the national authorities of countries which have not acceded to the Refugee instruments, there is still a tendency to avoid the term "refugee" and to use other terms as above, e.g. illegal immigrant, with the potential use of national immigration laws to constrain the entry or stay of refugees.

Key concerns include the following:

- the challenge of non-refoulement;
- inadequate understanding that the grant of refuge or asylum is a humanitarian, non-political gesture; the countries of origin of outflows should not take offence at this grant on the part of the recipient countries;
- the question of how to ensure that basic human rights standards must be upheld, e.g. access to shelter, food, clothing and education and humane treatment, such as protection against torture and violence;
- the issue of safe location of camps and the need to uphold the civilian nature of camps;
- while some detention of those seeking refuge in the process of regularisation of refugee status may be permitted, some countries are detaining them indefinitely and this detention is objectionable;
- the authorities at times fail to understand that recognition of refugee status is a declaratory act (i.e. it declares what the circumstances already indicate - that a person is refugee with vested rights) rather than a constitutive act (i.e. an act conferring status and rights on the refugee);
- asylum in the broad sense should be available to refugees, including possibly long-term settlement and local assimilation, but this is not so in practice.

In reality, the concerns of countries which have not acceded to the Refugee instruments should not be forgotten, especially their apprehension of mass influxes overloading their capacity and their pre-occupation with national security. Their fears may be allayed, in keeping with the flexibility of the refugee protection framework, as follows:

- the Refugee instruments stipulate that refugees are obliged to conform to the laws and regulations of the country of refuge;
- the country of refuge has the right, in time of war or other grave and exceptional circumstances, to take provisional measures which it considers to be essential to the national security in the case of a particular person, pending a determination that that person is in fact a refugee and that the continuance of such measures is necessary in his/her case in the interests of national security;
- the country of refuge can impose penalties on refugees if they do not present themselves without delay to the authorities and show good cause for their illegal entry or presence;
- the country of refuge can apply restrictions to movements of refugees which are necessary and until the status of refugees is regularised or they later obtain admission into another country;
- the principle of non-refoulement is of limited scope where there are grounds for regarding a refugee as a danger to the security of the country, or where the refugee, having been convicted of a final judgement or a particularly serious crime, constitutes a danger to the community of that country.

Of course, the above constraints on refugee status must not be used arbitrarily, and the role of the UNHCR in helping to balance the parameters of rights and duties on this front should not be overlooked. The confidence of the first asylum countries is also linked with burden-sharing as seen below.

2. Asylum-seekers

The term has been used to designate those who seek refuge/asylum across a border. In a 1997 report of an Experts Meeting held in Bangkok as follow-up to the 1996 Regional Conference on Refugees and Displaced Persons, they were identified as follows:

> " Asylum-seekers are persons who cross an international border and who claim or appear to be in need of protection but whose status has yet to be officially determined. Asylum-seekers can be legal or illegal, depending on the visa or other status they have at the time of their application. Asylum-seekers are "would be" or putative refugees; as such they must be outside their country of origin. Asylum-seekers are eventually considered "illegal migrant" or "refugees" depending on the official position taken with regard to their claims. When large numbers of asylum-seekers appear to be arriving for humanitarian reasons that are obvious, governments often consider them to be refugees on a prima facie or group basis."

The term has been particularly useful to cover those who are refugees in the international sense of the term but who find themselves in Asia-Pacific countries which are not parties to the Refugee instruments and which wish to avoid the term "refugees". The various key concerns listed above in the context of refugees, e.g. non-refoulement, also apply, **mutatis mutandis,** to asylum-seekers.

3. Externally Displaced Persons

In the 1997 report above, this group was defined as persons in refugee-like situations or **de facto** refugees, i.e. "persons who flee their country of citizenship, or their country of their permanent residence, as a consequence of armed conflict because their lives, safety or freedom are threatened. These persons are in need of international protection but may not all be covered by the usual legal interpretation of the term "refugee" which requires a fear of "persecution" for particular reasons."

If one were to take a broad interpretation of the term "refugee" to cover cross border victims in the case of armed conflicts, it would also cover externally displaced persons and help to reduce the terminological proliferation. However, this would depend upon a streamlining process which some countries may not agree with. Whatever the case, the various key concerns listed in relation to refugees, e.g. non-refoulement, also apply to the group of externally displaced persons, **mutatis mutandis.**

4. Persons forced to leave or prevented from return because of natural or ecological disasters or extreme poverty

This is linked with the group identified in the 1997 document above as "environmentally displaced persons". The latter was defined as covering "persons who are displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is the major cause of their displacement, though not necessarily the sole one. Given the generally accepted association of the word "refugee" within the concept of persecution, the term "environmental refugees" is not favoured."

The difference between this group and the above three groups is that unlike the other three which are cross-border cases, this group may be internal (within a country) or cross-border. From the angle of protection accorded by the country of origin, it may be necessary to examine whether the country of origin causes/caused that displacement or not. If the disaster is merely a natural phenomenon, the person affected is ,in principle, protected by the country of origin, although in need of assistance for return and reintegration into the community. This differs from the refugee-type of situation where the person is not protected by the country of origin and has to flee to another country in search of protection. However, if the disaster is man-made or partly man-made, there is room for the argument that the country of origin has failed to provide protection and assistance, thus needing some international protection, at least from the angle of

protection of human rights in general. This concern applies also to the case of extreme poverty which may be partly or wholly man-made, notably caused by the failure of the government in charge of the country of origin to respond to human rights and development. If the displacements are merely internal, there is an overlap with the various principles pertaining to internally displaced persons discussed below.

5. Persons forced to leave or prevented from return because of man-made disasters

The term "man-made disasters" is quite broad and may cover a variety of situations ranging from warfare and armed conflicts to environmental disasters, e.g. damage through nuclear accident and toxic waste. It differs from the categories of refugees, asylum-seekers and externally displaced persons, because, unlike those three categories, it can be both internal and cross-border. The man-made disasters may lead to failure to protect the victims, in which case international protection is also needed, e.g. war victims who cross borders in search of refuge, who ,in reality, fall under the wide definition of the term "refugee". If it is an internal situation, there is an overlap with the principles linked with internally displaced persons discussed below.

6. Internally Displaced Persons (IDPs)

By its very name, this group differs from refugees, asylum-seekers and externally displaced persons, because unlike the others, the group does not cross borders or has not yet crossed borders. However, there is a very thin line between IDPs and the other three groups. Significantly, the conditions that lead to IDPs are often the same conditions that lead to the cross-border displacements of the other three groups, i.e. persecution, armed conflicts and human rights violations. IDPs may also overlap with the other groups listed above in the sense of being environmentally displaced and or displaced by man-made disasters within countries. Yet, there was and is always a juridical divide in terms of the protection accorded. With regard to the flows concerning refugees, asylum-seekers and externally displaced persons, for a long time, the international community has been ready

to step in, both in principle and through humanitarian action, to protect those who cross borders in search of refuge, especially with a specific juridical regime for refugee protection. However, the issue of what principles to protect the internally displaced and who would be responsible was not clear until recently (and while now clearer, it is still not totally clear). Traditionally, the protection of IDPs depended upon national protection accorded by the national authorities, and generally outsiders could not intervene through action within those countries without the consent of those authorities. However, this doctrine is now subject to increasing critique as it fails to recognise that the national authorities are often dysfunctional, if not the root cause of the displacement itself.

Thus, there is now a set of international principles known as Guiding Principles on Internal Displacement which sets the tone for protecting IDPs; these were evolved by the UN Special Representative on Internally Displaced Persons. Although these Principles do not have a binding force as a treaty, they represent many elements of international custom which bind all countries, e.g. protection against torture. In many ways, these Guiding Principles are similar to the principles used for refugee protection but are transposed to the setting where there is no crossing of borders. For instance, the Guidelines advocate non-return to areas of dangers - a principle parallel to non-refoulement. Humane treatment is also voiced, similar to many of the provisions of the Refugee instruments. In principle, these Guidelines are derived from the sum total of human rights and humanitarian law. The Principles apply, **mutatis mutandis,** to the other two categories above - those linked with natural disasters and those linked with man-made disasters where they are internal rather than cross-border flows. Yet, it is not altogether clear who should assist or intervene where the national authorities fail to do so. In practice, the UNHCR and other organisations have at times been called in to provide humanitarian assistance, such as the provision of food and medical help. However, the area of humanitarian intervention - in the sense of using outside military means to protect victims in a country with gross

human rights violations without the consent of the government of such country - remains a sensitive and unsettled affair. It should involve the political organs of the UN, principally the Security Council and the General Assembly. Many countries are still opposed to such humanitarian intervention.

7. Stateless Persons

In the eyes of the 1997 document above, stateless persons are "persons whose nationality status cannot be established, or is doubtful, undetermined or unknown." Stateless persons are often displaced internally or externally, and in this sense they may be linked with all the categories listed above. However, they may also simply be stateless without having been displaced, e.g. born in a territory with uncertain parentage.

With regard to refugees, asylum-seekers and externally displaced persons, recipient countries in the Asia-Pacific region are reluctant to confer nationality on those born in their territory who fall into such categories, even if they recognise in their national law the principle of **ius soli** whereby nationality/citizenship is granted to those born in their territory. Some countries have added the exception that those coming in illegally (including those in search of refuge) cannot benefit from **ius soli.** The other main principle of acquisition of nationality is **ius sanguinis** by which one's nationality follows that of the father or mother. However, in the case of the offspring of the refugee father or mother, the father or mother has fled from the country of his/her nationality and is thus **de facto** stateless in the sense of not being able to enjoy protection from the country of origin - the **de jure** country of nationality. The child born is thus also **de facto** stateless, even though in theory it might be argued that the child is **de jure** a citizen of the country of the parent's nationality.

From the angle of protection, a person who is stateless is particularly vulnerable precisely because he/she may be exploited as a "non-entity". Whether or not he/she is displaced, he/she would have difficulties in accessing the basic services of the country in which

he/she finds himself/herself. For example, a stateless person usually has difficulties in accessing an educational institution where there is the requirement of national identity papers/identification document. If he/she seeks the help of law enforcers in the case where he/she has been exploited, he/she may land up being deported as an illegal immigrant for lack of identification papers.

It should be noted that the Refugee Convention does not oblige the recipient country to confer its nationality on the refugee. It merely advocates that the country should "facilitate" such process (Article 34 of the Refugee Convention). On another front, there are specific Conventions on statelessness which open the door to the application of **ius soli** to help the stateless or at least their children, i.e. the Convention on the Reduction of Statelessness 1961 and the Convention relating to the Status of Stateless Persons 1954. However, most Asia-Pacific countries have not acceded to these instruments. It seems that more burden-sharing is required on this issue, but it has not been addressed adequately to date. Moreover, when the question of return to the country of origin is raised, it may not be necessary to prove one's nationality. Mere proof of one's former habitual residence may suffice for the potential returnee to participate in the return process and obviate the difficulties of proving one's nationality. From the angle of a child born in a territory, it is also essential to ensure birth registration to preserve the child's identity, whether or not he/she is classified as stateless.

8. Returnees

According to the 1997 document above, returnees are "persons who return from their country of emigration back to the country they had left, generally their country of origin. They can be temporary labour migrants or guest workers. They can also be refugees or externally displaced persons who voluntarily repatriate, and they can also be rejected asylum-seekers whose claims have been denied and who are either sent or agree to go home."

The term "returnees" in the above sense refers to cross-border cases and is thus linked to all the cross border situations listed above and can cover even other categories not listed so far, e.g. migrant labourers who are to return to their home country. In the case of refugees, asylum-seekers and externally displaced persons, precisely because they have fled from their country of origin, the question of return there must be treated with care, depending upon voluntariness and assurances of safety and transparency. In many cases, if the political will permits, there is the possibility of advocating voluntary repatriation - in safety with monitoring and follow - up - for these three categories. However, for non-refugees or those who fail the test of refugee status determination procedures, there is the possibility of their coerced return as illegal immigrants. Yet, such classification may be ambivalent and caution has to be exercised. Even where a person has failed the test according to the refugee status determination procedures of a country, he/she may still be a person needing protection and should be protected against coerced return. For instance, if a country takes the narrow definition of "refugee" by adhering strictly to the Refugee Convention, this implies "screening in" cross-border political persecutees but excluding cross-border victims of war. Yet, the latter would still fall under the heading of "externally displaced persons" needing protection who should not be sent back to their country of origin involuntarily. The solutions for such group depend much upon international solidarity and burden-shaing, but at least they should enjoy the benefit of temporary refuge and humane treatment.

A Challenging Scenario:

The scenario facing the plight of those in need of protection in the Asia-Pacific region is faced with key challenges including the following:

a) Multiplicity of Terms/Categories

As noted above, a variety of terms have been used to cover situations of those seeking refuge. For instance, the terms "refugees",

"asylum-seekers" and "externally displaced persons" appear as expressions to describe what in many situations are similar if not the same. If one were to take a broad definition of the term "refugees" to cover situations of persecution, war/armed conflicts and gross human rights violations, and to treat the ascertainment of refugee status as declaratory rather than constitutive, the term "refugees" would arguably suffice to cover the other two terms.

Varied interpretations of the term "refugees" lead to the following complications, as noted by a UNHCR document:

> "8. At least three groups can be identified on whom divergent views concerning the interpretation of the refugee definition criteria have emerged:
>
> a) One important group consists of those who fear persecution by non-State agents for 1951 Convention reasons. Although in most countries they are recognised as refugees under the Convention, in a few countries they are denied refugee status and provided with alternative status;
>
> b) Another group comprises refugees who flee persecution in areas of on-going conflict. In a number of countries, they are treated as "victims of indiscriminate violence" and provided with complementary protection. This is the case even when the conflict they flee is rooted in ethnic, religious or political differences which specifically victimise those fleeing. In other States, this may well be the basis for their recognition as Convention refugees;
>
> c) A third group consists of persons who fear or suffer gender-related persecution, and who otherwise fulfil the criteria under the Convention. In a significant number of States, they are provided only a complementary or subsidiary status, often on a legislative basis, instead of being recognised as refugees. In other jurisdictions, such per-

sons are recognised as fulfilling the Convention criteria."

At the national level, the proliferation of terms is taken further with such nomenclature as illegals, illegal immigrants, displaced persons and those fleeing from fighting. These terms are often used to cover what the international community would call "refugees", but the fact that they are used nationally indicates that the national authorities wish to dissociate themselves verbally, if not conceptually, from the international terminology. There are practical implications for this. First, countries which avoid the term "refugees" tend to be countries that do not wish to be formally bound by the Refugee instruments. Second, the national nomenclature indicates a preference for broad national discretion in dealing with those seeking refuge on their territory, at times at variance with international standards. Third, a degree of confusion is caused by the national nomenclature since it fails to acknowledge that refugees are different from illegal immigrants. While the latter are still protected by the country of origin, the former are not. While the latter can return easily to the country of origin, the former cannot - precisely because refugees have had to escape from the country of origin.

The eight categories listed above of those in need of protection are linked with different components of protection. In the case of the refugee, asylum-seeker and externally displaced person, it is more often than not a question of protection , in a cross-border situation, against being sent back forcibly to the country of origin, precisely because the latter has failed to protect them or pushed them to escape. In the case of all eight categories above, there is the other angle of protection in the form of protection from human rights violations wherever they are and whether or not they have crossed borders.

Recently, the world has woken up to another category for which there may be an overlap with all the eight categories noted above. Victims of trafficking have come to the fore as a major concern. They are now covered by a new international Convention and its Protocol, namely the United Nations Convention against Transnational

Organised Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000). "Trafficking in persons" is defined by Article 3 of that Protocol as follows:

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour of services, slavery or practices similar to slavery, servitude or the removal of organs."

The consent of the victim in regard to the exploitation is irrelevant.

Then there is another category which may at times overlap with trafficking: smuggling. This is covered by another Protocol attached to the recent Convention mentioned, i.e. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention on Transnational Organised Crime (2000). By its Article 3, "smuggling" is defined as:

> "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident."

These new instruments provide for more effective criminalization of the traffickers and smugglers, with closer international cooperation on the issue, including exchange of information and extradition.

With these new categories, how are refugees who may also be victims of trafficking and smuggling to be protected ? The saving

clauses of the two Protocols are similar and provide for the situation of the refugee as follows: (per Article 14 of the anti-trafficking Protocol)

> "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, 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 recognised principles of non-discrimination."

Such saving clause implies that the refugee who is a victim of trafficking or smuggling still retains his/her rights as a refugee and should have access to the refugee protection system, including refugee status determination procedures. The laws and related classification of trafficking and smuggling should not lower the standards of protection accorded to refugees but help to raise those standards.

b) Proliferation of Technicalities

A number of technicalities have been introduced in recent years by some countries to ensure greater control over influxes of those seeking refuge, at times to the detriment of the international refugee protection system. One technicality is to send back a person who could have sought refuge in a country back to that country, when that person has been "orbiting" from one country to another after leaving the country of origin. The argument, according to the country sending back such person, is that there is a "safe third country" available. However, this is misleading precisely what is safe for some may not be safe for others. The "safe third country" concept has thus has been

used as a tool to prevent those seeking refuge from being admitted to asylum procedures and for sending them out of the country. This comment from a UNHCR document is indicative of the real situation:

> "Due to an inappropriate application of this notion ("safe third country"), asylum-seekers have often been removed to territories where their safety cannot be ensured. This practice is clearly contrary to basic protection principles and may lead to violations of the principle of non-refoulement. As is clear from relevant Conclusions of the Executive Committee (of the UNHCR), no asylum-seeker should be returned to a third country for determination of the claim without sufficient guarantees, in each individual case, that the person will be readmitted to that country; will enjoy there effective protection against refoulement; will have the possibility to seek and enjoy asylum; and will be treated in accordance with accepted international standards.
>
> An individual analysis must be done to establish whether the asylum-seeker can be sent to a third country. The question of whether a country is "safe" is not a generic one which can be answered for any asylum-seeker in any circumstances (i.e. on the basis of a "safe third country list"). A country may be "safe" for asylum-seekers of a certain origin and "unsafe" for others of a different origin, also depending on the individual's background and profile."

Another technicality used to prevent access for refugees is to claim that the person's claim to refugee status is abusive or manifestly unfounded. This is particularly pertinent to the situation where the person has used false documents to gain entry or has destroyed his/her identity document. It is also linked to the argument that the person should have gone to a safer place in the country of origin instead of leaving to seek refuge in another country (the so-called "internal flight alternative").

On analysis, the fact that the person has used false documents or destroyed the identity document should not lead to automatic dismissal of a refugee claim, precisely because the use of such documents and the destruction of identity documents may have been the only way of escaping from the country of origin and entering a potential country of refuge. Likewise, the "internal flight alternative" is misleading . In practice, it has been used to prevent those seeking refuge from accessing the full range of asylum procedures.

The injustices arising from the above technicalities are discussed as follows in a UNHCR document:

> "23. Similarly, claims from asylum-seekers arriving without documents or with false documentation have often been treated as abusive, in disregard of the fact that persons facing persecution are frequently compelled to travel without documents or to use forged documents to reach a potential country of asylum. It is accepted that a presumption of abuse may result from an asylum-seeker having, for example, wilfully destroyed or disposed of travel or other documents in order to mislead the authorities. Nevertheless, that presumption must still be tested in appropriate cases to determine its validity. Where an asylum-seeker does not possess proper documentation or has traveled on false documents, this by itself does not automatically render a claim abusive or fraudulent.
>
> 24. There has also been a growing confusion in the practice of a number of States between admissibility procedures and accelerated procedures. Issues that should have been evaluated in substance after admission to an accelerated procedure, have been erroneously considered under the decision on the admissibility of an asylum application. The two types of procedures must be clearly differentiated. The purpose of admissibility procedures is to

decide whether the claim will, or will not, be considered in substance in the country where is has been submitted. The purpose of accelerated procedures is to deal with the substantive claim in a simplified, shorter manner. Decisions on the abusive or manifestly unfounded character of a claim should not be taken at the admissibility stage.

25. Particular problems have been encountered in recent years with the determination of refugee claims that involve analysing whether the fear of persecution extends to the whole of the territory of the country of origin. In the practice of a number of countries, increasing insistence has been put on efforts which the asylum-seeker should have made to explore relocating internally prior to seeking asylum. The possibility of accessing safety elsewhere inside the country of origin has been styled "internal flight alternative" or more recently the "relocation principle" and has been used increasingly as a bar to admissibility of claims for refugee status.

26. In UNHCR's view, the use of this notion to deny access to refugee status determination, rather than situating it within the framework of the status determination analysis, risks seriously distorting refugee law. Moreover, even when examined in the context of substantive determination procedures, this notion is often applied without due regard for the circumstances in the displacement area, and the reasonableness of relocating internally as opposed to seeking asylum. This is particularly pertinent in the case of so-called "failed States" where political fragmentation means that it is no longer possible to equate a State with its constituent parts."

Another technicality is the notion of "temporary protection" whereby in mass influx situations, such protection is accorded to

those seeking refuge, as contradistinguished from long-term refuge or asylum pursuant to admission to asylum/refugee status determination procedures. This notion should not be used to prevent access to full asylum procedures. Yet, there is this **caveat** from a UNHCR document:

> "43. A related and disturbing development over the reporting period has been a growing tendency for States to extend the application of temporary protection regimes to asylum-seekers arriving outside the context of mass displacement. UNHCR's view remains that temporary protection is a practical device, allowing for a principled response by States to sudden arrivals of large numbers of asylum-seekers displaced by situations of war and generalised violence. Where individual status determination is too cumbersome or even impossible, protection is nevertheless ensured through the granting of temporary protection, albeit on the basis of temporary stay for most of them in the country of asylum. Upon termination of temporary protection, persons with ongoing protection needs must, in UNHCR's view, have access to proper individual procedures to determine these needs against Convention status requirements. Where there is no mass influx, individuals should be given access to an individual procedure to determine their status under the 1951 Convention."

A recent development is the notion of "complementary protection". Basically, it applies to individuals rather than mass influx cases and it is related to the situation after they have undergone a refugee status determination procedure. It means that even if these individuals do not pass the test of such procedure to be classified as refugees, they still need to be protected and are thus accorded a form of protection, **alias** "complementary protection" . Such protection implies non-refoulement and continued stay in the country of refuge with safeguards for human rights and access to basic services until the conditions are ripe and safe for these persons to return to the

country of origin. This notion is useful to cover two groups, as expressed by a UNHCR document:

> "a) Persons who should fall within the terms of the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, but who may not be so recognised by a State as a result of varying interpretations;
>
> b) Persons who have valid reasons for claiming protection, but who are not necessarily covered by the terms of the 1951 Convention."

Yet, these challenges are particularly pertinent:

> "25. ...Complementary forms of protection adopted by States to ensure that persons in need of international protection actually receive it, are a positive way of responding pragmatically to certain international protection needs;
>
> a) Beneficiaries of complementary protection should be identified according to their international protection needs, and treated in conformity with those needs and their human rights, The criteria for refugee status in the 1951 Convention should be interpreted in such a manner that individuals who fulfil the criteria are so recognised and protected under that instrument, rather than being treated under complementary protection schemes.
>
> b) Measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime;
>
> c) The standards of treatment of beneficiaries of complementary protection should provide for the protection of basic civil, political, social and economic rights. States should, as far as possible, strive to devise

> harmonised approaches to the treatment provided. They should implement complementary protection measures in such a way as to ensure the highest degree of stability and certainty possible in the circumstances, including through appropriate measures to ensure respect for other important principles, such as the fundamental principle of family unity."

In reality, the fact that this complementary protection (RE: "post" refugee status determination concerning individuals) needs to be contra-distinguished from temporary protection (RE: "pre" refugee status determination concerning mass influxes) is not always easily understood by those not well-versed in technicalities.

c) Cross-elasticity between Protection, Control and Managed Migration

There is a pivotal linkage between the instruments of migration control on the part of States (e.g. migration laws and policies), management of migration and protection of those in need. One of the visible signs of cross-elasticity between these elements is that the more prohibitive or restrictive the migration laws and policies of States, the more the migrants will resort to clandestine means of exit and entry, with the potential of becoming victims of criminals seeking to exploit them. This is most evident in relation to the growing phenomenon of human trafficking and smuggling which also affects those seeking refuge in other countries.

These observations from the World Migration Report 2000 in relation to Europe are also pertinent to the Asia-Pacific region:

> " As governments in the region introduced new visa and other policy restrictions on the legal entry of foreigners and tightened up immigration controls at airports and border crossings, so organised traffickers managed to expand their control over unauthorised border crossing. With official controls so much stricter in western Europe than in the past, it is

increasingly difficult for unauthorised migrants to reach the region without the assistance of traffickers. Ironically, therefore, stricter immigration controls in western Europe appear to play into the hands of organised crime networks. During the first half of 1998, for instance, more than one half of the 5000 or so unauthorised migrants from the former Yugoslavia apprehended in Germany were reported to have used traffickers.

.... While smugglers and traffickers strengthened their control over unauthorised border crossing, governments introduced a range of policies during the last decade or so designed to restrict asylum-seekers' access to western Europe. As a result, asylum-seekers attempting to reach western Europe often have little choice but to turn to traffickers; and thus arrivals of asylum-seekers fleeing conflict and human rights abuse increasingly intermix with the entry of unauthorised economic migrants. As a result, large numbers of ethnic Albanians from Kosovo, Kurds from Iraq, and Roma from eastern Europe - among other asylum-seekers - are labeled and treated as unauthorised immigrants, or (a relatively new term) illegal refugees."

On reflection, there is a need to shift away from the counterproductive type of instruments of control. This calls for realistic migration quotas for migrant workers and immigrants, adequate channels for family reunion cases and related orderly departure programmes, possible sponsorship programmes from the receiving countries to sponsor entrants, humanitarian categories or exceptions which provide for entry of humanitarian cases, dissemination of related information, and humane migration laws and policies that enable the outflow and influx of refugees and other migrants to be managed in keeping with international standards. The preferred directions are highlighted by international instruments of protection ranging from the Refugee instruments to the more recent Protocols against traf-

ficking and smuggling, and international labour standards, especially advocated by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990. In regard to the latter, for example, migrant workers who come to a country without the required documents (and are thus effectively "illegals" under that country's law) retain their rights against employers, e.g. in regard to salaries and access to justice and the judicial system. However, while Asia-Pacific countries have been willing to sign up the anti-trafficking Protocol, they have shied away from not only the Refugee instruments but also the Migrant Workers' Convention.

Confidence building among States to follow the path of managed migration consistent with international standards depends much on international solidarity and burden-sharing, as seen below.

d) Compassion Fatigue, Burden-Sharing and Burden-Shifting

Compassion fatigue towards refugees and other groups in need of protection is nothing new. However, it has been aggravated in recent years by the mass influxes which have taken place and by the declining commitment to grant asylum on the part of many countries. The promise of temporary refuge by well-intentioned countries has also been reduced to a degree of cynicism when that refuge turns out to be almost permanent, without adequate support from other countries. This is compounded by the double standards of some developed countries; when they advocate international standards for developing countries, they themselves fail to abide by them.

In retrospect, as recipients, Asia-Pacific countries have done relatively well in the past half century in according protection to those in need, in particular refugees, but there have also been lapses in practice, such as sporadic push-backs of refugees. Moreover, several of them are causing refugee outflows. On another front, while some have displayed great magnanimity in accepting huge influxes, the tide is also changing. For instance, while in the last decades of the 20th century neighbouring countries opened the door to Afghan refugees,

currently those same countries are starting to close the door.

As part of that compassion fatigue, a disquieting practice which rears its unwelcome head in both developing and developed countries is interception linked with interdiction or push-back, at times hidden behind various guises such as "humane deterrence" and the various technicalities noted above. Interception is being used, inparticular, against irregular migration linked with trafficking and smuggling, but it also has negative impact at times on those seeking refuge, including a threat to the principle of non-refoulement. Matters are compounded by the officials involved who are untrained in refugee law and who fail to differentiate between refugees and others not needing protection.

Some guidance for preferred action, advocated by the UNHCR, is found as follows:

"a) Interception and other enforcement measures should take into account the fundamental difference, under international law, between refugees and asylum-seekers who are entitled to international protection, and other migrants who can resort to the protection of their country of origin.

b) Intercepted persons who present a claim for refugee status should enjoy the required protection, in particular from refoulement, until their status has been determined. For those found to be refugees, intercepting States, in cooperation with concerned international agencies and non-governmental organisations (NGOs), should undertake all efforts to establish a durable solution, including through the use of resettlement;

c) Alternative channels for entering asylum countries in a legal and orderly manner should be kept open, in particular for the purpose of family reunion, in order to reduce the risk that asylum-seekers and refugees will resort to using criminal smugglers. By adopting appropriate national

legislation, States should enforce measures to punish organised criminal smugglers. By adopting appropriate national legislation, States should enforce measures to punish organised criminal smugglers and to protect smuggled migrants, particularly women and children."

Much also depends upon international solidarity and burden-sharing rather than burden-shifting. Without this shared spirit, countries which are already overloaded with mass influxes will not be easily cajoled into adopting a more open policy. A successful instance of international and regional cooperation on this front in the Asia-Pacific region was the Comprehensive Plan of Action adopted by source countries, first asylum countries and resettlement countries in 1989 as a package of measures based on burden-sharing. This is dealt with in greater detail below and exemplifies the fact that this solidarity helps to guarantee the protection of those seeking refuge.

e) Effective Prevention, Cure and Responsibility

The plight of the various groups needing protection harks back to the need to address the root causes of migration and displacement. Invariably, there are human rights at stake, coupled with the challenges of democracy, sustainable development, environmental protection, peace and good governance. The protection element of concern to this study is much contingent upon effective preventive measures to address those root causes. Thus the various standards on refugee protection are closely linked with international human rights standards and related violations which condition or are conditioned by the root causes and the need to promote the totality of and interdependence between those standards in practice.

Where there are violations of those standards, the question of cure or remedies also arises, and the protection of needy groups is also contingent upon redress for those whose lives have been harmed. Increasingly, this is seen in the light of State responsibility in terms of the accountability of the State and its actors in addressing the

root causes and providing redress. On the other hand, the question of the responsibility of non-State actors, such as non-government armed groups, the business sector and individuals, is coming increasingly to the fore. Innovative developments include the fact that several countries now accept that the persecution element inherent in the term "refugee" may be attributed to not only the State but also non-State actors. The question of individual responsibility has given rise to the establishment of international criminal courts. While the current international tribunals for former Yugoslavia and Rwanda are ad hoc, the advent of the Rome Statute of the International Criminal Court 1998 has opened the door to the establishment of a permanent international criminal court. This helps to act as both a deterrent against potential individual violators who may be responsible for refugee outflows and a means of redress against violators.

Asia-Pacific Trends:

a) National and Bilateral Responses

As already noted, most Asia-Pacific countries are not yet parties to the Refugee instruments. However, national responses, to a large part, reflect and respect the standards set by those instruments, including the principle of non-refoulement. Indeed, at times the non-Parties have acted in a more humane manner towards those seeking refuge than those countries which have acceded to the Refugee instruments have done so.

A major issue at the national level is the need to encourage these countries to protect those seeking refuge, differentiate them from those not needing protection, and not to apply immigration laws and policies in breach of international standards.

The national responses may also need to be complemented by bilateral arrangements - formal or informal. Some lessons are visible from South-east Asia. One example is readmission arrangements or agreements for returnees to go back to their country of origin. This has been used, for instance, in relation to the returnees from Thailand to

Laos. By contrast, Vietnam has allowed an Orderly Departures Programme to be implemented whereby people who might otherwise have been refugees can apply to emigrate to the United States. This is closely shaped by family reunion considerations. With regard to another key group - the Burmese, there is still a political impasse preventing the voluntary repatriation of the Burmese who have sought refuge in Thailand. Any future return of this group would need not only bilateral safeguards of safety but also international monitoring.

b) Regional Responses

There are three regional responses of note. First, there is an intergovernmental forum known as the Asian-African Legal Consultative Committee (AALCC) which in 1966 adopted a non-binding set of Principles on refugees. Those Principles adopted a definition of the term "refugee" similar to the Refugee instruments. They were also more progressive in a number of ways, especially with a provision on the issue of asylum, an element not adequately covered by the Refugee instruments above. As noted by the book titled The Status of Refugees in Asia, the progressive nature of these Principles included the following tenets:

"1. The exercise of the right to grant asylum to a refugee is to be respected by all other States and is not to be regarded as an unfriendly act. By contrast, there is no such provision in the 1951 Convention.

2. No one seeking asylum is to be subjected to measures such as rejection at the frontier, return or expulsion to a country where he fears persecution. The reference to non-rejection at the frontier goes further than the 1951 Convention, which mentions only the instance where a refugee is already on the territory of the State granting refuge, as opposed to being at the border of the State prior to entry.

3. A State should grant at least temporary refuge to refugees. This reference to a temporary stay in the country

granting refuge is lacking in the 1951 Convention, which seems to be based upon permanent stay and long-term settlement rather than temporary refuge. This innovation is pertinent to the kind of refuge to be granted to mass influx of refugees."

Subsequently, the AALCC adopted an addendum to support the principle of international solidarity and burden-sharing in relation to refugees. It is now contemplating a review of those Principles. An important consideration is that it should help to raise international standards and not lower them. It may wish to broaden the definition of 'refugee' to cover victims of war/armed conflict and human rights violations, which two other regional entities have opted for. A key **caveat** is that it should avoid the proliferation of technicalities noted above which are often used to constrain help for those seeking refuge rather than to ensure their protection.

Second, in 1989 countries of the Southeast Asian region and beyond came together to adopt the Comprehensive Plan of Action (CPA) as a package of measures interlinking between the source countries, first asylum countries and resettlement countries. The source countries promised to adopt measures to reduce clandestine departures such as a more effective information programme, while first asylum countries promised to provide temporary refuge to those arriving in search of refuge. A refugee status determination or screening procedure was introduced region-wide using the definition of "refugee" under the Refugee instruments. Those passing the test would be eligible for resettlement in third countries. Those failing the test would have to return to their country of origin. This package led to a substantial decline of the caseload, and although the non-refugees or the "screened-out" could have been sent back forcibly, in many instances, there was a mixture of inducements for them to return home on a voluntary basis, e.g. reintegration aid. The implementation of this package has now been completed. The final touch of humanitarian compromise was that a small group of non-refugees from Vietnam

in Hong Kong were allowed to stay on in Hong Kong after the CPA ended, a gesture tantamount to local settlement.

The third forum which has arisen in the region addresses a whole range of migrants in the region, not simply refugees although also covering refugees. The Asia-Pacific Consultations on Refugees, Displaced persons and Migrants (APC) began to hold dialogues in 1996 on this issue and its most recent dialogue was in Hong Kong in 2000. It has provided a key environment for dialogue and information exchange between countries of the Asia-Pacific region. More sub-regional meetings are now being held, in addition to the annual regional dialogue. In 1999, the APC countries adopted the Bangkok Declaration on Irregular Migration which set the tone for addressing irregular or unauthorised migration and its impact on the variety of groups in need of protection. That Declaration underlined the following: **(inter alia)**

- the need to address migration, particularly irregular migration, in a comprehensive manner;
- the need for concerted efforts to address the orderly management of migration and irregular migration;
- the need for comprehensive analysis of root causes and consequences of irregular migration;
- adoption of legislation to criminalize smuggling and human trafficking;
- humanitarian treatment of irregular migrants;
- information exchange;
- designation of national focal point on the issue.

Currently, the trend seems to be to address more the trafficking issue than the refugee issue, although the issue of burden-sharing of the latter was discussed at the most recent meeting. The APC has also been paralleled by another forum on the trafficking issue in the Asia-Pacific region known as the Asian Regional Initiative against Trafficking (ARIAT) process, and the two are increasingly convergent on this issue.

By comparison, it should be noted that the European Union (EU) has been moving toward a common harmonised policy on asylum and refugees, recently with an initiative from its meeting in Tampere 1999, although its treatment of those seeking refuge has been ambivalent on many fronts (as exemplified by the various technicalities above which the EU has also used). The question of a move towards harmonisation may be raised in the Asia-Pacific region through (sub-)regional organisations such as the Association of South-east Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC). SAARC has ,in fact, been exploring a sub-regional Convention on the issue of trafficking. ASEAN is also showing interest on this matter, but has not concretely addressed the issue of harmonisation in relation to refugee status. These avenues should ensure that they reinforce international standards and do not lower them.

c) Multilateral Responses

A perennial question is: why do most Asia-Pacific countries shun accession to the Refugee instruments ? In reality, if these non-Parties are already abiding largely by the standards stipulated under such instruments, why do they not sign up formally to them ? The advantages include the fact that by acceding to the Refugee instruments, there would be greater uniformity in refugee protection, especially with an accepted common definition of the term "refugee" and the attendant rights. The need to establish refugee status determination procedures under the instruments would lead to greater certainty of that status and contradistinguish refugees from other groups. Likewise, the Refugee instruments provide a possible common platform for international solidarity and burden-sharing.

However, many countries remain hesitant to take that quantum leap of accession. They are still fearful of mass influxes and are reluctant to accept local settlement or assimilation as a solution ensuing from the instruments. Their national security claim is longstanding, and has to be dealt with progressively. Despite non-accession, it

should be recognised that a number of Asia-Pacific countries participate actively in the Executive Committee of the UNHCR whose deliberations and Conclusions often help to evolve refugee law.

The paucity of accessions to the Refugee instruments should also be seen in the light of this region' s limited record in acceding to human rights treaties generally. The sole treaty to which they have all acceded is the Convention on the Rights of the Child 1989, but many countries also entered broad reservations not to accept the rights of the refugee child. Very few have signed up to the Migrant Workers' Convention above which provides minimum standards in relation to migrant workers and their families. However, several Asia-Pacific States have shown greater willingness to sign up to the Convention on Transnational Organised Crime and its Protocols on human trafficking and smuggling. This fervour should be tapped to ensure that the refugee and others in need of protection benefit from humane treatment when they are also victims of trafficking and smuggling. There should also be common and harmonised procedures to ensure that the victim of trafficking and smuggling benefits from refugee status determination procedures where the circumstances indicate the possibility of that status.

Conclusions:

In retrospect, the record of the Asia-Pacific region in addresing the issue of migration and the refugee phenomenon has been laudable on many fronts, while there have also been lacunae in some areas with room for improvement. Notably, in recent times, the region has been host to a very large number of those seeking refuge and has, to a large extent, accorded them protection by allowing them to stay temporarily. However, that temporary refuge has at times been mired in uncertainties, such as sporadic push-backs of those seeking refuge and or use of various technicalities to prevent their admission. The root causes of such flows have yet to be dealt with more effectively, and the whole array of human rights for the full range of persons needing protection, whether they are internally displaced or externally displaced, should be enhanced.

In this perspective, there are key orientations for the future including the following:

- the need to ensure effective protection of human rights for all, interlinked with the call for democracy, sustainable development, environmental protection, peace and good governance;
- the need to respect non-refoulement with the realisation that while traditionally this was advocated in the case of cross-border cases, it is also now being extended to cover those who are internally displaced;
- the need for an effective protection framework highlighting at least temporary refuge and protection for those who are displaced, in addition to non-refoulement, non-discrimination, access to basic services and satisfaction of basic needs, family unity, and a variety of long-term or durable solutions (local settlement, third country resettlement and voluntary repatriation) ;
- the need to uphold the definition of "refugee" in the 1951 Refugee Convention as amended by its 1967 Protocol, with the possibility of extending it to cover victims of war/armed conflict and egregious human rights violations;
- the need to identify and support national and international agencies which can provide protection to persons in need of protection; in this regard, there is the primary role of the UNHCR in refugee protection, while those who are internally displaced need a coordinated set of agencies which can offer help, including the International Organisation for Migration (IOM), the International Committee of the Red Cross (ICRC), and possibly the UNHCR where its mandate is extended by the UN;
- the need to enable civil society, including NGOs, to play a key role in monitoring the protection of those in need and to offer help;

- the need to empower refugees and their representatives in the protection process;
- the need to have refugee status determination procedures, following international standards, whether or not the countries where such procedures are (to be) adopted are parties to the Refugee Convention and its Protocol ; such procedures should include possibilities of appeal;
- the need to convey the understanding that the grant of refuge or asylum is a humanitarian act which should not be considered to be hostile;
- the need to ensure that national immigration laws and policies do not victimise refugees and others in need of protection; preferably, there should be a law, separate from immigration law, to recognise refugee status; if it is felt that immigration law should deal also with refugees, the distinction between refugees and illegal immigrants should be made clear, and such law should also stipulate a category of humanitarian exceptions to allow refugees to remain in the short- and long-term;
- the need to pay particular attention to the rights of vulnerable groups within the categories of those needing pro-tection, e.g. women, children, those with disabilities and the elderly;
- the need to ensure complementarity between laws on human trafficking and smuggling and the protection of refugees and others in need so as to treat them as victims;
- the need to help local populations affected by refugee influxes so as to promote non-discrimination among local residents and the newcomers;
- the need to capacity-build countries and their officials, such as through consistent training, to understand, promote and protect human rights, in addition to the specific international regime for refugee protection;

- the need to enhance public education on migration issues and the human rights of migrants to counter racism and xenophobia, and to foster activities between different ethnic groups from a young age to nurture cross-cultural understanding and empathy for those who are displaced;
- the need to promote international solidarity and burden-sharing;
- the need to criminalise and punish those who exploit refugees and others need of protection, while not criminalising refugees and those in need of protection;
- the need to provide victim-friendly facilities to refugees and others need in of protection when they have to confront the judicial and administrative process; in this regard, where possible, refugees and others in need of protection should not be held in detention but be transferred to welfare facilities, and if detention is to take place, it should not be indefinite;
- the need for States to accede to the whole range of treaties dealing with human rights and the protection of migrants, implement them effectively, and withdraw reservations from the treaties to which they have acceded;
- the need to maximise use of regional forums for dialogue and action to protect those groups in need of protection and reinforce international and regional cooperation on the issue;
- the need to promote voluntary and safe return of refugees and others in need of protection to their country/ area of origin, with sustainable follow-up and assistance for reintegration.

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Chapter VI *Children and Displacement: The Interface between Child Rights and Asia*

Introduction:

Globally millions of people are on the move every year. At times, this movement is positive in that it offers new livelihoods and opportunities. However, there is a more disconcerting side to such movement; massive displacements of people are also taking place whereby millions are forced or coerced into moving from their homesteads for a variety of negative factors such as persecution, human rights' violations, violence, armed conflicts, environmental pressures, and exploitation due to crime. Children, who are already vulnerable due to their sensitive age and stage of development, are doubly and multiply vulnerable, as the displacement may wreak further havoc on their safety and progression.

There are both massive cross-border flows and internal flows of displaced persons. A definition of the term "displaced persons" can be given as follows, adapted from the work of the Special Representative of the United Nations Secretary-General on Internally Displaced Persons:

> "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disasters".

This study is particularly concerned with four main issues related to displaced children:

- refugees, namely those who have crossed borders in search of protection and are thus externally displaced;
- internally displaced persons, namely those who move for the reasons mentioned in the definition above within borders;
- persons displaced by environmental stress, e.g. relocation due to "development" projects and natural disasters;
- persons displaced by sale and/or trafficking and/or criminality.

Child Rights:

Internationally, the child is defined as a person under 18 years of age. There is a comprehensive global framework to protect and assist children in the form of a treaty known as the 1989 Convention on the Rights of the Child (CRC). There is a host of other instruments which complement this Convention in terms of international standard setting. These include the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights.

The CRC posits four main principles as follows:

- non-discrimination, implying that all children have inherent rights, irrespective of their nationality, gender and other origins;
- the best interests of the child, implying that in all matters concerning the child, his/her best interests must be a primary consideration;
- the right to life, survival, development and protection;
- respect for the views of the child as part of the right to participation.

To date, the CRC has been signed/ratified by almost all countries of the globe. Under the CRC, there is an international Committee on the Rights of the Child set up to monitor its implementation by States parties. The latter are obliged to report periodically to the CRC Committee, and the latter will make recommendations in regard to areas needing improvement in the form of "concluding observations". Implementation of the CRC usually entails effective national laws, policies, programmes, practices, mechanisms and resources.

While displaced children have benefited from the greater transparency advocated by the CRC, the latter has been weakened, to some extent, by many States which do not accept various provisions of the Convention. In particular, these States have entered reservations to two key rights pertaining to displaced children, namely the right to birth registration and to acquire nationality (Article 7), and the right of refugee children to protection and assistance (Article 22). These are discussed further below.

At this juncture, it is timely to test the issue of child rights from the angle of various forms of displacement.

Refugee Children:

Refugees are generally seen as those crossing borders in search of protection. The root causes of such displacement are primarily political persecution, human rights' violations and armed conflicts. Internationally, movements for purely economic reasons such as poverty do not give rise to refugee status. The main United Nations agency with a mandate to help refugees is the office of the United Nations High Commissioner for Refugees (UNHCR). The main international treaties on the right of refugees are the 1951 Convention relating to Status of Refugees and its 1967 Protocol.

The definition of "refugee" under the Refugee Convention as amended by its Protocol is as follows: any person who

"owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it."

The definition addresses principally the political refugee. In practice, it has been extended to cover victims of armed conflicts and serious human rights' violations.

It is a fact that most Asian countries have not acceded to the above instruments. However, to a large extent, they have abided by the sense of humanitarianism inherent therein. The UNHCR is also mandated by its Statute to offer assistance and protection to refugees in all countries, irrespective of accession to the instruments.

At the National Consultation on " Challenging the New Millennium: The Rights of the Child and the Issue of Displacement for Thailand" held in Bangkok on 11-12 October 1999, a representative of the Office of the United Nations High Commissioner for Refugees (UNHCR) stated the situation as follows:

"The UNHCR is currently assisting 21.5 million refugees and displaced persons. Thirty-five percent of this number (or 7.5 million individuals) is found in Asia. About half of the number of refugees and displaced persons assisted by the UNHCR (or 10.7 million) are under the age of 18. In some refugee situations, the percentage of children increased over 60 percent. While the world moves towards the new millennium, addressing and resolving the plight of refugee children and adolescents represents one of the major challenges the international community is currently facing."

During the past decades, massive refugee flows have taken place in many parts of Asia. Examples include the flight of Indochinese refugees, refugees from Myanmar, refugees from East Timor, and millions of Afghan refugees. The latter three groups are still waiting for durable solutions. Southeast Asia, South Asia, West Asia and Central Asia have witnessed many different groups of refugees searching for asylum in other countries.

In many countries, while the national policy has been to allow them to stay temporarily without being deported, these refugees are still classified under national immigration law as illegal immigrants subject to deportation rather than as refugees with the right not to be pushed back to areas of dangers. There is thus a potential or actual conflict between the national position based upon national immigration law and the international position based upon the right to "non-refoulement" defined by Article 33 of the Refugee Convention as follows:

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Common problems facing those seeking refugee status include:

- threats to physical safety, e.g. refugee camps are placed too near conflict areas;
- psychological trauma;
- limited access to basic services such as education, health and shelter;
- lack of birth registration and family registration so as to recognise the child as a legal entity coupled with family unity;
- statelessness;
- gender-based violence and exploitation;

- limited access to protection and assistance, including legal assistance, e.g. if they are prosecuted in the courts for illegal entry;
- lack of a national process to determine refugee status, thereby leaving those seeking refuge in a limbo status as illegal immigrant even though, unlike ordinary illegal immigrants who are protected by their country of origin, those seeking refuge are not protected by the country of origin;
- presence of children not accompanied by their families, namely unaccompanied children, at times sent by their families expressly to open the door to resettlement in other countries ("anchor cases");
- limited cross-border cooperation to explore options such as how to deal with the root causes of displacement and how to provide effective solutions such as local settlement in the country of refuge, resettlement in third countries, and/or voluntary repatriation to the country of origin;
- national security fears on the part of the country of refuge, especially if some of those seeking asylum are involved in political activism.

From the angle of child rights, the CRC Committee has recommended consistently that member States should withdraw their reservations to the provisions affecting refugee children. It has also advocated that States should become parties to the main refugee instruments, namely the Refugee Convention mentioned above and its Protocol. By becoming parties to these instruments, States would need to guarantee protection for refugees. They would also need to implement a gamut of rights such as access to education and establish a screening procedure to determine refugee status and distinguish refugees from other groups such as economic migrants. Asia's limited record in acceding to the refugee instruments is shown by the fact that in Southeast Asia, only China, the Philippines and Cambodia are parties thereto. South Asia has generally distanced itself from

accession, while in Northeast Asia, only Japan and the Republic of Korea are parties to the instruments.

A strong message should be that pending accession to these instruments, countries should abide effectively by the humanitarian principles inherent therein. A variety of guidelines concerning refugee children also exist internationally which should be followed by all countries. These include:

- the 1994 UNHCR Guidelines on Refugee Children: Protection and Care;
- the 1997 UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children seeking Asylum;
- the 1997 UNHCR Executive Committee Conclusions on Refugee Children and Adolescents.

The general principles for dealing with refugee children were laid down by the 1994 UNHCR Guidelines as follows:

"a) In all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary consideration;

b) Preserving and restoring family unity are of fundamental concern.

c) Actions to benefit refugee children should be directed primarily at enabling their primary caregivers to fulfil their principal responsibility to meet their children's needs.

d) Where the special needs of refugee children can only be met effectively through child-focused activities, these should be carried out with the full participation of their families and communities.

e) Refugee girls and boys must be assured protection and assistance on a basis of equality.

f) Unaccompanied refugee children must be the particular focus of protection and care.

g) UNHCR staff are required to make their best efforts both to prevent risk to refugee children and to take additional action to ensure the survival and safety of refugee children at particular risk."

With regard to the unaccompanied child, the 1997 Guidelines highlight the following actions to help the child in question:

- access to territory in search for asylum;
- registration and identification of the child, including tracing of family;
- access to procedures to determine refugee status;
- care and protection;
- durable solutions, principally local integration in the country of first asylum, resettlement in third countries and voluntary repatriation to the country of origin.

The 1997 UNHCR Executive Committee Conclusions underline the following actions:

"i. preventing separation of children and adolescent refugees from their families and promoting care, protection, tracing and family reunification for unaccompanied minors.

ii. safeguarding the physical security of refugee children and adolescents, securing the location of camps and settlements at a reasonable distance from the frontiers of countries or origin, and taking steps to preserve the civilian character and humanitarian nature of refugee camps and settlements;

iii. preventing sexual violence, exploitation, trafficking and abuse; addressing the needs and rights of child and adolescent victims through the provision of appropriate legal and rehabilitative remedies; and by following up on the Plan of Action of the 1996 Stockholm World Congress on Sexual Exploitation of Children;

iv. providing appropriate training to military personnel and peacekeepers on human rights and humanitarian protections to which children and adolescents are entitled; and holding all parties accountable for violations of such rights and protections in refugee situations;
v. ensuring access to education, and the right of the child to freedom of thought, conscience and religion;
vi. providing medical or other special care, including rehabilitation assistance, to assist the social reintegration of refugee children and adolescents, especially those who are unaccompanied or orphaned."

Finally, there are special provisions in international law in the case of armed conflicts. Various Red Cross Conventions also call for protection and assistance of refugees, and the obligation for combatants to distinguish between military and civilian targets, preventing damage to the latter. There are prohibitions against the use of children as soldiers if they are under 15 years of age. This age threshold is in the process of being raised to 18 through the evolution of a Protocol to the CRC.

Internally Displaced Children:

The 1998 report of the Special Representative on Internally Displaced Persons estimates that there are some 25 million internally displaced persons (IDPs) today. Unlike the cross-border cases giving rise to refugee status under specific treaties under international law as discussed above, the international community has not yet adopted specific treaties on IDPs. However, there is the work of the Special Representative which has led to the concretisation of guidelines on IDPs discussed below.

IDPs are defined as:

" persons or groups of persons who have been forced or obliged to flee or to leave their homes or placed of habitual residence, in particular as a result of or in order to avoid the

effects of armed conflict, situations or generalised violence, violations of human rights or natural or human-made disasters, and who have not an internationally recognised State border".

In a study submitted to and published by the United Nations in 1998 entitled "Internally Displaced Persons: Compilation and Analysis of Legal Norms", as a precursor to the guidelines below, three situations are particularly pertinent to the displacement:

- situations of tensions and disturbance, or disasters;
- non-international, i.e. internal armed conflict;
- inter-State, international armed conflict.

However, there may be other coercive factors such as displacement by the arrival of settlers, evictions, natural disasters and environment-related projects such as dam construction. These factors are dealt with later in this study under the heading environmental stress.

The challenge facing IDPs is illustrated by this observation:

"9. Internally displaced persons are entitled to enjoy, in full equality, the same rights and freedoms under domestic and international law as do the rest of the country's citizens. However, experience has shown that such persons, in practice, rarely enjoy such rights and freedoms because displacement, by its very nature, generally entails deprivations of multiple rights. Along with its emotional cruelty, displacement often breaks up the nuclear family, cuts off important social and cultural community ties, terminates stable employment opportunities, and deprives those in need of special protection, such as infants, expectant mothers and the sick, of vital public/private sector services.

10. Although the displaced are frequently forced to flee their homes for the same reasons as do refugees, the fact that

> they remain within national territory means that they cannot seek to qualify as bona fide "refugees" entitled to the special protective regime accorded to refugees under international law. Moreover, their presence within national territory means that their own Government bears primary responsibility for meeting their protection and assistance needs. However, because Governments frequently cause or tolerate internal displacement and/or are unwilling of unable to guarantee the basic rights and meet the needs of their internally displaced persons, intergovernmental organisations, their specialised agencies and non-governmental organisations have, at times, assumed these roles on an ad hoc basis."

The problem of IDPs is rampant in Asia, and in nearly all countries, IDPs are to be found for a variety of reasons ranging from armed conflicts to political tensions and environmental stress. From the angle of the child, the deprivations often parallel those of refugee children, including lack of physical and psychological safety, statelessness, inaccess to legal protection, and weak cooperation to tackle the issue.

General human rights principles apply to IDPs. In armed conflicts, there are various humanitarian law treaties related with the Red Cross movement which provide further guarantees. In particular, the four Geneva Conventions of 1949 concerning the protection of victims in times of armed conflicts, as expanded by their Protocols I and II of 1977, are particularly pertinent. For example, Article 49 of the Fourth Geneva Convention concerning the treatment of civilians in times of armed conflicts dictates to occupying powers of a territory in international armed conflicts that "such evacuations may not involve the displacement of protected persons outside the bound of the occupied territory except when for material reasons it is impossible to avoid such displacement". Article 17 of Protocol II concerning non-international armed conflicts advocates that:

"1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

Recently as a result of the work of the Special Representative mentioned, various Guiding Principles on Internal Displacement have emerged. They advocate the key principle of non-discrimination and the obligation of national authorities to provide protection and humanitarian assistance. Principle 4 voices the concerns of children as follows:

"2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs."

The rights to be guaranteed according to these Principles include:

- the right to be protected against being arbitrarily displaced from his/her home or place of habitual residence;
- the right to life, dignity, liberty and security of IDPs;
- in relation to protection during displacement, the right to seek safety in another part of the country; the right to leave their country; the right to seek asylum in another country; and the right to be protected against forcible return to or resettlement in any place where their life and safety would be a risk;
- the right to family life and to trace families;

- the right to an adequate standard of living;
- the right to medical are;
- the right to recognition as a person before the law;
- the right not be deprived of property arbitrarily;
- the right to freedom of thought, conscience and association;
- the right to education;
- the right of voluntary and safe return to their home or place of habitual residence.

While these rights are readily acceptable in principle, a major challenge concerns the question of who is entitled to intervene and/or assist IDPs if there are violations of their rights, especially by the country of origin. Does the latter need to consent to the assistance or intervention ? The Guiding Principles provide this response:

"Principle 25:

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when the authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced."

By implication, consent of the country of origin is thus not a pre-condition for the humanitarian assistance, such as in relation to

medicine and food, to be offered to IDPs, if such consent has been without good reason. However, the Principles fail to provide an answer to the question of whether military intervention for humanitarian reasons or "humanitarian intervention" would be legitimate. Given the current debate on the issue in the United Nations, it may be submitted that even military intervention is becoming increasingly acceptable for humanitarian reasons if there are egregious human rights violations. Recent flashpoints include Rwanda where because there was no humanitarian intervention, genocide took place, and Kosovo where humanitarian intervention helped to protect IDPs. However, the case of Kosovo was particularly controversial as it was a regional self-defence organisation, the North-Atlantic Treaty Alliance (NATO) acting on its own initiative, rather than the United Nations or an organisation acting under the United Nations mandate, which intervened.

Two other issues are pertinent. Who actually provides such humanitarian assistance and protection? Who monitors protection of IDPs? With regard to the first question, a variety of actors are involved. Internationally, while the UNHCR is mandated to deal with cross-border cases, it has at times dealt with IDPs. The Red Cross movement, including the International Committee of the Red Cross, has been a key actor to help the victims of armed conflicts. A variety of non-governmental organisations (NGOs) are also active. This spread of agencies suggests the need for close coordination between the actors involved and to ensure that there is a fall-back agency if the others are not ready or are not able to act.

With regard to the second question, some monitoring is available via the Special Representative above who report to the United Nations, and existing treaty based mechanisms such as the International Human Rights Committee under the International Covenant on Civil and Political Rights, the CRC Committee, and the operations of the Red Cross movement . However, the lack of a specific treaty and related treaty-based mechanism on the issue of IDPs means that the monitoring is limited in scope.

On another front, there is a need to integrate the Guiding Principles mentioned into the work of all United Nations agencies and related bodies. The CRC Committee could also use them to render the situation more transparent via the national reports submitted for scrutiny under the CRC.

Children Displaced Due to Environmental Stress:

This heading is used to describe a variety of displacements linked with the environment which can be internal (within a country) or external (cross-border). Two forms are particularly relevant:

a) Dislocation due to environment-related projects

Displacement in this respect often refers to relocation or dislocation as a result of "development" projects, such as dam construction which takes its toll among the population, especially indigenous and rural peoples. Asia has witnessed a plethora of cases on this front, especially the infamous "damned dams" which have pushed out hundreds of thousands of indigenous peoples in many countries. The reaction against such displacement has been gathering momentum with environment NGOs becoming increasingly active in lobbying with world financial institutions not to give loans or grants to such projects unless there are mechanisms to prevent serious damage.

The World Bank which often provided loans for these projects in the past has become more circumspect. In 1990 it adopted various guidelines concerning involuntary resettlements in its dealing with development projects based upon these principles:

- community participation is essential in shaping the fate of those who are to be resettled;
- cooperation with NGOs on these projects is important to provide assistance to the displaced;
- in regard to the expropriation of property, resettlement and compensation:

"where resettlement is unavoidable, the identification of several possible relocation sites and their demarcation are necessary prior to the commencement of resettlement. For land-based resettlement, the new site's productive potential and locational advantages should be at least equivalent to the old site. For urban resettlers, the new site should ensure, inter alia, comparable access to employment, infrastructure, services and production opportunities. The conditions and services in host communities should improve, or at least not deteriorate: improved education, water, health and production services to both groups fosters a better social climate for their integration and in the long run prevents conflicts."

Two key developments have emerged in the Asian region. One is the spread of environmental impact assessment prior to the implementation of projects to assess potential damage to the environment and human displacement. The other is the growth of public hearings/inquiries prior to the adoption of projects so as to enable the community to participate in sharing opinions and reaching compromises prior to project implementation. With regard to environmental impact assessment, a key weakness in the past was that it tended to be based upon environmental and ecological data rather than the plight of human displacement and the need for compensation and comparable alternatives as a substitute for the previous livelihood of displaced persons. There should be stronger integration of the child's perspective as part of the child impact assessment. With regard to public hearings, there are at times difficulties in that the marginalised have little access to such hearings, and when they take place, such hearings do not necessarily lead to satisfactory compromises and options for the displaced persons. The methodology for the participatory process and concomitant remedies, such as mediation, still need to be evolved.

Interestingly, the International Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights has added this caveat as part of a General Comment concerning international financial and aid agencies:

"International agencies should scrupulously avoid involvement in projects which, for example...promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation...Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account."

b) Dislocation due to natural disasters

Massive displacements of children and their families may take place due to natural disasters such as flooding and fires. However, it should be recognised at the outset that what is termed "natural disaster" is often man-made rather than natural, e.g. extensive deforestation by logging companies leading to siltation and flooding.

International guidance on the issue can be derived from the 1994 Strategy and Plan of Action for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation adopted by the World Conference on Natural Disaster Reduction held in Yokohama. It is complemented by the International Decade for Natural Disaster Reduction which began in 1999.

Basicallly, the message is that disaster prevention, mitigation and preparedness is better than disaster response. As part of the Decade, the strategy for the year 2000 comprises the following:

"1. Development of a global culture or prevention as an essential component of an integrated approach to disaster reduction;
2. Adoption of a policy of self-reliance in each vulnerable country and community comprising capacity-building as well as allocation and efficient use of resources;
3. Education and training in disaster prevention, preparedness and mitigation;

4. Development and strengthening of human resources and material capabilities and capacity or research and development institutions for disaster reduction and mitigation;
5. Identification and networking of existing centres of excellence so as to enhance disaster prevention, reduction and mitigation activities;
6. Improvement of awareness in vulnerable communities, through a more active and constructive role of the media in respect of disaster reduction;
7. Involvement and active participation of the people in disaster reduction, prevention and preparedness, leading to improved risk management;
8. In the second half of the Decade, emphasis should be given to programmes that promote community-based approaches to vulnerability reduction;
9. Improved risk assessment, broader monitoring and communication of forecasts and warnings;
10. Adoption of integrated policies for prevention of, preparedness for, and response to natural disasters...."

Basically, all countries should formulate national plans and appoint a national coordinating committee pursuant to the Action Plan above. In 1999, the impetus for prevention strategies was taken further by the Asia-Pacific regional meeting held in Bangkok as a follow-up to the Yokohama Strategy. The Bangkok Declaration ensuing from this meeting highlighted these concerns:

- promotion of an integrated and holistic effort to prevent disasters;
- improvement of risk management through the involvement of professional, technical and scientific disciplines;
- strengthening of regional and sub-regional institutional and professional frameworks;

- enhancement of meaningful participation of local communities in reducing the vulnerability of people, the environment, social and economic resources;
- fostering of disaster management capabilities.

It may be noted that many of the programmes for disaster prevention and mitigation have been geared to the adult male rather than women and children. A classic example is that it tends to be the adult male who is taught to deal with flooding, such as by climbing on rooftops! Programmes thus need to be more gender-sensitive and child-responsive.

Children Displaced due to Sale and/or Trafficking:

The sale and/or trafficking of children for labour and other purposes in Asia has grown exponentially in Asia in the past decades. While the CRC clearly prohibits such practice, it is pervasive in the region, and has grown partly as a result of commercialization linked with poverty, demand and supply factors and criminal elements reaping their profits from children. Countries are often simultaneously source countries, destination countries and transit countries.

As an example of the magnitude and variety of the problem, a study from the International Labour Organisation (ILO) submitted at the conference on children and displacement in Thailand referred to above made this observation:

> "Thailand is the main receiving country in the Greater Mekong Sub-region. An estimated 194,180 foreign child labourers worked in Thailand in 1996. Most are from Myanmar, Laos and Cambodia and they work in construction, small shops, factories, agriculture, and domestic work. An estimated 16,423 foreign commercial sex workers is active in Thailand, of whom 30 percent is under 18 years of age. Cambodia and Yunnan province in China are both at the sending and receiving end. At least 3,000 Vietnamese children and women have been trafficked to Cambodia for sexual exploitation, and to China for domes-

tic work. The majority of the 7,000 unsolved trafficking cases from Yunnan Province in China has been trafficked internally and to Thailand, mainly for prostitution purposes. In Cambodia trafficking for sexual exploitation occurs mostly within the country itself: an approximate 20,000 children and young women do work in the sex sector in Phnom Penh alone. The average age of the girls has dropped to 15 years. Cambodian children are trafficked to Thailand mainly for begging and soliciting; about 500 Cambodian children are known to work for gangs in Thailand."

Nationally, many countries already have general laws such as the Penal Code which can counter such sale and trafficking. There may also be more specific legislation on the issue, such as Thailand's 1997 law against the trafficking in women and children. However, the problem is how to implement such law effectively and to strategise both nationally and transnationally against the criminal networks exploiting children.

The world is not short of international standards and treaties on the issue. In the early 20th century there were various Conventions against human trafficking. 1949 saw the passage of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. However, there has been a paucity of accessions to this Convention. NGOs have also criticised it for lacking a monitoring mechanism, for not being gender-sensitive enough, and for leaning towards reprimanding prostitution, even though it criminalises those who exploit prostitutes.

More recently, as already mentioned, the CRC prohibits the sale and trafficking in children. The ILO has propelled a host of Conventions against forced labour which can also be used against trafficking. In 1999, the ILO-backed Convention No.182 was adopted by the international community. Entitled Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the Convention calls for laws and policies to crimina-

lise those who traffic children. Article 3 classifies as "the worst forms of child labour", **inter alia**:

> "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."

Victims of trafficking may also be protected as migrant workers, whether or not they are documented, by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. However, there have been few accessions to this treaty. In regard to sexual trafficking of children, global counteraction was boosted by the 1996 Declaration and Agenda for Action of the World Congress against Commercial Sexual Exploitation of Children which highlighted the need for more preventive measures such as through education, more protection measures such as through law enforcement, more recovery and reintegration measures including psychological care, more child participation against the phenomenon, and more national and international cooperation. At the regional level, Asia-Pacific countries convened in Bangkok in 1999 to adopt the Bangkok Declaration on Irregular Migration calling for criminalisation of those involved in human trafficking, more exchange of information between countries, more information programmes, and more capacity building such as training of officials.

In terms of international standard-setting, there is being drafted currently the United Nations Convention against Transnational Organised Crime for which there will also be a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. Once finalised, this will call for closer cooperation between law enforcement authorities against the criminal elements trafficking in humans and to facilitate exchange of evidence and information for prosecutions and investigations. Interestingly, there is as yet no settled definition of the term "trafficking". The current draft (1999) offers this definition:

> "Trafficking in persons" means the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat or use of kidnapping, force, deception or coercion, or by the giving or receiving of unlawful payments or benefits to achieve the consent of a person having control over another person, for the purpose of sexual exploitation or forced labour."

From the angle of child rights, it is submitted that the question of consent is immaterial. The child must be protected absolutely against trafficking, irrespective of the issue of his/her consent.

In terms of programming, more United Nations and other agencies are now involved in countering the phenomenon. In Asia,these include the United Nations Children's Fund (UNICEF), ILO, United Nations Development Programme, the Economic and Social Commission for Asia and the Pacific (ESCAP), and the International Organisation for Migration (IOM). Their assistance ranges from financial and technical support to localities to training, research, information and service delivery to help the victims. A variety of NGOs and academic institutions are also active against the issue; these include the End Child Prostitution, Pornography and Trafficking for Sexual Purposes (ECPAT) organisation and the Mekong Law Centre supported by Canadian and Japanese funding.

A key problem facing the trafficked child is that he/she may regrettably classified as an illegal immigrant under the national immigration law of the destination country and/or illegal emigrant under the emigration law of the source country. It is thus essential to treat them as victims in law and practice, and attenuate the strictures of migration laws. One example of a humane development on this front was the 1999 Memorandum of understanding between government agencies and NGOs in Thailand to treat the victims humanely. Cross border cases will no longer land up in immigration jail in Thailand for having entered the country illegally. These children will be sent to welfare homes pending return to their country of origin rather than to immigration jail. Likewise, local victims will be treated humanely and will be put in the care of welfare institutions rather than law enforcers.

The message from the above is that while the international standards are ever-present to combat child trafficking, much more needs to be done at the field level in terms of concrete programmes to deal with the root causes of such trafficking, to end the criminal elements exploiting children, and to help child victims recover safely and return to their homesteads. A humane approach is essential to treat the victims through welfare and community institutions and services and not to penalise them through the criminal justice system. Safe return to their homes and countries is also imperative.

Critical issues:

a) Physical Safety

The physical safety of the various groups of displaced children is a major concern in Asia as elsewhere At one end, in the initial phase when the displacement is taking place, there is the question of access to help and safety whether in the case of refugee children, internally displaced children, children displaced due to environmental stress or children displaced by sale and trafficking. Then, there is the question of safe location of camps and accommodation. This is particularly difficult for refugee and internally displaced children who find themselves near conflict or combat areas. Subsequently, there is the issue of safety of the displaced children in the search for long term solutions. This may entail local settlement in the first country of refuge, resettlement in third countries and voluntary repatriation in the case of refugees, safe return home in the case of internally displaced children and trafficked children, and substitutes for their former homes in the case of children displaced by environmental stress.

The UNHCR's document entitled Refugee Children: Guidelines on Protection and Care illustrates the actions needed in the case of refugee children:

> "...
> Report incidents of abuse, assault, abduction, detention and military recruitment of children to the national authorities and

also to UNHCR Headquarters to enable intervention as appropriate in support of relevant Field Office interventions. Since corrective measures to protect refugee children from such action are difficult to achieve and may call for public condemnation, Field Offices must provide detailed reports, substantiated with as much proof as possible.

Camp/settlement character. Maintain the civilian and humanitarian character of refugee camps or settlements. The presence of armed resistance fighters in or near refugee camps or settlements increases security challenges and other problems.

Location. Locate camps or other accommodation at a safe distance from the border of the country of origin or conflict areas to minimize the danger of armed attacks, harassment or military recruitment.

Safe living environment. Promote safe living arrangements for refugee children and their families and communities the most opportunities to protect children. Consider the needs for privacy, adequate space, spatial configuration of camps, lighting at night and special security arrangements....

Special accommodation. Where necessary, organise special accommodation for individuals at particular risk, such as unaccompanied young women, families headed by women, or abused children. Creative solutions include protected housing, whistles, camp guards and crisis rooms."

It is also important to impose an obligation on the various actors who have impact on displaced children to ensure their safety. For instance, in the Guiding Principles on Internal Displacement, this position is stated as follows:

"Principle 10.

2. Attacks or other acts of violence against internally displaced persons who do not or no longer participate in hostilities are

prohibited in all circumstances. Internally displaced persons shall be protected, in particular, against:

a) Direct or indiscriminate attacks or other acts of violence, including the creation of areas where attacks on civilian are permitted;
b) Starvation as a method of combat;
c) Their use to shield military objectives from attack or to shield, favour or impede military operations;
d) Attacks against their camps or resettlements; and
e) The use of anti-personnel landmines."

At stake are the following challenges for all types of displacement:

- the need for effective access to help and areas of safety when the child is being displaced;
- the need for safe location of camps and accommodation once the child reaches the places and persons providing help;
- the need to ensure safe solutions for displaced children, including safe and voluntary to the country or area of origin.

b) Psychological Care

While the physical protection of displaced children is essential, there is the psychological side which should not be forgotten, especially as many children will be suffering from traumas related to displacements. This will need family and community supports as well as substitutes when the original family of the child is absent.

The linkage between physical and psychological care is evident in Article 39 of the CRC:

"States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse;

torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

A checklist for services related to psychological well-being is provided by the UNHCR Guidelines on Protection and Care as follows:

"• Are education and other activities provided so that children are able to participate in predictable and regular development enhancing activities ?
- Do refugee adults and children have access to social services and other specialized efforts to help address difficulties ?
- Are systems in place to identify and assist children experiencing psychosocial distress ?
- Is training and support being provided to teachers, primary health care personnel and other service personnel to help them better support children in distress ?
- Do specialised mental health services exist to which children in severe distress might be referred ?"

These questions may also be pertinent to the other groups of displaced children who are not refugees.

c) Access to Services

The need for effective access to services relates to all groups of displaced children. In the Guiding Principles on Internal Displacement, the following is advocated:

"Principle 18:

2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:

   a) Essential food and potable water;
   b) Basic shelter and housing;

c) Appropriate clothing; and
d) Essential medical services and sanitation.

3. Special efforts should be made to ensure the full participation of women in the planning and distribution of these basic supplies."

Gender imbalances in such access should not be forgotten; they should be countered by more proactive strategies to enable women/girls to have equal access when compared with men/boys.

Regrettably in many situations, displaced children simply have no access to basic services at all. This often happens when the victims of trafficking are locked up in hidden places, such as brothels and sweatshops. Much, therefore, depends upon measures to render the presence of the children more visible so that they would have genuine access to services.

In regard to education, while countries generally agree to permit children to elementary education whatever their status, the practice is deficient when the displaced child is a foreigner or stateless. Even when they have access to school, they may be hampered by the State policy not to grant certificates of performance/credits to foreign and/or stateless displaced children.

Access to services thus depends very much upon genuine realisation of the principles of non-discrimination, the best interests of the child, the right to life, survival, development and protection, and respect for the views of the child - the underlying axioms of the CRC.

d) Nationality and Statelessness

In many instances of displacement, the child is already stateless or becomes stateless. In regard to the latter, he/she may be stateless in practice, even though by law he/she has a nationality in principle, especially where the exercise of the rights under such nationality is not possible.

As indicated earlier, the CRC posits the right to be registered upon birth and to acquire a nationality, but several States have entered reservations to this right. This is partly due to their fear that the right to acquire a nationality would mean automatic acquisition of the nationality of the country where the child is born, i.e. **ius soli.** This fear is misguided as the CRC does not limit itself to such position. This is seen from the language of Article 7 of the CRC which does not restrict itself to **ius soli,** but leaves the door open to a variety of ways of acquiring nationality, including by blood ties, i.e. **ius sanguinis.** It reads as follows:

> "1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

What is to be done if the child is stateless ? Article 7(2) of the CRC provides a clue by referring to national law and international instruments. The Refugee Convention does not compel the signatory State to grant nationality to refugees. It merely advocates the possibility of naturalisation by stating that : (Article 34)

> "The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

For more guidance, there are the 1961 Convention on the Reduction of Statelessness and 1954 Convention relating to the Status of Stateless Persons. Basically, under the first instrument,

member States would be obliged to grant nationality to those born on their territory where they would otherwise be stateless. This thus veers towards the **"ius soli"** principle. These instruments are not yet binding on Asia, as Asian countries have generally not signed these treaties. However, the CRC Committee has recommended that countries should sign and abide by these treaties.

Even when a child is stateless, the CRC provides the framework for a variety of civil, political, economic, social and cultural rights. For instance, the right to education, including free and compulsory primary education, pertains to all children, including those who are stateless. This means that wherever they are, stateless children have the right to such education which must be implemented. In practice, as noted above, while many countries abide by this right, they fail to give certificates of performance. Beyond primary education, there are few guarantees of access to education.

On another front, displaced children are often in a difficulty when faced with the need to prove their nationality, even though in theory they may already have a nationality. This entails close cooperation internally and externally to ascertain proof of the child's identity and nationality. In cases where the child needs to return to his/her country or area of origin, where nationality cannot be proved, it should suffice that there is proof of the child's former domicile and/or habitual residence for the child to return there. Domicile and/or habitual residence are thus notions that complement nationality and help to fill in the void where it is not possible to ascertain proof of the child's nationality.

e) Protection and Assistance

The heading covers a variety of interventions some of which overlap with the other sections already discussed such as access to services. A key component of protection and assistance is legal protection such as help to prove the child's status and recognition of such status before the law, coupled with legal aid and representation.

This is crucial, for example, in the case of a child claiming refugee status. Unless he/she is able to prove such status, in national law he/she might be classified as an illegal immigrant subject to deportation. Under the Refugee Convention and its Protocol, a specific procedure is necessary for the determination of refugee status. However, precisely because many Asian countries have not become parties to this Convention, they lack such procedure and the status of those seeking refuge remains vague.

Even where the status of a displaced child is vague, a humane approach for treating the child is essential. For instance, if the child is a victim of cross-border trafficking, he/she is likely to be classified as an illegal immigrant by the immigration law of the destination country to which he/she is trafficked. By implication, he/she can be deported under such law. However, this is clearly unjust, as he/she should be classified as a victim rather than a wrongdoer tied to the rubric "illegal immigrant". Various instruments relating to child trafficking have thus called for humane treatment of these children and guarantees to ensure safe return to the country of origin, as opposed to mere deportation under national immigration law which may have no real guarantees of safety for the child.

For example, the 1996 Declaration and Agenda for Action of the Stockholm World Congress against Commercial Sexual Exploitation of Children advocates this action:

> "e) in the case of trafficking of children, develop and implement national laws, policies and programmes to protect children from being trafficked within and across borders and penalize the traffickers; in cross border situations, treat these children humanely under national immigration laws, and establish readmission agreements to ensure their safe return to their countries of origin accompanied by supportive services; and share relevant data."

In practical terms, this means that steps must be taken to ensure that the conditions are safe for the child to return to the country of origin, coupled with monitoring and follow-up at all stages from the destination country to the country of origin. The practice of pushing the child casually to a frontier without monitoring and follow-up should be shunned. There is also the reality that unless there are such safeguards, the child may regrettably be re-trafficked by criminal elements to the destination country in due course.

Interestingly, in the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, the possibility of allowing victims of cross-border trafficking to stay in the destination country for a while, possibly with a view to prosecuting the trafficker, and seizure of the assets of the traffickers, possibly with a view to compensating the victims, are voiced as follows:

"Article 5:

Status of the Victim in the Receiving State

1. In addition to measures provided pursuant to article 7 of this Protocol, each State party shall consider enacting immigration laws that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. Each State party shall give appropriate consideration to humanitarian and compassionate factors in determining the status of such a victim in its territory when it is the receiving State party.

Article 5 bis

Seizure and Confiscation of Gains

States parties shall take all necessary and appropriate measures to allow the seizure and confiscation of gains obtained by the criminal organisations from the offences described in this Protocol. The proceeds from such seizure and confiscation shall be used to defray the costs of providing due assistance to the victim, where deemed appropriate by States parties and as agreed by them, in conformity with individual guarantees enshrined in their domestic legislation."

With regard to the return process of victims of trafficking, the draft Protocol puts forward this position:

"Article 6

Return of Victims of Trafficking in Persons

1. Each State party agrees to facilitate and accept, without delay, the return of a victim of trafficking in persons who is a national of that State party or who had the right of abode in the territory of that State party at the time of entry into the receiving State.
2. At the request of a State party that is the receiving State, each State party shall, without undue or unreasonable delay, verify whether a person who is a victim of such trafficking is a national of the requested State.
3. In order to facilitate the return of victims of such trafficking who are without proper documentation, the State party of which such a victim is a national or in which he or she had the right of abode at the time of entry into the receiving State shall agree to issue, at the request of the receiving State, such travel documents or other authorization as may be necessary to enable the person to re-enter its territory."

f) Coordination/Cooperation

Granted that in many situations of displacement, political conditions surrounding the displaced child are highly volatile, coordina-

tion/cooperation to help the child is not always easy. In refugee situations, voluntary repatriation of the refugee is often difficult, precisely because in many cases, there are conflicts between or a political distance between the country of origin and the country of refuge. In internal displacements involving armed conflicts between government and dissident armed groups, access to displaced children is at times intractable precisely because these civilians might be pawns in a political game.

Yet, there is no escaping the fact that the safety of displaced children and long term-solutions for their plight depends upon more coordination and cooperation between those actors which have impact on their welfare. In the refugee case, this depends much upon a level of negotiations between countries of origin, countries of first refuge and resettlement countries. Internally, line ministries would also need to cooperate closely with UNHCR, NGOs and other relevant agencies to ensure the protection and assistance of refugees. In the case of internally displaced persons, where there are armed conflicts, some compromises are needed between the various combatant groups to treat children as "zones of peace" protected from harm and manipulation. In the case of those displaced by environmental pressure, line ministries, NGOs, communities, families and the children themselves are all catalysts which need to be involved in the planning and implementation of programmes. Likewise, in the case of child trafficking, internal and cross-border cooperation is essential to counter the criminal elements exploiting children.

Some constructive examples can be cited as evidence of such coordination and cooperation. Fore instance, due to close cooperation between South-east Asian countries, the UNHCR and countries outside the region, the problem of Indochinese refugees has now been solved, with the last groups of Lao non-refugees returning to their country in 1999-2000. In regard to those displaced internally by armed conflicts, several flashpoints in Asia have witnessed the return of some displaced children, as in the case of Sri Lanka and East Timor, although a large number of both refugees and internally displaced

are also still awaiting solutions. In the case of those displaced by environmental stress, cooperation between civil society has prevented displacements in some settings, as is the case of India. In regard to child trafficking, there have been some instances of safe return of the victims from destination countries such as Thailand to countries of origin such as China, Cambodia, Vietnam and Myanmar.

The cooperation needed is ,in fact, multi-leveled:

- to tackle the root causes of displacement before it takes place;
- to help the displaced when the displacement is actually taking place;
- to assist the displaced once they have found sanctuary or refuge somewhere;
- to support long term solutions for them and in appropriate cases, safe and voluntary return to their country or area of origin.

Orientations:

In retrospect, the issue of displacement and children, especially the interface between child rights and Asia, is critical with the advent of the new millennium. Many young lives are being lost or harmed where the interventions to help the child are too little, too late.

There is thus a degree of urgency for more comprehensive interventions based upon these tenets:

1. Prevention. There is a need to promote more actively the respect of child rights in the region and the world. In this perspective, the CRC provides the linchpin for the assistance and protection of displaced children, complemented by an array of international standards which should be implemented more effectively at the national level. There is a key linkage between human rights, democracy, sustainable development, peace and environmental protection which should be fostered as part of a programme to prevent the displacement of children and their families.

Among the concrete actions recommended are:

- the need to adopt stronger laws, policies, programmes, mechanisms and resources to implement the CRC at the national level;
- the need to withdraw reservations to the CRC;
- the need to accede to other key human rights treaties, such as human rights Covenants, CEDAW, the Refugee Convention and its Protocol, and the Conventions concerning Statelessness, and to implement them well.
- the need to act humanely in keeping with international trends, such as the Guiding Principles on Internal Displacement.

2. Mitigation. This implies the need for actions to reduce the impact of displacement. It calls for greater preparedness and improved management of situations of displacement. This can be complemented by early warning systems and data which can help to mobilise programming and access to help.

3. Protection. This entails more effective implementation of the various international instruments and standards to protect the displaced. It can be enhanced by more accessible services and mechanisms to offer protection, including:

- the need for sustainable international and national mechanisms to monitor the issue of displacement ;
- the need for effective national laws and policies to reflect international standards and to reform or avoid those national laws and policies which discriminate against and/or harm the displaced;
- the need for quality law enforcers trained to adopt a humane approach towards displaced children;
- the need for gender-sensitive and child-responsive personnel and legal systems;

- the need to ensure the safety of children at all stages of displacement and the search for long-term solutions;
- the need to address the issue of statelessness and grant nationality to stateless children, while guaranteeing child rights even for those without nationality.

4. Remediation. This calls for the responsibility of those who violate child rights. It implies the need to overcome impunity and to render judicial and other remedies accessible to the child victims. It should be enhanced by:
   - improved national legal systems accessible and sensitive to child rights;
   - improved international legal system, coupled with support for the establishment of an International Criminal Court to put on trial those who commit serious crimes;
   - improved access to the CRC Committee by adopting a Protocol to the CRC to allow individual complaints to be lodged with the CRC Committee;
   - improved recovery and reintegration facilities, including socio-psychological help for the displaced child.

5. Participation. This entails more avenues for community and child participation in assisting and protecting displaced children. It calls for:
   - recognition of the role of civil society, including NGOs, in representing the displaced child and in advocating/rendering assistance and protection;
   - promotion of child-to-child/youth associations and movements for child protection;
   - establishment of national and international Children's Parliaments as a voice for children and to provide advice to policy makers, local, national and international;
   - involvement of the private sector, in addition to communities, families and children, in helping to prevent the root causes of displacement and addressing the consequences;

- commitment by not only government but also dissident groups, including non-government armed groups, to protect children and enable them to access help;
- maximisation of education and awareness raising with the help of the media to protect child rights.

6. Cooperation. This implies both internal and external cooperation, within countries and across borders. Various orientations are pertinent:
   - more cooperation nationally, transnationally and internationally to tackle the root causes of displacement and render assistance to the displaced child;
   - closer liaison between key actors to protect children, including the formation of national and regional networks on children and displacement;
   - greater promotion of bilateral and regional agreements to solve the plight of displaced children;
   - more promotion of good practices to assist and protect the displaced child, while countering negative practices;
   - more cohesive and sustainable systems to collect data, adopt indicators of progress and monitor developments in terms of child rights' implementation;
   - more child impact assessment of all programmes and activities affecting children to prevent, reduce and/or eliminate negative impact;
   - more integration of the agenda of children and displacement into national and international planning and related responses.

This was prepared as a background paper for the Regional Consultation on Children and Displacement, organised by Thailand's National Youth Bureau, Bangkok, 26-8 January 2000.

Chapter VII

From the First World Congress against Commercial Sexual Exploitation of Children (Stockholm 1996) to the Second World Congress (Yokohama 2001): A Track Record for the East Asia and Pacific Region ?

Introduction:

Everyone of us probably has a story to tell about what we have read, heard or witnessed concerning the commercial sexual exploitation of children. I have two particularly vivid memories. One memory of two little girls who had been sold by their sister-in-law into prostitution in a neighbouring country. The authorities nearby suggested that I should interview them, but I could not bring myself to do so. The girls had been crying, and had I interviewed them, I felt that I would have been re-traumatising them. Another memory of my sitting down and consulting the police in one country concerning child pornography on the Internet. They showed me on the computer a picture of a girl handcuffed, blindfolded, bare legs forced wide apart in a very tortured sexual pose. Images of child sexual abuse and exploitation mixed with sadism and torture.

The phenomenon has become increasingly globalized and commercialised.[1]

The commercial sexual exploitation of children (CSEC) is regrettably very much today's phenomenon, although also rooted in the past. It entails three situations: child prostitution, child pornography and child trafficking for sexual purposes. It should be seen as a universal crime. Yet, it is rampant, pernicious and ubiquitous.

At the outset, there are some basic truths about child sexual exploitation which should be borne in mind:

1. **It is a challenge for both developing and developing countries.** The CSEC in its various manifestations relates

to both developing and developed countries. While the masses of estimated victims are often seen as situated in developing countries, developed countries are not immune to this phenomenon. For instance, Central and Eastern Europe has emerged as a key area of concern in recent years. Many developed countries are also the emission and reception points for the piles of child pornography circulated around the globe.

2. **It is both traditional and modern-technological.** Several instances of child sexual exploitation date back to the past. This is exemplified by various negative traditional practices which push children into prostitution. For example, although countries have outlawed the transfer of children to temples to become supposed deities who them subsequently fall into the trap of prostitution, these malpractices persist. Some families and communities also readily sell their children into the sex trade. These range from the settings where poor families hand over their daughters to pimps and procurers to those settings where parents videotape their children for sexual purposes and exchange them in circles of friends. A modernistic angle is the commercialization of child sexual exploitation embodied in the growth of sex tourism worldwide which wreaks havoc on child victims in many parts of the globe. On the technological side, while technology has its positive side in terms of human development, there is the negative side where the Internet and computers enable images of child sexual exploitation to be produced and sent instantaneously and exponentially around the globe.

3. **It is both invisible and intractable.** Child sexual exploitation is often invisible. This is witnessed by the many children locked up in brothels or hellholes around the globe. Even where the victims are eventually found, the exploiters are often intractable, as we are faced with both personal

instances of abuse and organised crimes that operate their networks clandestinely locally and around the globe. There may also be links with drug trafficking. On another front, proving the identity of the victims is not always easy, especially when there is cross-border trafficking of the children. The difficulties are compounded by the rampancy of corruption and poor law enforcement in many settings.

4. **It is both a national problem and a transnational problem.** Child sexual exploitation has emerged not only as an internal problem facing many countries but also as a transborder - indeed transcontinental - problem . This is highlighted regrettably the negative side of globalization whereby the flow of people across the globe has become interwoven with cross-border trafficking of children for sexual and other purposes. On another front, while the Internet brings with it great potential for information and education in an increasingly technologized global village, it is also a window where abusers exploit children at times using them as objects of child sexual exploitation and at times as contact points for exploitation. The implication for international cooperation is clear: no country is an island in terms of the needed actions.

5. **It is both an issue of poverty and an escalation of criminality.** The environment of poverty often lends itself to the growth of exploitation, as the lack of choices for families pushes their children into the exploitative market. However, this should be balanced with the fact that there are also many poor communities where child sexual exploitation is not rampant due to the inner strengths of such communities and social safety nets available. By contrast, there are many rich communities where child sexual exploitation is rampant. This is exemplified by the instances of child prostitution which pervade many developed communities and the spread of child pornography among those who are finan-

cially relatively well-endowed. It is thus important to understand that the environment which breeds child sexual exploitation is extending beyond poverty. While poverty may explain the supply factor pushing children into the trade, it does not adequately explain the demand factor personified by the pimps, procurers, brothel owners, clients, manipulators and the industry in their various manifestations. These constitute the criminal elements which are a key dimension behind child sexual exploitation. Thus there is an issue of criminality - and its escalation - which has to be countered effectively.

6. **It inflicts both physical damage and psychological scars.** The physical damage to children inflicted by sexual exploitation is evident in the multiple forms of violence used against children. These vary from threats to abductions, physical abuse, rape, torture and other forms of coercion to press the victims into sexual submission. It is a testimony to a contemporary form of slavery rife with multiple abuses of power. There is another face to the physical damage - indeed often irreparable damage - in the form of the spread of sexually transmitted diseases, especially HIV/AIDS among adolescents. It is further distorted by the warped belief that by having sex with the young, one can prevent oneself from being infected with HIV/AIDS. Taken further, there is the anomalous chauvinistic belief that by having sex with the young, one can rejuvenate oneself. The situation is compounded by those systems that fail to educate children about reproductive health and the threats of sexual exploitation and that suffer from a denial syndrome through their deceptive claims that HIV/AIDS is not problem. In addition, the victims of such exploitation often suffer mental and psychological traumas, such as multiple fears, anxiety and stress, needing sustained help. Yet, in many settings, even where the victims are rescued physically, the services

to help them mentally in the long term, such as through counseling and social support, are still unavailable or inadequate.

From the Convention on the Rights of the Child (CRC) 1989 to Stockholm 1996:

The above basic truths impel us to fortify our actions against the CSEC. At the international level, one entry point has been to develop an international framework embodying basic minimum standards for all countries in countering such exploitation. While the seeds for such framework were sown even prior to the Second World War, the advent of the CRC as part of the United Nations(UN) human rights framework in 1989 and as the key international treaty/agreement on child development and protection provided the global community with a structure for more child-responsive actions.[2] Under this treaty, the child is basically defined as a person under 18 years of age. There are several provisions calling for prevention of abuses and exploitation as well as recovery and reintegration of the child victims. Most directly on the issue of sexual exploitation, Article 34 of the Convention calls for inter-disciplinary measures with the following stipulation:

> "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 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."

Another provision deals with the trafficking issue as follows: 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."

The implementation of the CRC is monitored by a ten-member Committee on the Rights of the Child. States Parties are supposed to send in periodically their reports to this Committee on how they are implementing the CRC at the national level. The CRC Committee will then dialogue with these States and then issue various recommendations to suggest improvements on the part of the latter, known as Concluding Observations. In effect, implementation depends upon a variety of measures referred to by the CRC Committee in its deliberations. They interrelate with an approach based upon the human rights of children, including laws, policies, programmes/practices, mechanisms, resources, and information/education, and cooperation/coordination. To these may be added the need for an open process and mindset involving not only the government sector but also civil society, including non-governmental organisations (NGOs) and young people.

As the most widely ratified human rights treaty, with only two countries failing to ratify it, the CRC has been pivotal in raising the priorities on behalf children worldwide. It has had significant impact on the need for effective implementation of child rights and correlative reforms at the national and local levels in the areas mentioned above such as law and policy reform and review of programmes and practices. It is complemented by another UN organ which helps to monitor the issue of child exploitation by preparing annually independent reports which are submitted to the UN for discussion and follow-up, i.e. the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography.

Yet, while the CRC provides the general framework for child protection, it is not specific enough on the types of measures to be targeted against child sexual exploitation, as seen in the "generality" of stipulations in Article 34 above. The need for more specific commit-

ments and a checklist of needed measures - based upon the call for more "specificity" of actions - was responded to by the convening of the First World Congress against Commercial Sexual Exploitation of Children in Stockholm in 1996.

While this was a global Congress , it was not a UN Congress; this allowed it to be more flexible in format. At the Congress itself, there was participation from the government representatives of over 120 countries, a host of NGOs, many intergovernmental organisations (IGOs) including the United Nations Children's Fund (UNICEF) and the international police organisation (INTERPOL), and representatives of young people. The Congress adopted the Declaration and Agenda for Action of the First World Congress against Commercial Sexual Exploitation of Children ("The Stockholm Declaration and Agenda for Action") responding to the quest for "specificity" of actions against CSEC.

Interestingly, that Declaration and Agenda for Action were drafted long before the Stockholm Congress, and negotiations for an improved text took place through a variety of bilateral and regional consultations with governments and other groups on the basis that at the Stockholm Congress itself, the final text would not have to be re-negotiated but would be adopted on the first day rather than the last day of the Congress. This process went smoothly and the Congress proceeded to adopt the "The Stockholm Declaration and Agenda for Action" on the first day as planned. The subsequent days were thus for participants to network and exchange experiences on how best to undertake concrete action against the CSEC.

The Stockholm Declaration and Agenda for Action complements the CRC while helping to enrich it. It provides more details to guide governments and other stakeholders in regard to needed actions. The thrust of the Stockholm document is as follows: the Declaration itself underlines key principles and commitments, calling upon States in cooperation with national and international organisations and civil society to[3]:

- accord higher priority to action against CSEC, with adequate resources;
- promote stronger cooperation between States and all sectors of society and strengthen families against CSEC;
- criminalise CSEC, punish the offenders and ensure that the child victims are not penalised;
- review and revise, where appropriate, laws, policies, programmes and practices to eliminate CSEC;
- enforce laws, policies and programmes against CSEC and strengthen communication and cooperation between law enforcement authorities;
- promote adoption, implementation and dissemination of laws, policies and programmes against CSEC, in addtion to relevant mechanisms;
- develop and implement comprehensive gender-sensitive plans and programmes to prevent CSEC and help the victims recover and reintegrate into society;
- create a climate through education, social mobilisation and development activities to help families to protect their children from CSEC;
- mobilise political and other partners to assist countries against CSEC;
- enhance popular participation, including that of children, against CSEC.

The Siamese twin of the Stockholm Declaration is its Agenda for Action which provides a list of needed measures in a comprehensive and inter-disciplinary setting, including the following[4]:

1. Coordination/Cooperation:

   i. National/local levels:
   - adopt national agendas for action and indicators of progress by the year 2000;
   - identify/establish focal point(s) at the national/local levels, with data bases on CSEC, by the year 2000;
   - promote close cooperation between stakeholders.

ii. Regional/International levels:
- promote better cooperation between countries, international organisations and other catalysts, including the Committee on the Rights of the Child and the other main UN monitor on the subject, i.e. the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography;
- advocate and mobilise support for child rights against CSEC;
- press for full implementation of the CRC.

2. Prevention:
- provide children with access to education;
- improve access to health and other services for children and families vulnerable to CSEC;
- maximise education on child rights;
- promote child rights in family education and family assistance;
- set up peer education programmes and monitoring networks against CSEC;
- implement gender-sensitive national social and economic policies and programmes to assist children, families and communities against CSEC;
- develop/implement and publicise laws, policies and programmes against CSEC, and review them where needed;
- mobilise the business sector against CSEC;
- target those involved in CSEC to promote behavioural changes.

3. Protection:
- develop/implement laws, policies and programmes against CSEC;
- develop/implement national laws to establish the criminal responsibility of services providers, customers and

intermediaries of CSEC, including in regard to possession of child pornography;

- develop/implement laws that protect children from being penalised as criminals in CSEC and provide child-friendly support services;
- in the case of sex tourism, develop/implement extra-territorial criminal laws, promote extradition and strengthen laws/enforcement, including confiscation of assets and profits of those committing CSEC;
- in the case of child trafficking, develop/implement laws, policies and programmes against trafficking and penalise the offenders, and in cross border cases, treat the children humanely under national immigration laws and establish readmission agreements to ensure safety of return of the victims;
- strengthen networks between laws enforcers and with civil society, set up special law enforcement units, establish police liaison officers, and train law enforcers on child rights;
- encourage civil society networks, and interaction among communities, families, NGOs, the business sector, including tourist agencies, employers, trade unions, computer and technology industry, the mass media, professional associations, and service providers to monitor and report cases to the authorities, and adopt voluntary ethical codes of conduct;
- create safe havens for child victims.

4. Recovery and Reintegration:
   - adopt a non-punitive approach to child victims of CSEC, including legal aid and judicial remedies;
   - provide social, medical, psychological counseling and other support to child victims and their families;
   - undertake gender-sensitive training of medical and other personnel to help child victims;

- prevent and remove social stigmatization of the child victims, facilitate their recovery and reintegration, and minimise their being placed in institutions;
- promote alternative means of livelihood for child victims and their families;
- adopt not only legal sanctions against the perpetrators but also socio-medical and psychological measures.-

5. Child Participation:
   - promote the participation of children and young people to express their views and act against CSEC;
   - support networks of children and young people as child rights' advocates.

Since the Stockholm Congress, what has been the track record of the world, and more particularly that of East Asia and the Pacific region, in responding to that Declaration and Agenda for Action?

From the Stockholm Congress 1996 to the Yokohama Congress 2001:

The Second World Congress against Commercial Sexual Exploitation of Children will be held in Yokohama in December 2001. It provides a timely occasion to take stock of developments since the First World Congress, in particular from the angle of how the First Congress has influenced measures in favour of child protection against CSEC worldwide.[5] This may be tested from the angle of an approach based on the human rights of children structured as follows: process/mindset, laws/enforcement, policies/implementation, programmes/practices, mechanisms/personnel, resources(material/non-material), information/education, and cooperation/coordination.

a) Process/Mindset

Have the process and mindset in favour of child protection against CSEC become more open, participatory and contributive ? The answer is Yes, while there is, of course, room for improvement.

Partly because of the Stockholm Congress and its Declaration and Agenda for Action, the issue of CSEC has been gaining a much higher profile and legitimacy nationally and internationally. The Declaration and Agenda for Action have been referred to many times nationally, regionally and globally as an inspiration for action to help children, such as in relation to the preparation of national measures against CSEC, in the work of the CRC Committee and in programming in all parts of the world against CSEC. At least in principle, governments, NGOs and IGOs have found it easier to integrate the issue of child sexual exploitation into their work and to partnership-build against CSEC. Some countries which were not represented in Stockholm, e.g. Costa Rica, have been influenced into taking more concrete measures against CSEC, e.g. by the adoption of a national plan on the subject.

Law enforcers have found it easier to come together to address the problem of CSEC more openly. This is exemplified by the work of INTERPOL which now has a committee to tackle this issue. It has also interlinked with NGOs and has broadened its work to organise international seminars with a variety of actors, including NGOs, the private sector and academics in the fight against CSEC. This parallels the broadening of the mindset and activities of IGOs including UNICEF, the International Labour Organisation (ILO), United Nations Development Programme(UNDP), International Organisation for Migration (IOM) and other key agencies in propelling more activities and related funding against CSEC.

On the civil society front, there is stronger networking among and between NGOs and other civil society actors on the issue. Much of the monitoring of the implementation of the CRC and Stockholm Declaration and Agenda for Action is done by this sector. This is exemplified by the End Child Prostitution, Child Pornography and Child Trafficking for Sexual Purposes (ECPAT) organization which produces an annual report tracing and tracking the implementation of the Stockholm Declaration and Agenda for Action globally. [6] Another civil society group - the NGO Group for the CRC: Focal Point on

Sexual Exploitation of Children - is a network which has close contact with the CRC Committee and the UN Special Rapporteur on the Sale of Children.

Various stakeholders which were not previously so involved in action against CSEC are now more involved, e.g. the computer industry, Internet service providers and the travel and tourism industry. This is represented by a variety of actions on the part of the private sector, such as the adoption of Codes of Conduct and the growth of networks against CSEC, coupled with hotlines to take complaints and measures to promote cooperation with law enforcers. However, it should be noted that at the Stockholm Congress itself, the representation of the private sector, especially the computer industry, was minimal, and this needs to be improved in future.

In regard to the integration of young people into activities against CSEC, this has become more accepted, at least verbally. A test case was the Stockholm Congress itself where some authorities were reticent to have child participation at the Congress. In fact, it was the NGOs which pushed hard for such participation. As it turned out, the child participation element at Stockholm was the most invigorating part of the Congress. Subsequent progress has been exemplified by various international fora where young people have come together to network and coalesce against CSEC. These include the Out of the Shadows conference held in Vancouver in 1998 and International Conference of Young People's Participation Project against CSEC held in Manila in 2000. Yet, it should be admitted that child/youth participation against CSEC, in practice, still has to cover much mileage when faced with undemocratic settings and mindsets which subordinate young people to the "children should be seen and not heard" syndrome.

b) Laws/Enforcement

Since the Stockholm Congress, there have been a number of important legislative changes globally as well as key instances of law enforcement against the perpetrators of CSEC. A number of new

treaties have arisen to complement the CRC, including the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000, and these are dealt with later below in detail. Many countries have adopted new criminal laws against CSEC and have raised the age for protecting children from this phenomenon to the international standard of absolute protection for those under 18 years of age, irrespective of the child's consent (i.e. the issue of consent is immaterial, since there can be no consent to a detrimental act). These are exemplified by new laws in Thailand, Italy, Japan and the United States. The United Kingdom is now preparing to follow suit.

Many countries have adopted new legislation on child prostitution, child pornography and child trafficking, and these are listed annually in ECPAT's annual review of the implementation of the Stockholm Declaration and Agenda for Action.

The new laws vary from reforms of old laws of a general nature, such as the Criminal Code or Criminal Law Statute of some kind, to the introduction of more specific laws against child prostitution, child pornography and child trafficking. An example of latter approach is Ireland's 1998 Child Traffficking and Pornography Act. One of the most recent additions to the laws against child pornography is Japan's new criminal law (2000) which now punishes the exploiters of children in such situation; it covers not only production and distribution but also possession of child pornography for public use.

A recent national law on the trafficking issue, although not specifically limited to children in regard to sexual exploitation, is the United States law titled the "Trafficking Victims Protection Act 2000". It incriminates human trafficking, advocates victim-friendly procedures, confiscation of the proceeds of crime, provision of temporary visas ("T" visas) for the victims to help prosecute the traffickers, humanitarian aid for countries to counter the trafficking, psychological rehabilitation, mandatory restitution paying the victims full amount of their losses, and the establishment of an interagency task force to monitor and combat trafficking. The first global report assessing other coun-

tries' actions against human trafficking was issued by the United States authorities in 2001, classifying countries into those which respond to that law's concerns, those which are borderline, and those which fail to do so. Ultimately, this may lead to various incentives and disincentives applied by the United States in relation to the countries concerned.

A variety of countries have adopted or reformed their extraterritorial criminal laws to cover the misdeeds of their nationals or residents when committed against children abroad. These laws enable the countries of origin of the perpetrators to prosecute them for crimes committed against children, including sexual exploitation, in destination countries, especially when the perpetrators escape back from the latter. A number of successful prosecutions are evident in a range of countries, including Germany, France, Netherlands, Sweden, and Switzerland.

This leads appropriately to the issue of law enforcement. How effective is it ? There have been key instances of law enforcement in many countries in the past few years, at times linked to the impetus provided by the Stockholm process and based upon the partnership-building from the First World Congress and its Declaration and Agenda for Action. A recent study by Human Rights Internet notes prosecutions against child sexual abuse and exploitation in the following countries in recent years[7]: Ghana, Kenya, South Africa, Uganda, Bangladesh, Cambodia, China, India, Israel, Japan, the Philippines, Taiwan(Province of China), Thailand, Antigua and Barbuda, Costa Rica, Honduras, Peru, Uruguay, Czech Republic, Australia, Belgium, Canada, France, Germany, Netherlands, Sweden, Switzerland, United Kingdom and United States. Many were successful prosecutions against the adult exploiters.

The cases in the countries above exemplify improved law enforcement, e.g. stronger action by the police nationally and cross-border cooperation in transnational cases. However, they also provide insights for needed improvements. Regrettably, not all the prosecu-

tions in these countries were responsive to child rights, and some were even in breach of child rights. In one case, the child victim was incriminated by the national Penal Code for being in a situation of prostitution. In another case, possession of child pornography produced by the alleged wrongdoer for personal use was not considered to be illegal. A law illegalising it was considered by the Supreme Court to be unconstitutional, but this Supreme Court decision goes against the international trend of making possession of child pornography illegal. In another case, the penalties imposed on the adult exploiter were reduced, since the child was seen as a contributory partner by being a prostitute. This court judgement fell into the trap of stigmatizing the child victim.

c) Policies/Implementation

A key entry point for child protection is to have national policies/plans/agendas against CSEC. These plans are particularly useful to direct government entities to take action and cooperate with other partners. These policies are not "hard law" as such, but ,in fact, represent a "soft law" approach. This was advocated by the Stockholm Declaration and Agenda for Action with a time frame of the year 2000 by which, it was hoped, that all countries would have such national agendas or plans and related indicators of progress.

According to monitoring by ECPAT, some 50 countries now have or are in the process of preparing/ adopting such policies/plans.[8] This is welcome. Yet, that number is disappointing since it is hardly universal. Where they exist, the policies/plans vary from general policies on development and or youth development to more specific policies against child abuse and exploitation or against CSEC. For example, France's policy is specifically against child abuse and exploitation in the setting of violence. The United Kingdom recently finalised its national plan against CSEC. Many developing countries in Asia and elsewhere have national economic and social development plans of a general nature. Some have specific youth development plans. Some have such plans together with other plans against CSEC, while others

have only specific plans against CSEC. Elements of action against CSEC may also be integrated into other national plans such as those against HIV/AIDS.

An example of a plan resulting directly from the Stockholm Congress is Mexico's National Action Plan to Prevent, Attend to and Eradicate the Commercial Sexual Exploitation of Children 1998. It follows, to a large extent, the format of the Stockholm Agenda for Action with the following structure: problem identification in Mexico; protection of the child; recuperation and reintegration; awareness raising; training and capacity building; prevention of CSEC; and child and youth participation. The Plan was evolved with the help of civil society and a national seminar was held before the Plan was adopted.

The crunch is not only the plans themselves but the open and participatory process of building such plans with key partners and the effective implementation of these plans in terms of reforms and other needed actions. The track record on this front is good on some fronts, but ambivalent on other fronts. Currently, the monitoring on this issue is incomplete, since it tends to cover the question " does this country have a national plan ?". In future, it needs to address more strongly the question " how effectively is the plan implemented ?"

d) Programmes/Practices

Several programmes against CSEC pre-existed the Stockholm Congress while others have come into being since then. They encompass programmes and related practices in the field of prevention, e.g. awareness-raising and education for children, and income generation and micro-credit for families. Others relate to protection, e.g. law/policy reform and enforcement as seen in many of the cases on law enforcement cited above from all over the world; recovery and reintegration, e.g. counseling programmes and safe return home for trafficked victims; child participation, e.g. promotion of child-to-child networks; and cooperative activities, e.g. inter-agency cooperation between UN organisations, and with and between governments and civil society. A recent publication examining some of these programmes in the Asia-

Pacific region was completed with the help of NGOs, governments and UN agencies, and some of the examples from this study are cited below in regard to the track record of the Asia and Pacific region.[9]

Globally, it may be noted that there are many good intentions for programming and these go hand in hand with the need for good practices and effective application of laws, policies and programmes. An analysis of implementation practices in various parts of the world is given by ECPAT's 2000 Report and provides a comparative bird's eye view, with a sampling of regional variations, as follows :

> On West Africa: "The greatest success in West Africa has been the development of a national plan of action in Togo. There has also been an increased awareness in children's rights in general and CSEC in the region. This success is attributed to the very active NGOs in West Africa...The difficulties encountered in the region are the acute poverty resulting in the lack of facilities and services for victims of CSEC. The lack of human and financial resources coupled with inadequate laws, lack of law enforcement and trained personnel compound the difficulties in tackling CSEC as a serious regional problem. War and strife in some of the countries have exacerbated CSEC in those countries."[10]
>
> On North and Central America: "The greatest success in the North and Central America region have been the efforts devoted to the development of National Plans of Action against the CSEC. Half of the countries in the region have taken steps to develop national plans. Furthermore, it is impressive to note that although Costa Rica and El Salvador did not adopt the Stockholm Declaration and Agenda for Action, both countries have taken steps to implement it. Although the implementation of the Costa Rican national Plan has been disappointing, progress has been achieved in both Costa Rica and Mexico. These countries stand out because the framework of a national plan of action has ensured that actions have been planned or

undertaken in all the three main policy areas, namely protection, prevention and recovery, rehabilitation and reintegration. However, the activities and measures taken in these countries need to be reinforced, so that measures are carried out systematically and so that political will, infrastructure and resources are provided for adequate implementation of the plans. .....Four issues should be prioritised. Firstly, Canada, Honduras, Panama and the United States should take concerted steps to develop national plans of action and thus meet their obligations under the Stockholm Agenda for Action. Secondly, efforts should be made to drastically improve law enforcement and awareness in the region. ...Thirdly, taking into consideration the growing problem of child sex tourism in the region, there is a need for greater prevention measures in order that this dimension of CSEC is stamped out...Finally, in Central America resources need to be devoted towards the recovery and rehabilitation of victims of both children in prostitution and trafficking for sexual purposes."[11]

On Western Europe: " A concerted strategy to tackle CSEC is emerging in countries of Western Europe. This is partly due to the fact that the European Union is a federation of states, and many policies are the result of harmonization within the union. Also, many NGO projects are in partnership with countries, partly funded by the European Union. To date there have been some successes that demonstrate commitment to eradicate CSEC, the greatest of which is the increased awareness of the problem...Despite this, Western Europe faces some important obstacles in combating CSEC. The basic problem is lack of information in many countries..."[12]

On Eastern Europe: "Considering the magnitude of the problem, very little, if anything has been done to tackle CSEC in Eastern Europe. Some awareness raising campaigns have been carried out; however, all actions taken so far are negligible in the face of the problem. The most progress has been

> achieved in the Baltic where Latvia and Lithuania have adopted national plans of action on CSEC and where regional cooperation has increased...There are many difficulties faced throughout the region. These include the lack of awareness of the issue, capacity, human and financial resources, child friendly facilities and regional cooperation. Most NGOs working in the field are under-resourced, lack the capacity and are not working on CSEC specifically. However, the main problem is the governments themselves. They have done little to reform inadequate laws, crack down on organized criminal networks and weed out corrupt law enforcement officials...."[13]

The experiences of Asia and the Pacific as part of the track record will be seen later in the discussions below. At this juncture, it suffices perhaps to note that the Yokohama Congress will be a key opportunity to take stock of the experiences of implementation and identify good practices while shunning the not-so-good practices. On the less positive front, globally in several settings the implementation process is still undermined by 5 BIG C's: Corruption, Collusion, Cronyism, Clientelism and Crime.

e) Mechanisms/Personnel

As noted above, the Stockholm Agenda for Action called for the identification of a national focal point or focal points and related data bases by the year 2000 on the issue of CSEC. How many countries now have such focal points ? The answer is unclear. For example, ECPAT's annual appraisal of the implementation of the Stockholm Declaration and Agenda for Action cited above concentrates more on national plans than on national focal points.

On scrutiny, it is possible to state that some countries are using existing agencies as national focal points, e.g. various ministries such as the Ministry of Social Welfare or the equivalent. Others have established new bodies to focus on CSEC. For instance, Mexico has established an Inter-institutional Committee, while Costa Rica has established a National Commission against CSEC. In some countries, the

focal points could also be under the national institution vested with the power to monitor implementation of the CRC in general, while in other countries, there may be human rights institutions such as National Human Rights Commissions and Ombudspersons which could play a role in monitoring against CSEC. More information is needed on this front.

From the angle of official personnel, government personnel in some regions are becoming more mobilised against CSEC, stimulated in part by the adoption of national plans of action against CSEC. As indicated in the citations above, several countries are promoting more training of personnel and more capacity-building on child rights. However, other regions,such as Eastern Europe, are lagging behind on this front.

From another standpoint, the mechanisms and personnel of civil society are also important as a check-and-balance for government mechanisms and personnel. Their networks have grown in some regions, while in other regions, they remain under-capacitated.

f) Resources (Material/Non-Material)

An essential concern at the Stockholm Congress was the call for adequate resource allocation against CSEC. Has this come to pass ? While material/financial allocations have improved on some fronts, e.g. European Union commitment to activities against CSEC, the performance of other regions is unsatisfactory. These range from various parts of the Americas to Africa, Eastern Europe, and Asia and Pacific.

A key entry point is to examine how much countries allocate to the social sector, especially pursuant to the Copenhagen World Summit on Social Development 1995 which called for at least 20% allocation of the national budget and 20% of international aid to the social sector (i.e. the "20/20" commitment). This has not yet come to pass in many countries. Moreover, the expenditure of several countries on arms purchases remains high, where this would be better spent on

child protection. Ironically, some of the poorest countries with a high percentage of CSEC spend more than 50% of their national budget on militarisation and armaments.

From the angle of non-material resources, there is a large pool of good will, voluntarism, and community safety nets (e.g. good neighbours helping each other and NGOs helping local communities and families) already being tapped for action against CSEC. Many actors against CSEC devote their time voluntarily to help children, and these laudable deeds should be borne in mind. A key question is how to sustain this kind of resources in a time of pressing economic needs, where it is noticeable that the number of volunteers are declining in several regions. States' incentives for these non-material resources remain inadequate. Indeed, at times, State actions, such as burdensome taxation laws applying to the work of NGOs (where they should really be tax exempt), impede, if not deplete, the pool of social capital.

g) Information/Education

One of the continual debates concerning CSEC is the numbers of children subjected to this scourge. " How many millions ?" is a favourite question form the global media. Have they increased or declined ? Much depends upon effective field research but this is lacking in many settings. In some of the recent research, it is possible to indicate that CSEC is in decline for some groups, e.g. recent research in Thailand in relation to Thai children in CSEC[14], but in other situations the figures of declines and increases may be somewhat anecdotal. On another front, with the rise of child pornography on the Internet, it is possible to generalise from recent investigations concerned with those using the Internet for CSEC in several countries that CSEC is faced with another type of "new millions" - millions of pictures of child pornography conveyed by the Internet. The various arrests/prosecutions of the perpetrators have led to the discovery of millions of images of child pornography, perhaps replicable **ad infinitum.**

It is worth remembering that the Stockholm Agenda called for indicators of progress as well as data bases by the year 2000. This call

has not been responded to in many parts of the world, although it is underlined by ECPAT's review of the implementation of the Agenda for Action which often notes the lack of data on the subject. A caveat should also be lodged where the estimates are merely guesstimates, as these may lead to distortions in terms of the needed actions and allocations against CSEC. Various UN agencies are now underlining more the need to build data bases, such as by means of long-term/ longitudinal surveys and sentinel surveillance system to trace samples of the children and their families in the path to and from CSEC. These include UNICEF, ILO, UNESCO and UNDP, as exemplified by the joint work in the Mekong region. This needs to be sustained and expanded to other regions.

On the educational front, there have been several positive advances such as the spread of child rights education in many countries where the issues of CSEC may also be raised. Special training programmes on child rights and against CSEC have been undertaken in many parts of the world and they range from programmes for general students to NGOs and officials such as the police, immigration officials and other law enforcers. Awareness campaigns for the public against CSEC have also grown in some regions, e.g. radio spots against CSEC, videos shown on airplanes against CSEC , and related posters, leaflets and other methods of dissemination. However, public education against CSEC is still inadequate in various parts of the world which have become flashpoints, e.g. Eastern Europe and parts of Africa, Asia and the Pacific.

h) Cooperation/Coordination

Has there been progress in terms of cooperation and coordination since the Stockholm Congress ? As noted earlier, the Stockholm Congress opened the door for closer cooperation between many governments, IGOs and NGOs both at the national and international levels. With regard to the UN agencies or organs with a mandate to deal directly or indirectly with the issue of CSEC, there has been more focus on action against CSEC on many fronts. For instance, the CRC

Committee refers continually to the Stockholm Declaration and Agenda for Action as part of the Concluding Observations to Governments so as to guide them on needed actions. The UN Special Rapporteur on the Sale of Children has also done so on many occasions. Likewise, many other UN agencies, other IGOS and NGOs.

They have also come together more on many occasions. For instance, the UN Special Rapporteur on the Sale of Children at times appears before the CRC Committee to interchange information. There are also several interagency activities worldwide sometimes between governments, sometimes between IGOs, sometimes between NGOs, and sometimes between IGOS and NGOs together with governments.

Regional organisations are also tackling the issue more directly. This is seen particularly in Europe, exemplified by the work of the Council of Europe and the European Union. Several concrete programmes are supported regionally and globally by the latter. The inter-American human rights system has addressed the issue of CSEC more directly and has granted greater access to NGOs in litigation on behalf of children before the Inter-American Court of Human Rights, while in Africa there is the African Charter on the Rights and Welfare of the Child which provides room for a more regional approach to tackling CSEC. In Asia, cooperation within and between regional organisations and other entities has led to the rise of the South Asian Convention against trafficking in women and children, and the Plan of Action of the Association of South East Asian Nations (ASEAN) concerning Children in 1993, recently bolstered by an ASEAN Declaration on the issue of Transnational Organised Crime 2000 and a Regional Commitment on Children in 2001. Various activities in the Mekong region incorporate a mix of NGO, IGO, academic and governmental inputs.

On the less positive front, it should be noted that there is much overlap and duplication in some activities which need closer coordination and sharing of tasks. For instance, in some parts of the globe, trafficking has become a very topical issue among many international

and regional organisations, and several have rushed headlong into programming on the issue without adequate preparation and avoidance of wastage. In other cases, there is a tendency to issue Declarations without sufficient follow-up implementation programmes and resource allocations. For instance, in one region, an official organisation which claims to have the interests of children at heart took almost a decade to agree upon a child-related programme. The committee vested with decision-making power on programming hardly meets at all, and the whole system is replete with bureaucratization.

Another example at the inter-regional level is an official organisation which prides itself on having a strong base for giving aid to developing countries, but its conditions are so rigid as to dampen, if not destroy, the enthusiasm of local partners in implementing programmes. Local partners may have to wait several months to receive money from that funding organisation, even though the aid agreement was inked a long while ago. Even if the money has been sent, the local partners may have to wait for months again for permission from that organisation concerning whether it is allowed to use the money. How are the staff of those local partners and the target groups for the aid to survive in those months ?

Clearly, there is much room for improved coordination and cooperation on all fronts, and any evaluation of this area calls for a readiness to improve not only in regard to one's external relations but also introspectively.

East Asia and The Pacific: A Track Record ?

At this juncture, it would be useful to trace the track record in regard to implementation of the Stockholm Declaration and Agenda for Action in relation to East Asia-Pacific countries and interlink with other parts of Asia , as follows:

A) Adoption/Implementation of National Plans of Action and Related Focal Points and Data

B) Prevention of CSEC

C) Protection of Children against CSEC
D) Recovery/Reintegration of Child Victims of CSEC
E) Child/Young People's Participation against CSEC
F) Cooperation and Coordination against CSEC

A) Adoption/Implementation of National Plans of Action and Related Focal Points and Data

Since the Stockholm Congress, the East Asia-Pacific region has seen the rise of national plans or agendas against CSEC in a number of countries, particularly Australia, Thailand, Cambodia, and Taiwan (Province of China).[15] New Zealand and Japan are emerging with national plans. These should be seen in the total context of the Asian continent. In Asia as a whole, some plans are of a general nature but also refer to CSEC, e.g. that of Bangladesh and Sri Lanka. Others are national plans specifically against CSEC, e.g. those of Thailand, Cambodia, Australia, India, Israel, Nepal, the Philippines, Pakistan and Taiwan (Province of China).

While the initiatives of countries to adopt national plans against CSEC are welcome, the limited number of national plans for such a large region, where the majority of the world's children are found, is disappointing. In fairness, it should be noted that some countries without such plans are taking some concrete measures against CSEC, while in truth, the mere fact that a country has a national plan does not guarantee that it will be well implemented unless there is the political and social impetus between governments and civil society to do so. Yet, the added value of having a national plan is that it provides more focus and specificity of purpose, in addition to a rallying call for more comprehensive actions, with the possibility of more targeted resource allocations, monitoring and cooperation.

Recent monitoring of the whole Asia-Pacific region in relation to national plans and related implementation measures provide key insights for the East Asia and Pacific region. For instance, in regard to the Middle East, Israel is commended for the positive step of adopting a national plan, but implementation needs bolstering. Some countries

without national plans are putting child protection higher on their policy agenda, e.g. Jordan and Lebanon. Others needing more concrete actions include Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates ,Yemen and Gaza and the West Bank. This observation deserves note:

> "Awareness raising is the greatest difficulty facing the region (the Middle East). There are two obstacles to achieving this. Primarily there is a lack of resources and institutional capacity. Several countries are suffering from downtrodden economies, the effects of wars and the consequences of international ostracization. As such, they do note have the ability to address CSEC and other issues are taking priority. Additionally, the strong social taboo on discussing matters of sexuality, especially child sex is a compounding factor."[16]

With regard to Central Asia, no country has adopted a national plan yet. Only a few countries are taking more concrete measures such as the adoption of some programming and policies against CSEC; these include Georgia and the Kyrgyz Republic. The general impression is disquieting and is observed as follows:

> "While the above indicates the seeds of eradicating CSEC in Central Asia, other countries have not acknowledged the issue and are not in a position to address it. Not understanding the extent of the issue is the largest obstacle facing the region. Only by doing this can governments move forward and promote concrete policies and proposals. The paucity of State resources is another crucial issue. During the past decade, countries in the region have undergone serious economic, political and social challenges that are quickly eroding any resource base that can be used to combat CSEC. These challenges are making prostitution and trafficking a means of survival and profit. In Azerbaijan and Armenia, armed conflict and the resultant forced migration have further depleted scarce resources, thus exacerbating the situation. In Afghanistan, the

extreme strict interpretation of religious tenets potentially forces women and children to find lewd means of survival."[17]

With regard to South Asia, many countries have moved towards adopting national plans against CSEC and or more general plans which refer to CSEC. Constructive developments in terms of more openness towards the issue and more programming against CSEC have been taking place in recent years in such countries as Bangladesh, India, Nepal, Sri Lanka and Pakistan. Yet, this caution deserves note:

"There are many obstacles to eradicating CSEC in the region. The immensity of the problem overwhelms the capacities of certain South Asian countries and in general, the best intentions fall by the wayside. Bangladesh and Sri Lanka are particular victims of this. War in Sri Lanka has consistently diverted public funds that could potentially be used for social issues. Bangladesh is one of the poorest countries in the world, and the government perpetually deals with the cycle of famine and floods. In Pakistan, political uncertainty and an emphasis on security have resulted in a lack of funds for basic children's needs. In India, the federal nature of the political system means that individual states bears the responsibility of combating CSEC on the ground. However, this entails a national coordination that is very difficult to manage.

Along with capability issues, combating CSEC is extremely difficult in a region that culturally disadvantages the girl child and children from poorer socio-economic backgrounds. However, the most important challenge is to improve law enforcement. As mentioned earlier, law enforcement in many of these countries is non-existent; and police, bureaucrats and politicians are actively involved in the victimisation of children."[18].

What of the performance of the East Asia and Pacific region? With regard to East Asia, some national plans are emerging, as in

Thailand, the Philippines, Cambodia and Taiwan(Province of China), while some of those without national plans have been taking more concrete steps against CSEC, e.g. law reform in Japan and a higher agenda for children in Vietnam. However, various obstacles remain as follows:

> "Overall, there still seems to be a lack of knowledge and awareness on the issue. In terms of the lack of knowledge, research is required; especially in the countries outside the Mekong and in other states of China apart from Yunnan. Awareness raising on different issues is required in different countries. There is a need for mass awareness campaign in Laos. Furthermore, people need to be made aware of existing legislation. Action needs to be taken to sensitise the media in Japan, the Republic of Korea and Taiwan (Province of China), so that matters relating to CSEC are reported in a victim friendly manner.
>
> More efforts need to be made to prevent child sex tourism. Japan needs to improve enforcement of its extraterritorial laws. The Republic of Korea needs to develop extraterritorial laws so that it can prosecute its citizens for child sex tourism offences. Measures also need to be taken in Malaysia and Singapore to crack down on citizens who engage in child sex tourism in Thailand and Indonesia. In Taiwan (Province of China), tourist industry officials need to be made aware of their responsibility to report cases of sex tourism. Overall, there is a need for advocacy and awareness raising directed at the child sex tourists themselves.
>
> Finally, like in other regions, the main problems in East Asia are lax law enforcement, lack of education and a lack of rehabilitation measures..."[19]

More particularly with regard to the Pacific, there is still a paucity of national plans- existing principally in Australia and emerging in New Zealand, but some concerted actions against CSEC are being

taken in some countries with and without national plans, including Australia, New Zealand, Fiji, Kiribati, Marshall islands, Micronesia, Papua New Guinea, Samoa and Solomon Islands. Given the huge geographic expanse of the region with many island states, many of which have few resources, the following challenge deserves note:

> "Attitudes still need to change. In some islands, there is still the belief that the island's isolation will protect the children from CSEC. However, it is promising to note that most countries in the region have taken steps to reform their legislation and that some countries have taken actions towards developing national plans. It is hoped that the launch of Australia's national plan will serve as an impetus to other countries in the region to speed up work on the development of their own national plans.
>
> The main problem in the region is the lack of comprehensive research to determine the nature, extent and localities of CSEC. This lack of research makes it difficult to determine specifically what victims require and what is needed to tackle CSEC. Nevertheless, it is evident that in many of the Pacific island states, there is a lack of both adequate facilities and trained personnel to deal with CSEC. Furthermore, increased collaboration and coordination is required between NGOs and governments so that CSEC can be tackled holistically rather than in a piecemeal manner."[20]

With regard to national focal points and data on CSEC, the information concerning the region is still piecemeal and needs strengthening. Some countries are using existing ministries to deal with the issue, e.g. Singapore and Malaysia. Others are setting up new mechanisms to deal with the issue, e.g. various committees in Thailand, while interlinked with established ministries. With regard to data, more information is coming to the fore in some parts of the region due to increased research on some fronts, but many statistics are still anecdotal. Efforts to overcome the gaps include the work of the ILO and the UN Inter-agency Project on Human Trafficking in the Mekong

Sub-region which incorporate, as part of the programming, the need to collect data in the long-term about the children vulnerable to CSEC and their families by means of sentinel surveillance and longitudinal studies. Countries need to build not only strong focal points on the issue but related data bases with adequate resources for sustainability. Monitoring of the whole process also needs to be improved. The monitoring so far has tended to be on the question " is there a plan?" rather than "how is the plan being implemented ?". This implies that much remains also to be done to monitor and promote effective implementation of national plans against CSEC. The identification of national focal points and related data also demand greater attention and follow-up for the future.

b) Prevention of CSEC

Has the East Asia-Pacific region witnessed more activities to prevent CSEC? There have been key instances of action which indicate good practices on this front. One exemplary instance is the willingness on the part of some members of the private sector to support programming against CSEC. The Youth Career Development Programme in Thailand attests to the cooperation between members of the hotel industry, UNICEF, NGOs and the government sector to help train youth and prevent the conditions leading to their entry into CSEC. This programme recruits young women who might otherwise have been vulnerable to CSEC to enter a programme of training in the services of hotel industry and life skills. The services include housekeeping, laundry, floral arrangement, food preparation, and food/drinks service, as well as English language training. It has been evaluated, and there is follow-up to chart the career development of the participants. There are also spin-offs from the programme which may lead to deeper understanding of the environment facing the trainees, e.g. the lack of birth registration may be an impediment to their future and this question has also to be tackled.

The lessons learnt include the following, drawn from a recent assessment:

"The programme has demonstrated several important points. It has shown that underprivileged young women respond positively and responsibly when given opportunities. It has shown that businesses have the commitment and capacity to address social issues, and that the public and private sector can work together to achieve a common goal. Finally, the programme has shown that vocational training can be carried out in non-traditional settings with a curriculum that is responsive to the needs of young women.

A number of issues remain for the programme to address in the future. For example, one of the target groups for the programme is hilltribe girls. Many of these girls do not have proper birth registration and identification. They need to be assisted with registration so that they can legally work in the hotel industry and elsewhere. The welfare schools from which the girls have been selected should be involved in the identification of potential candidates and the final selection of participants in the programme. Finally, the experience gained from the programme needs to be shared amongst the participating agencies and organisations and other interested parties."[21]

Another example is the programme titled Child Wise Tourism which aims to prevent CSEC through tourism industry training in a variety of Asian countries, including Vietnam, Thailand, Cambodia, Indonesia and the Philippines. [22] The programme has been propelled by ECPAT in cooperation with the governmental sector and is targeted to awareness raising and community education on child rights and training activities in the tourism sector against CSEC, with participation from young people. Educational material and modules are produced, and the issue of child sex tourism is increasingly included in tourism curricular of key tourism agencies.

Another initiative is the Mekong Sub-regional Project to combat trafficking in women and children, supported particularly by the ILO's International Programme for the Elimination of Child Labour.

This covers Cambodia, Lao People's Democratic Republic, Thailand, Vietnam, and Yunnan Province of China. The project is targeted to promote education, including vocational education, skills training, employment opportunities, income generation, micro-credit, and legal literacy. The government sector and local NGOs are assisted to develop programmes against trafficking, involve stakeholders including community leaders, and promote local and national coordination by means of national steering committees.

The step-by-step progression of the project is seen as follows:

> "The project has avoided top-down approaches to the extent that member countries' political systems allow. Once permission to conduct projects had been obtained at the national level, the details of the projects were worked out at the local level with the participation of the villagers, and to the extent possible, considering the views of the children. In Lao People's Democratic Republic and Yunnan Province of China, agricultural extension workers were instrumental in identifying realitic income-generating opportunities. In Lao People's Democratic Republic, the workers suggested training in the vaccination of chicken, while in Yunnan they suggested cultivating bamboo, tea, and a special type of paddy rice. In Lao People's Democratic Republic, children played an important role in the development of awareness-raising materials."[23]

The lessons learnt include the following:

"
- If child labour and anti-trafficking concerns are to be incorporated into national policy and planning processes, it is crucial that the country's Ministry of Planning or Prime Minster's Office is represented in National Steering Committees on Child Labour.
- Meaningful child participation in national planning is difficult.
- Local participation and ownership are crucial to the success of projects, but take time and require experienced and well-

trained staff. Local staff may initially require extensive assistance.

- Selection of well-qualified implementing agencies can yield quick results, but these agencies are not always willing to work in remote areas.
- Income generating activities should be based on proper analysis of customer preference rather than preference of local producers.
- Preventive interventions through awareness raising, education, and the creation of economic opportunities should be complemented by initiatives that attempt to deal with the demand side of the equation.
- It should be recognised that labour migration will continue in situations of economic disparity. Attention must be directed towards creating acceptable working environments in sectors that host large numbers of illegal migrants.
- More efforts should be made to assess adverse effects of interventions in other policy fields, such as campaigns to promote tourism. Relevant agencies must be lobbied to mitigate possible adverse effects.
- Policy makers and local partner agencies should be trained in using the media to mobilise support for changes in policies and attitudes."[24]

UNICEF has emphasised preventive measures in much of its programming. Examples include the teacher participation in the prevention of child sexual abuse and exploitation programme in the Philippines which helps to promote school-based activity to capacity-build teachers against CSEC. This includes evolving with the teachers educational material, such as charts and visual aid, against CSEC. Another programme is to foster a community based child protection network for prevention and early intervention in Cambodia. This aims to enhance the network between the police, teachers, health workers and other local government personnel against CSEC. Location-wise, it is targeted at vulnerable areas such as the border with Thailand.

From the angle of the Stockholm Agenda for Action, these initiatives are most welcome. However, there remains a challenge concerning how to promote more programmes of prevention, especially beyond the Mekong region. There is also a need to involve more members of various power groups, e.g. the private sector, and to prevent them from exploiting children. Anti-crime measures need to be expanded throughout the region. Various antiquated national laws and policies also need to be reformed to prevent further abuses, and yet this takes time. Likewise, those attitudes and negative traditional practices which tend to look upon children as the property of parents rather than as subjects of human rights.

C) Protection of Children against CSEC

The protection issue is intrinsically linked with all the other needed strategies, such as prevention, and is closely interwoven with key interventions such as effective laws and policies and related implementation.

There have been concrete developments in the East Asia-Pacific region in recent years. One example of measures related to protection of children against CSEC is the development of a national plan of action in Thailand interlinked with a variety of activities such as law reform. The national plan was evolved even before the Stockholm Congress, although its implementation was propelled by the latter. Thailand's National Policy and Plan of Action for the Prevention and Eradication of CSEC was prepared by the National Commission on Women's Affairs (Office of the Prime Minister) and was adopted in 1996.[25] Its structure correlates largely with the Stockholm Agenda for Action and it takes a five-pronged approach: prevention, suppression, assistance and protection, rehabilitation and reintegration into the mainstream, and follow-up mechanism.

Some of the key elements of this plan include nine years' education for all children, vocational training, family and sex education, awareness raising and coordination with neighbouring countries, and cooperation between the government sector and NGOs as part of the

prevention of CSEC; adoption of new laws and promotion of law enforcement and child-friendly procedures, and data collection as part of suppression of CSEC; provision of complaints' procedures, public awareness raising, improved social services for those wishing to exit from the sex trade, and channels for sending back victims of trafficking across borders as part of assistance and protection. As for rehabilitation, these are underlined: follow-up monitoring, access to social services, occupational training and job placement, income generation, help for street children, private sector cooperation, and coordination between the government sector and NGOs in returning the victims to their homes countries. On the follow-up mechanism and cooperation, a national level committee under the Prime Minister's Office with the National Commission on Women's Affairs is established as the national focal point on the issue. This plan has been bolstered by a more recent plan on the question of the trafficking of women and children, coordinated by the National Youth Bureau.

The 1996 plan has led to and/or been interlinked with a variety of reforms, especially in the legislative and programming fields. For instance, concurrently with the Stockholm Congress, Thailand also reformed its law on the prostitution issue. The Prostitution Prevention and Suppression Act 1996 came into existence. It protects those under 18 years of age absolutely against such exploitation, irrespective of the child's consent. To a large extent, it decriminalizes the position of the victim, while the intermediaries are subjected to heavier penalties and customers are also liable. It also establishes a high-ranking national Committee for Protection and Vocational Development to help oversee implementation of the law with participation from both the government sector and civil society.

That law was followed by the passage of the Measures in Prevention and Suppression of Trafficking in Women and Children Act 1997. In addition to legal measures against trafficking, this law allows the taking of early depositions of witnesses which helps cross-border victims to give evidence and return home more quickly. It also enables them to stay in facilities provided by NGOs rather than the government.

It has been followed by a memorandum of understanding between the government sector and NGOs which helps to keep victims of cross-border trafficking out of immigration jail, thereby attenuating the strictures of the national immigration law which tends to classify all who enter Thailand without proper documents as illegal immigrants. The alternative approach is thus provided by the Memorandum of Understanding on Common Guidelines of Practices for Agencies concerned with Cases where Women and Children are Victims of Human Trafficking 1999, which shifts the victims of trafficking out of the immigration jail situation to facilities provided by the Social Welfare department in coordination with NGOs. This also helps to counter the stigma of their being classified as "illegals" when they are in fact "victims". A parallel Memorandum has been worked out between the NGOs themselves. There is also an initiative to promote bilateral agreements in the form of Memorandum of Understanding or the equivalent between Thailand and the countries of origins of victims of trafficking, the first of which is between Thailand and Cambodia.

Thailand's recent anti-money laundering law also allows the confiscation of proceeds from CSEC, while a new law amending the country's Criminal Procedure Code now allows the videotaping of child witnesses as part of the quest for more child-friendly facilities. In the search for evidence, the child being interviewed is allowed to have a social worker or psychologist and another person that the child trusts with him/her, as well as the prosecutor and the police. There has also been more training of law enforcers and social workers on child rights, and the network of NGOs on the matter is strong.

On analysis, this country profile suggests that there have been positive consequences as a result of the national setting being linked with the Stockholm Agenda for Action, but there is also much room for improvement. Capacity-building of law enforcers needs to be built through more training and adequate incentives, with the need for a stronger police focal point against CSEC and improved selection of law enforcers. More effective law enforcement is required both to counter internal and cross-border CSEC, and to combat the corruption

inherent in some areas. In various quarters, child protection is still low priority, and some authorities still regard the child victims of CSEC as criminals rather than victims. Various officials are also reluctant to abide by the Memorandum of Understanding above unless it becomes fully binding legislation. On another front, generally clients of CSEC are still not prosecuted.

With regard to the application of the criminal law against CSEC, it would be useful to allow the court to award civil damages at the same time as imposing criminal sanctions. Currently, if the child victim wishes to claim civil damages, he/she has to institute new proceedings to do so separately from the criminal proceedings; this is tedious and difficult. Moreover, the law on the question of pornography is antiquated and does not deal adequately with child pornography, particularly the advent of Internet-related child pornography. In regard to sentencing, Thai law also provides for the death penalty in the case of crimes with violence. There is some disagreement on this, although the international trend is against the death penalty. Meanwhile, the psychological interventions to deal with both the exploiter and the exploited remains underdeveloped.

From the information angle, the data system has to be improved, and there is an ongoing debate concerning how many victims of CSEC there are in the country. While recent research points to the fact that today Thai children in CSEC are declining in numbers, uncertainties remain concerning the numbers of child victims from neighbouring countries found in Thailand. Much of the data collection collected by one ministry closely linked with the issue of CSEC is in regard to general cases of prostitution (adult and child) rather than data disaggregated between adult and child; this suggests the need to build more specific data base(s) on CSEC. The cases also need to be followed up on a long term basis.

Another positive example of measures to protect children from CSEC is the adoption of the Cambodian Five Year Plan against the Sexual Exploitation of Children 2000 which follows closely the

structure of the Stockholm Agenda for Action with emphasis on prevention, protection, recovery and reintegration.[26] The proposed actions include legislative reform, strengthening the implementation process, promoting training of government personnel, enhancing public education on the subject, improving systems to receive complaints from the victims, setting up special protection systems, and strengthening international cooperation especially against cross-border trafficking and child pornography.

While the Cambodian Plan took some time before it was finalised and while it is somewhat early to appraise its implementation, the whole process of evolving this national plan has been linked with a higher profile of CSEC and the call for effective counteractions both in Cambodia and internationally. One outcome has been the pressure for prosecutions of some of the perpetrators of CSEC, and these have led to some successes in the courts. Another has been the rise of projects on law reform and training of law enforcers, including the police, prosecutors and judges. In 2000 the Law Enforcement against Sexual Exploitation of Children project was launched in Cambodia with support from the Ministry of Interior in partnership with UNICEF, IOM, the Office of the United Nations Higher Commissioner for Human Rights (OHCHR) and a number of NGOs. Of the many components of the project being implemented are:

- development of an operating manual for the police in relation to child sexual exploitation;
- preparation of various training modules and exercises for trainees on the issue of child sexual exploitation;
- productions of videos on the issue;
- organisation of national seminars and workshops for law enforcers;
- setting up of a hotline to receive complaints;
- production of one-minute advertisements against child sexual exploitation shown on Cambodian television;
- formation of an interagency monitoring body.

One constructive result has been the rise of investigations by the authorities, as well as rescues of the victims of CSEC. A key test of the project's sustainability will be how it will be continued if and when the foreign funders reduce the financial support one day in the future. Recent monitoring of the project suggests that there is a need to have more women involved in the training, more contact between the police and the social welfare authorities, more measures against corruption, more prosecutions of the suspects as contradistinguished from mere investigations, more coverage of the judiciary in training programmes, and an integrated monitoring system to follow the implementation process.

D) Recovery and Reintegration of Child Victims of CSEC

A major issue globally, although neglected to a large extent in many parts of the world, is the need for recovery and reintegration measures for the child victims. This was highlighted in the Stockholm Agenda for Action.

On one front, there is the issue of judicial remedies, legal aid and assistance. In many countries, the courts system is very inaccessible to - and too expensive for - people in general and children in particular. Judges are more often than not untrained on child rights and the needed responses to CSEC. Legal aid and assistance for the victims are also unavailable in many settings.

On a constructive front, in some countries of the region, key initiatives have been taken by NGOs together with IGOs and sometimes governments to improve the situation. For instance, the Philippines and Cambodia witnessed for the first time, not so long ago, the successful prosecution of foreigners who had exploited local children. On another front, China has witnessed a myriad of prosecutions of human traffickers and those involved in prostitution. However, the call for accessible judicial remedies and child sensitive legal procedures has met with incipient responses which need to be broadened. There is a need to ensure justice for all parties - both the victim and the accused, while realising that legal sanctions are not enough and that psychological remedies are also required.

Another angle of the recovery and reintegration process is rescue and return of victims of trafficking to their homes. A number of NGOs, such as the Centre for the Protection of Children's Rights or the equivalent, in various South-east Asian countries have liaised with the government sector both nationally and across borders to ensure the safe return of victims. These activities have been expanded in recent years. For instance, the IOM is now much more involved in this process and supports the Ministry of Social Affairs, Vocational Training and Youth Rehabilitation in Cambodia to improve policies, skills and channels of safe return for the victims, including the establishment of transit and receptions centres near the border to help facilitate the returnees' travel home.[27]

From the angle of the child victims and medical and social service providers, in the Asian region an important programme under the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) came into being in 1998 covering some 12 countries of South Asia and the Mekong region and the Philippines. Its focus is broader than CSEC since it also covers child sexual abuse in general. The programme is targeted to strengthen the capacity of health and social service personnel through training aimed at the recovery and reintegration of child victims into society.

A key element is training of health and social service providers on medical issues and psychological issues affecting the victims; this element is titled Human Resource Development (HRD) Course on Psychosocial and Medical Services for Sexually Abused and Sexually Exploited Children and Youth. This is paralleled by field research in the countries participating in the programme as well as formation of country teams on the issue. Key concerns under the programme are the threat of HIV/AIDS, and physical, psychological and emotional problems faced by the victims. Such research helps to provide a needs assessment of activities as well as to identify areas for training intermixed with case management and counseling. Recent evaluation of the course suggests a useful multiplier effect as follows:

"Many national counterpart organisations commented that the HRD course enhanced the capacity of their personnel to help children by teaching the personnel to view the children's problems holistically. Participants from the Philippines, for example, commented that the discussion of HIV/AIDS and "care for caregivers" led them to appreciate the complexities of the issues and the need for social responsibility. They noted that they have been able to apply the skills and knowledge gained from programme participation in their work place. The Filipinos also said that they felt sufficiently confident to conduct training at home on issues such as psychosocial intervention and strategies for working with victims. The national counterpart organisation in Pakistan remarked that the subregional training session " clarified many myths and built capacity to have a more holistic understanding of the issue" An organisation from Nepal said that the course enhanced participants' understanding of counseling survivors of child sexual abuse and sexual exploitation. An organisation from Sri Lanka said that the course had " greatly enhanced the work and day-to-day activities encountered in the rehabilitation of sexually abused children." The participants felt that their attitudes towards sexually abused and sexually exploited children had changed considerably since the training. Finally, the Indian national counterpart organisation stated that the subregional course was "a major landmark in capacity building of the staff": it gave skills, knowledge, and enthusiasm to work toward elimination of sexual abuse and sexual exploitation more effectively and "aggressively."[28]

Another example is the role of UNICEF on this issue; it has been expanding its work in this area, as seen in its programmes in Thailand and Vietnam aimed at supporting shelters to help exploited and abused children and capacity-building of social workers and counselors to help children in such situation. There is also a linkage with the volunteers' networks as a vigilant force to help children.

A basic reality is also brought home by these experiences. In this region, there is a critical shortage of personnel - indeed trained personnel - to deal with the psychosocial and medical problems of the child victims of CSEC. Countries generally lack staff to deal with psychological issues, and the spread of AIDS takes its toll in terms of depletion of resources. The building of a corps of quality-based personnel and a supportive infrastructure to act sustainably is an underlying challenge.

Activities on all fronts ranging from improvements in regard to judicial services, safe return programmes for trafficked victims, and psychosocial programmes need to be expanded beyond the South-east Asian region. The small Pacific nations are a case in point needing more extensive services.

E) Child/Young People's Participation against CSEC

One of the most invigorating follow-up activities from the Stockholm Congress was the organisation of a young people's conference against CSEC held in Manila in 2000. This brought together young people and their supporters from over 20 countries from the Asia-Pacific region and beyond. It integrated those who had survived CSEC into the process, while providing examples of how young people may also act as protectors of children as well as counselors for exploited children.

A number of other developments are of note with a message that child/young people's participation should not be tokenistic acts on the part of adults but be democratic processes involving the young and their representatives in programme planning, implementation, benefit sharing and evaluation. The role of young people in the media to campaign against CSEC is currently visible from the Tinggog sa Kabataan (Voice of the Children) radio programme by young people for young people in the Philippines. It is run with minimum cost: about 50USD per production of each of the 30 minute weekly radio slots. These are produced by young people with the help of NGOs for other young people and are used to educate children and the general public

about child rights. Survivors of CSEC also participate in the programmes. A recent evaluation notes the following lessons from the programme with a view to future programming:

"• A child focused and child friendly framework. Every plan of action should be with promoting the children's rights advocacy in mind. There should be a constant reminder and recognition that the programme would not be possible without the talented and hardworking children. The children should be given the credit that they deserve.
- Partnership between the children and the host organisation, in this case, between ECPAT-Cebu and the Tinggog sa Kabataan children. This partnership should be characterised by open and constant communication.
- Technical support from a radio station that is willing to give airtime to a radio programme by children for children. Tinggog sa Kabataan is supported by a radio technician of the station who help the children during the actual recording and editing of the recording session.
- Child survivors of abuse who are willing to actively participate and undergo different training related to broadcasting. The children were trained on script-writing, radio production, oral and written communication.
- NGO partner who are supportive of the radio programme and of the children. The partners should not feel that they just provide the children; they should be committed to give assistance to the programme's implementation. At the same time, the NGO partners of the children should actively encourage the children to participate in the programme."[29]

Another recent innovation is to involve children in participatory research on the issue of CSEC. This sensitive area has been trodden very carefully by a Save the Children supported research programme on migrant children and youth along the borders of China,

Myanmar and Thailand. The children interviewed as part of the research provide key life experiences concerning CSEC and the solutions needed in a participatory manner. The voices of these children provide a more qualitative angle to the findings and the proposed actions. Some of the preliminary findings include[30]:

- the need for more cross-border collaboration inclusive of ethnic diversity and marginalised groups;
- the need to access children who are classified as "illegals" as a consequence of their lack of documentation;
- the need to develop sensibility to the fears of migrants and ensure their security;
- the need to establish safe channels of return;
- the need to promote life skills and literacy, including language, mathematics, reproductive health, laws and child rights;
- the need to support youth mobilisation against abuses
- the need to support reintegration through counseling and care services;
- the need to enhance collaboration with partners to deal with undocumented migration.

UNICEF has also been expanding its work in this field as seen in its support for child participation projects. One example is the child participation project in the Philippines which promotes continuing education, advocacy and forms for discussions on the CRC. Community theatre is used as part of the lively methodology of participation and information dissemination.

There remains a key challenge for all societies. For the future, the Asia and Pacific region has to prove that in practice, it accepts readily and extensively the fact that children/young people can be key protectors and advocates of child rights and are entitled to participate in shaping their destinies.

F) Cooperation/Coordination against CSEC

All the examples given above as good practices exemplify some form of cooperation, collaboration and coordination whether between governments, between NGOs/civil society members, between members of the private sector, between IGOs and or between an admixture of all these stakeholders.

A number of innovations deserve note. First, there is the rise of interagency or multidisciplinary teams against CSEC. One example of this is found in the programme promoted by the Department of Social Welfare and Development of the Philippines. [31] Key government agencies, NGOs and local community groups such as the Barangay are brought together as part of the mobilisation process. Under this process, there is a quick response team which is an inter-agency task force consisting of a police officer, a prosecutor, a doctor, a psychologist, a psychiatrist and a counselor. The work of this team is to respond quickly to cases of child abuse and exploitation and to provide immediate assistance. These are linked to various facilities, such as therapy centres, to help the child victims.

Second, there are some novelties concerning child protection programming in the face of new technology, especially the Internet, to integrate the private sector into the process. For example, New Zealand has an Internet Safety Group comprised of the government sector, NGOs, community groups, young people and their parents, and Internet service providers to introduce a safety kit to schools to help prevent child abuse and exploitation on the Internet.[32] An Internet safety kit has been produced to promote a safe learning environment for children and hotlines for complaints are available.

In the Mekong area, several agencies have come together to counter the trafficking in children. This is seen in the UN Inter-agency Project on Human Trafficking in the Mekong sub-region which brings together several UN agencies and other partners. The project covers fours aspects: data gathering, information and research; initiatives at the country and regional levels; legal remedies and human rights; and

impact assessment. An example of joint activities is a project to collect data concerning hilltribe communities where children may be vulnerable to CSEC. This is done through sentinel surveillance to compile data concerning children and their families longitudinally.

On another front, the less salutary side of coordination/ collaboration/ cooperation also exists in the East Asia and Pacific region in the form of weak coordination, duplication, wastage of resources, lack of sustainability and "quick lump sum overloads" whereby various aid givers overwhelm their local partners with (relatively) massive and short term lump sums wanting "quick fixes" when the truth of the matter demands longer term commitment and responsiveness. "What will happen when such sums dry up and what about local sustainability even without foreign aid ?" is a persistent question that deserves carefully planned, participatory answers.

Challenging Developments:

Before heading to the future priorities for the region in the lead-up to and aftermath of the Yokohama Congress, a variety of challenging developments should be borne in mind and responded to by the East Asian and Pacific region. These include the following:

A) New International Instruments

On a welcomed front, the countries of the East Asia and Pacific region have unanimously ratified the CRC. Many have participated actively in adopting the Stockholm Declaration and Agenda for Action, and their follow-up. Yet, the world is also at a juncture where many new treaties and declarations are emerging to deal additionally with various aspects of child sexual abuse and exploitation. The natural reaction is to encourage all countries to become parties to them. However, a pause for thought is also wise. Is there any added value on the part of these emerging international instruments, or are they merely adding to the verbiage of many existing international instruments ?

A number of new international treaties have come into existence since the Stockholm World Congress.[33] First, closest to the

CRC and the issue of CSEC is the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography which was adopted by the UN General Assembly and open to signature and ratification in 2000. The added value of this treaty may include these components:

- it provides a long-awaited global definition of child prostitution and child pornography - child prostitution is defined as "the use of a child in sexual activities for remuneration or any other form of consideration"[34] and child pornography is defined as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purpose"[35];
- it underlines the need to criminalise the perpetrators;
- it highlights the need for more international cooperation on the issue;
- it presses for more monitoring and more detailed national reports to the CRC Committee on the issue.

However, it has inherent constraints as follows:

- it opens the door to some countries to sign the Protocol without ratifying the CRC;
- it does not make it clear that the child in a situation of CSEC must not be penalised;
- while it advocates measures against child pornography, including possession of such pornography for public use, it does not call for incrimination of possession for private use;
- there is an issue concerning its potential duplication/ overlap with other instruments such as those dealt with below;
- one lobby suggests that the it would have been better to concentrate on more effective national measures and implementation of the CRC rather than evolve a new instrument in the form of this Protocol.

By 2001, from the region, Cambodia, China, Nauru, and the Philippines had signed this Protocol, while Vietnam was one of the few countries which had ratified it. Logically, because this Protocol is now a global treaty, despite its constraints, countries should adhere to it and maximise its use. It may be noted further that, although not on CSEC specifically, protection is accorded to children in armed conflicts by another new treaty, i.e. the Optional Protocol to the CRC on the Involvement of Children in Armed Conflicts.

Second, in 1998 the ILO's Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour was adopted and open to ratification. It lists, as some of the worst forms of child labour, child prostitution, child pornography, and child trafficking, impliedly including sexual trafficking. Its added value may be said to be as follows:

- it calls for the penalisation of those who exploit children in CSEC as part of the worst forms of child labour;
- it opens the door for higher priority in the ILO's tripartite sytem - the partnership between governments, employers' federation and trade unions, in regard to child protection;
- it calls for a number of measures to be taken in keeping with the ILO's comparative advantage, e.g. educational access, occupational programmes, income generation and decent working conditions;
- it offers added monitoring of the issue by means of the ILO monitoring process, including via its General Assembly.

However, there are some constraints in regard to this Convention as follows:

- it does not define child prostitution, child pornography or child trafficking;
- in many cases concerning CSEC, it is NGOs outside the ILO tripartite system who have access to the children at

stake, and yet these NGOs and the children themselves do not have full access to the tripartite system;

- in many countries, labour ministries linked with implementation of this Convention are less involved in action against CSEC than other agencies such as child-related agencies and (potentially) the police are or should be involved;
- there is a question whether it duplicates or overlaps with other instruments, when it would, arguably, be better to concentrate on effective implementation of national measures.

By 2001, Indonesia, Malaysia, Mongolia, Papua New Guinea, the Philippines, Thailand and Vietnam had ratified this ILO treaty.

Third, the most recent international instrument is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention against Transnational Organised Crime 2000. In its focus on action against cross-border crime - defined as involving at least 3 persons transnationally - its added value may be as follows:

- it provides a definition of trafficking in persons in its Article 3 as "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms, of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."
- consent of the child under 18 years of age to such trafficking is immaterial;

- it calls for more child-sensitive measures and procedures;
- it underlines measures for international protection;
- it highlights the criminal angle of human trafficking and advocates more effective criminal-law based measures and implementation;
- it involves the UN's criminal justice arm in the fight against such trafficking.

It is possibly impeded by the following constraints:

- the definition of trafficking in persons is complex;
- there is challenge of duplication/overlap with the other instruments already referred to;
- the monitoring mechanism for this instrument could be periodic meetings of States parties; it is uncertain how effective they will be, especially if NGOs have little access to them.

By 2001, China, Indonesia, the Philippines, Thailand and Vietnam had signed the UN Convention linked with this Protocol, while Indonesia and the Philippines had signed the anti-trafficking Protocol.

En passant, it should be noted that the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 has been raised increasingly in tandem with the CRC to concretise strategies for child protection. It is now enhanced by a new Protocol which allows individuals to complain of violations in regard to women's rights to the international body set up to monitor implementation of the CEDAW.

A number of emerging international and regional instruments provide added support for action against child sexual abuse and exploitation. Indirectly related to the issue is the rise of the International Criminal Court (ICC) whose Statute was adopted in 1998 and open to signature/ratification by States. Of the various crimes falling under its jurisdiction, perhaps the most closely related to CSEC are war crimes and crimes against humanity, the latter covering situations of peace

and war where there is widespread or systematic attack on the population. Among the crimes listed are rape, sexual slavery, enforced prostitution, and sexual violence. The ICC will have jurisdiction to try individuals for these crimes and the sanctions include long-term imprisonment. The Court can cover the nationals of countries which have not signed/ratified its Statute in some instances. However, there are various constraints such as the possibility of the UN Security Council blocking the prosecution. The Court's jurisdiction is universal but complementary to national jurisdiction; if action is taken to prosecute the perpetrator at the national level, the Court cannot be seized of the case unless there are improprieties at that level.

More recently, there has emerged a Convention on Cybercrime drafted by the Council of Europe. It obliges member states to take action to counter various crimes on cyberspace including the production, offer, distribution, procuring and possession of child pornography in a computer system or on a computer-data storage medium. On another front, the outcome document of the future UN General Assembly Special Session on Children lists a variety of needed actions against child sexual exploitation, including awareness raising concerning child sexual exploitation, working with the private sector, addressing the root causes, protecting the safety of the victims, monitoring the situation and sharing information, and combating the criminal use of information technologies.

These are enhanced by various regional commitments, declarations and action plans such as Resolution 53/4 of ESCAP on Elimination of Sexual Abuse and Sexual Exploitation of Children and Youth in Asia and the Pacific (1997); the Bangkok Accord and Plan of Action to Combat Trafficking in Women adopted by the Regional Conference on Trafficking in Women (1998); the Asian Regional Initiative against Trafficking (ARIAT) Regional Action Plan against Trafficking in Persons, Especially Women and Children (2000); the Beijing Declaration on Commitments for Children in the East Asia and Pacific Regional for 2001-2010 (2001); and the Declaration on the Commitments for Children in ASEAN (2001).

The global community and the East Asian and Pacific region are indeed not short of instruments, such as treaties, commitments and declarations, on the issue. The crux is their effective implementation. Their complementary implementation needs to be ensured, and the added value of each instrument needs to be maximised while mitigating the constraints.

B) New Technology

The challenge of new technology affecting CSEC has already been referred to several times. In particular, information technologies such as the Internet may be either a boon or a bane. On the positive side, the Internet brings a wealth of information which can help to promote knowledge, education and recreation. However, the negative side is that it may be used for abuse and exploitation. In recent years, various bulletin boards and newsgroups have used it to convey masses of child pornographic materials across the globe, while chatrooms have been luring children into exploitation linked at times to abductions.

A few reflections are required concerning how to deal with the issue.[36] First, it should be realised that the Internet is not completely anonymous and it can be monitored. However, a balance must be struck between respecting everyone's right to privacy, freedom of expression and communication, on the one hand, and child protection, on the other hand. Second, there is no uniform legislative approach to how to deal with the negative aspects of the Internet.[37] Some countries prohibit the use of computers altogether or subject those who wish to have them to seek permission from the Government. This is an undesired, draconian approach. Others have no law concerning the use of the Internet. Others are exploring a variety of legislative inter ventions such as to render the Internet service providers and others using the web liable for illicit material, including child pornography. The laws on this issue may vary from specific law concerning the Internet to general law such as the Criminal law countering child pornography both "off line" and "online". Others establish conditional

liability by obliging Internet Service Providers to block or take down the illicit material, once they have been notified of the latter, i.e. the "notice and take down" approach.

Third, legislative responses need to be complemented by technological and other responses. Computer programmes are now available to help filter the incoming information as well to rate the content of the information with the possibility of blocking undesired material. New computer programmes are being developed to help "fingerprint" the material and identify similar materials on the net. Fourth, strategies to encourage child-wise use of technologies, such as information kits to prevent abuses on the Internet, are now available, but they need to be addressed not only to children/youth but also the adults around them, in particular parents and teachers to block the illicit or undesired information. The adults are often not as technologically proficient as the children themselves. This implies the need for computer-related education not only for children but also the adults surrounding them. This may be assisted by easy to use computer programmes which are already integrated into computers and which help both adults and children to choose the types of information coming in and to screen out the illicit or undesired information.

Fifth, networks of organisations for child-wise use of computers and to monitor against violations are needed. Some already exist , e.g. Cyberangels which is an NGO with an international network monitoring against child exploitation. Sixth, hotlines are also required to receive complaints and to assist referrals to the authorities. There are extensive hotline networks in Europe, but this intervention is only nascent in the Asia-Pacific region. Seventh, the increasing technological gap between the computer-haves and computer-have-nots is worrying. This is part of the increasing global disparity in the field of human development, and the technological gap needs to be bridged more strongly as it is creating a development chasm. However, developing countries should also realise that although they have less access to information technologies and use the Internet less than the developed countries do, various harmful and or illicit materials such as child

pornography are already coming into these countries or exiting from them - at times in ethnic languages.

Eighth, the technology is mutating every day, and it is being used to exploit children in diversified forms. For instance, a few years ago, it was the bulletin boards which were most talked about in terms of the spread of child pornography. Today, cameras attached to computers - "webcams" - have arrived on the scene, while more individualised webs and "E-messages" add new features to the "real time" of instantaneous but globalised communication, replete with moving images of multiple forms of exploitation. This thus calls for technological and community-based vigilance.

C) Multiplicity of Catalysts/Stakeholders

The multiplicity of catalysts and stakeholders is already well known in the fight against CSEC. The governments/government personnel, NGO and IGOs are often in the front line of this process. However, other emphases are needed.

First, the perspective of children/young people and their families. This is already accepted in national and international plans and strategies to a large extent, but it needs to be implemented more effectively. A crucial test, for example, is to integrate children and youth into not only the implementation of programmes against CSEC but also the planning and evaluation stages. The 2000 International Conference of Young People against CSEC provided a timely stimulus for this process which should be taken up more strongly at the Yokohama Congress.

Second, as was noted earlier, members of the private sector were not well represented at the Stockholm World Congress. While the travel/tourism industry and the media were there, there was too little linkage with the computer industry ranging from software to hardware members and intermediaries such as Internet service providers. Some recent developments concerning the private sector deserve note[38].

The travel and tourism industry has come together more readily to adopt Codes of Conduct or Ethics against CSEC. One example is the European Code relating to tour operators which is now linking up with Japanese counterparts. The Code take a position against CSEC, obliges its members to take action to educate those involved in the chain of providing services, e.g. to educate tour operators, to inform the public, e.g. by leaflets, and to oblige contracts to incorporate clauses against CSEC. A key issue is how to monitor this self-regulation, as it is "soft law" and not "hard law". The remedies for breaches are, of course, not legal sanctions but more along the line of peer review and pressure, with possibly exclusion or expulsion from the group. However, the experience of East Asia and the Pacific on the front is still limited.

On another front, more members of the industry are willing to establish hotlines or to interlink with NGOs to receive complaints. This needs further exploration in the East Asia and Pacific region. Finally, the media themselves are being called upon to act as monitors of abuses and as protectors of children. Through investigative journalism, many children have been saved from the sex trade, and this needs to be maximised. However, the media also need to prevent themselves from acting unethically, such as by printing the names and faces of child victims unmasked and in breach of the child's right to privacy. Various international and national media Codes are emerging to promote respect of human rights, including child rights, and these need to be well implemented with transparent and credible monitoring and pressures for accountability.

The rise of all these catalysts and stakeholders implies the need to coordinate and cooperate well to maximise results and avoid unnecessary overlaps in taking action against CSEC.

D) Plethora of Sex Exploiters

A difficult , although not sufficiently addressed area, is how to deal with the range of sex exploiters.[39] In many settings, there is a tendency to concentrate on the misdeeds of "paedophiles", i.e. those

who like to have sex with pre-pubertal children. However, the range of exploiters is much broader than that group. There are many exploiters who are not paedophiles but who like to have sex with adolescents under the 18 year old threshold in the post-pubertal stage. These "preferential" or "situational" exploiters of children also need to be dealt with. There is also a tendency to highlight "foreign" exploiters, while not adequately countering the local clientele.

The almost natural reaction is to try to impose criminal sanctions on them, and to make these sanctions more severe. However, this is only one of the needed actions and it may at times not solve the problem at all, especially if the exploiters have psychological problems needing socio-medical-psychological treatment. Many studies indicate that early interventions are the best, and it is best to start when the potential or actual exploiters are young rather than to leave it to adulthood when the remedies may be too late to change their psychological patterns and behaviour. Yet, many countries in East-Asia and the Pacific and elsewhere often do not have the psychological facilities to deal with the issue.

What to do with the sensitive issue of the young sex exploiter of other children ? It has to be recognised that at times young people under 18 years of age also act as the sex exploiters of children, e.g. when they act as pimps to procure other children. More often than not, the criminal law already incriminates them, but there is a need to examine the interventions in a child-sensitive manner. First, generally children who have done something wrong deserve a second chance to change their ways. They cannot be put in the same basket as adult wrongdoers. Second, the CRC and related international instruments concerning children who have allegedly broken the law already guide us on the issue by calling for a humane juvenile justice system. There is a need to divert these children from sanctions such as locking them up in prison. Detention should be a measure of last resort, and a variety of community-based remedies need to be explored, e.g. community work exacted from the child who has done something wrong, as part of "restorative justice". Psychological help

such as counseling is also essential to enable the young person to change his/her ways. Third, reproductive health education and sex education are important so as to enable children to understand the parameters of human sexuality and conduct. Yet, this is regrettably a taboo in so many East Asian and Pacific countries, as elsewhere.

The notion of sex exploiters of children also invites us to understand that there is a plethora of persons and or organisations in the chain of exploitation. At times, it may be the parents. At others times, it is the intermediary, the brothel owner, the so-called law enforcers, the client, members of the industry, and transnational criminal syndicates. This implies the need for multi-leveled but interlinked counteractions and support networks to tackle the chain of exploiters.

E) Integrated/Comprehensive Measures

The call for integrated and comprehensive measures is hardly new and permeates international instruments such as the CRC and the Stockholm Declaration and Agenda for Action. This implies a variety of actions - laws, policies, programmes, practices, mechanism, personnel, resources, information, inter-disciplinary cooperation, and the building of an open process and mindset to respond to the needs of the child holistically.

It calls for a broader alliance of actors from many disciplines - law, psychology, medicine, science, ethics, politics, economics, sociology, business and more to respond to the rights of the child in all their manifestations. This is embodied in the new Global Movement for Children propelled by UNICEF, and the results have to be monitored progressively. It is thus worth having time frames and deadlines, and this may also influence the targeting of future actions for the East Asia-Pacific region and the global community. It is also linked with the call for indicators of progress as benchmarks for development and is interrelated with the need to integrate child impact assessment into all programmes which affect children.

Future Priorities:

In retrospect, the period between the First World Congress and the Second World Congress has witnessed several key developments of a positive kind in the East Asia and Pacific region. It has witnessed the adoption of some national plans against CSEC, a range of new laws and policies against CSEC, more prosecutions of the wrongdoers, more programmes for preventing child abuse and exploitation and on child protection, more networks to help child victims, more information gathering and research, and more capacity building and mobilization against CSEC.

However, on a less positive front, to date, several countries do not yet have national plans of action in accordance with the Stockholm Agenda for Action, while weak implementation of activities against CSEC pervades many countries, whether or not they have such national plans. Also the national focal points against CSEC and data bases need to be identified, established and or developed. The actions in favour of prevention of CSEC, protection of the child victims, recovery and reintegration of the victims, child and youth participation against CSEC, and cooperative activities are also underdeveloped in various parts of the region, such as in the Pacific island states. On a related front, those programmes which exist in other countries and sub-regions, such as the Mekong basin, need to be made more sustainable and expanded to cover the whole range of children vulnerable to CSEC. A key issue throughout is the need for more effective implementation of activities to help children in a child-friendly manner.

Key priorities for the future for governments, in cooperation with members of civil society and other actors, include the following:

- implement effectively the Convention on the Rights of the Child and related instruments, including the Declaration and Agenda for Action of the First World Congress against Commercial Sexual Exploitation of Children ("The Stockholm Declaration and Agenda for Action");
- for the countries which have not yet adopted the Stockholm Declaration and Agenda for Action, adopt this in-

strument in an expedited time-frame, preferably before 2004;

- for the countries which do not have them yet, establish and implement national agendas for action and national focal points, with data bases and adequate resources, consistent with the CRC and the Stockholm Declaration and Agenda for Action in an expedited time-frame, preferably before 2006;
- encourage ratification and implementation of the relevant international instruments for child protection, including the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, ILO Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime;
- support the process of the Second World Congress against Commercial Exploitation and its outcome commitment/declaration;
- underline and adopt integrated and comprehensive measures as voiced by the Stockholm Declaration and Agenda for Action to prevent CSEC, to protect the child victims, to ensure their recovery and reintegration, to enhance child and young people's participation against CSEC, and to promote closer collaboration and cooperation against CSEC;
- ensure effective law enforcement and the criminalization of CSEC, while not criminalizing/penalizing the child victims;
- tackle more effectively the environment behind the root causes of CSEC, including poverty, discrimination, social disintegration and crime;
- address new forms of technology to use them well for child protection and to counter their misuse;

- broaden the networks of actors for child protection, including NGOs, other members of civil society, community watchdogs, the private sector, IGOs and government personnel;
- expand programmes for capacity-building, including training and education of personnel and awareness-raising among the public, and provide more accessible services and child-friendly facilities and procedures to children vulnerable to CSEC and their families;
- guarantee improved access to education and enhance life skills education, reproductive health sex education, including the issue of sexually transmitted diseases and HIV/AIDS, and income-generating activities consistent with the rights of the child;
- promote internal and cross-border cooperation to counter child trafficking and other forms of CSEC.
- strengthen the use of national mechanisms, such as national human rights commissions and ombudspersons, bilateral and parallel agreements, such as Memorandum of Understanding between neighbouring countries, and regional arrangements/organisations, including ESCAP, ASEAN and the Pacific Islands Forum, against CSEC, and support and improve the monitoring process against CSEC;
- foster more concrete and sustainable participation of children and young people in action against CSEC, including in regard to the planning, implementation, benefit-sharing and evaluation of programmes against CSEC.

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Notes

1. For recent studies, see: J.Carr, "Child Pornography", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001; J.O'Connell Davidson, "The Sex Exploiter", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001; J. Warburton, " Prevention, Protection and Recovery", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001; K.Shibarata and H.Saeki, Trafficking in Children for Sexual Purposes", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001; M.E.Hecht, "The Role and Involvement of the Private Sector", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001; G.Van Bueren, "Child Sexual Exploitation and the Law", theme paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 2001. The term "East Asia and the Pacific" is used broadly in this study but it does not include the Americas.

2. For general reading concerning the Convention on the Rights of the Child (CRC), see: G.Van Bueren, **The International Law on the Rights of the Child** (Dordrecht: Matinus Nijhoff, 1995); V.Muntarbhorn, **A Sourcebook for Reporting under the Convention on the Rights of the Child** (Bangkok: UNICEF and Child Rights Asianet, 1997); UNICEF, **Children in Need of Special Protection** (Bangkok: UNICEF EAPRO, 2000).

3. For text and related documents,see: **Declaration of the World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 27-31 August 1996, Parts I and II** (Stockholm: Regeringskansliets, 1996).

4. **Ibid.**

5. V.Muntarbhorn, "From Stockholm 1996 to Yokohama 2001: Stocktaking of Action against Commercial Sexual Exploitation of

Children", background paper of the Kyoto Symposium in preparation for the Second World Congress against Commercial Sexual Exploitation of Children (2001), Kyoto, 26 February 2001.

6. See further: ECPAT, **Looking Back/Thinking Forward** (Bangkok:ECPAT, 2000).

7. Human Rights Internet, **The Canadian Component of the Protection Project: A Socio-legal Analysis of International Jurisprudence on the Commercial Sexual Exploitation of Women and Children** (Ottawa: Human Rights Internet, 2001).

8. ECPAT, **op.cit.**

9. **Asia-Pacific Answers: Good Practices in Combating Commercial Sexual Exploitation of Children and Youth** (Bangkok: ECPAT, ESCAP, IOM, ILO-IPEC, UNAIDS, UN Inter-agency Project on Human Trafficking in the Mekong Sub-region, and UNICEF, 2001).

10. ECPAT, **op.cit.,** pp.24-5.

11. **Ibid.,** pp.55-6.

12. **Ibid.,** p.120.

13. **Ibid.,** p.137.

14. See, for example, S.Baker, **The Changing Situation of Child Prostitution in Northern Thailand: A Study of Changgwat Chiang Rai** (Bangkok:ECPAT, 2000).

15. ECPAT, **op.cit.**

16. **Ibid.,** p.82.

17. **Ibid.,** pp.88-9.

18. **Ibid.,** p.97.

19. **Ibid.,** p.110.

20. **Asia-Pacific Answers, op.cit.,** pp.4-9; 9.

21. **Ibid.,** pp.9-13.

22. **Ibid., pp.**11-20; 18.

23. **Ibid.,** p.20.

24. **Ibid.**, pp.21-7.

25. **Ibid.**, pp.27-33.

26. **Ibid.**, pp.42-7.

27. **Ibid.**, pp.33-42; 38.

28. **Ibid.**, pp.48-54; 53.

29. Save the Children (UK), **Breaking Through the Clouds: A Participatory Action Research Project with Migrant Children and Youth along the Border of China, Myanmar and Thailand,** forthcoming.

30. **Asia-Pacific Answers, op.cit.**, pp. 60-7.

31. **Ibid.**, pp.64-7.

32. "From Stockholm 1996 to Yokohama 2001: Stocktaking of Action Against Commercial Sexual Exploitation of Children", **op.cit.**, pp. 3-6.

33. Article 2(b) of the Optional Protocol.

34. Article 2 (c).

35. See further, J.Carr.

36. V.Muntarbhorn, "Child Pornography Legislation and Policies: Problems and Prospects (Child Pornography and the Internet: Law and Practice in the Realm of Cyberspace)", background paper of the Child Pornography on the Internet Experts Meeting, Interpol, Lyon, 28-9 May, 1998.

37. See further, M.E.Hecht, **op.cit.**

38. See further, J.O'Connell Davidson, **op.cit.**

39. For a recent study, see: Home Office, **Setting the Boundaries: Reforming the Law on Sex Offences, Vols. I and II** (London: Home Office, 2000).

Chapter VIII

Combating Migrant Smuggling and Trafficking in Persons, especially Women: The Normative Framework Re-appraised

The issue of migrant smuggling and trafficking in persons, especially women and children, has come to the fore dramatically in recent years as part of the negative side of globalization. There are dark forces at work exploiting innocent people globally, regionally and nationally; such forces are often invisible, elusive and intractable. The world is facing a proliferation of crime and criminality in their various incarnations as a modern form of slavery, thus demanding closer cooperation in terms of needed counteractions.

The literature on the subject is becoming copious, thus indicating that the knowledge base for action already exists to some extent.[1] In this regard, the normative framework and responses referred to below relate primarily to the laws and policies/plans at various levels against the phenomenon of trafficking and smuggling. As will be seen later, the normative framework already exists to inspire measures to help the victims. The main challenge is the effective implementation of laws and policies in practice, and this depends upon how they help to protect rather than aggravate the plight of the victims.

At the outset, a number of considerations may be highlighted. First, the trafficking in persons is both internal and external, within countries and across countries. The phenomenon relates primarily to the movement of persons coercively or due to abuse of authority by those having power over the victims, for the purpose of exploitation. By contrast, migrant smuggling is essentially a cross-border situation entailing the procurement of the illegal entry of a person into another country. Whether in relation to trafficking or smuggling, countries are often concurrently source countries, transit countries and destination countries.

Second, while the trafficking for sexual exploitation - prostitution - is often in the news, the trafficking phenomenon has many (more) faces. For instance, it may relate to forced labour, debt bondage, begging, child adoption, and even possibly the sale of human organs. Women and girls are a particularly vulnerable group, especially in relation to sexual exploitation.

Third, the growing transcontinental nature of trafficking and smuggling has put on the map new areas and populations affected by the phenomenon. For example, a few years ago, who would have heard of Uzbek and Russian women being trafficked or smuggled to Bangkok ? Who would have imagined boat loads of Afghans and Iraqis en route to Australia, or Chinese nationals being trafficked or smuggled in container lorries to/through Europe ? This geographic and ethnic spread results in an understandable sense of insecurity on the part of destination countries. Yet, at times it leads to overblown fears with draconian actions in breach of human rights.

Fourth, in view of the increasing global pre-occupation with the issue of terrorism since the attacks on New York on 11 September 2001, there is a trend on the part of several States to turn to more stringent migration policies as a weapon against terrorism. A key challenge is how to prevent over-reaction with drastic consequences for the rights of migrants, especially victims of trafficking and smuggling. Interlinked with this is the worrying tide of racism and discrimination against migrants.

Fifth, any consideration of laws and policies would be incomplete unless the call for comprehensive measures is heeded, bolstered by genuine political commitment and adequate resources. Added to this is the challenge of enabling the various stakeholders - not simply States and intergovernmental organisations, but also civil society actors, such as non-governmental organisations (NGOs), the media, the business sector and the victims themselves - to cooperate as a vigilant force against the phenomenon.

The Normative Framework :

The framework of laws and policies/plans against trafficking and smuggling can be witnessed at three levels: multilateral, regional and national.

a) Multilateral

There are age-old treaties on the issue of trafficking. These include the International Agreement for the Suppression of the White Slave Traffic (1904)[2], the International Convention for the Suppression of White Slave Traffic (1910)[3], the International Convention for the Suppression of the Traffic in Women and Children (1921)[4], the International Convention for the Suppression of the Traffic in Women in Full Age (1933)[5] and the Convention on the Suppression of Trafficking and the Exploitation of the Prostitution of Others (1949)[6]. All of them, to a lesser or greater extent, were aimed at crime prevention and suppression.

However, these early treaties suffered from the fact that they were not gender-sensitive enough and were not broad enough to cover the range of trafficking situations noted earlier. The 1949 Convention suffered the further fate of being perceived as stigmatizing prostitution, whereas globally, at least in relation to adult prostitution, there are two contra-posed lobbies - one lobby views adult prostitution as exploitation, while the other views it as legitimate work. All of these early instruments were shaped by another defect; they belonged to an era where there did not yet exist adequate monitoring mechanisms at the international level to trace and track human trafficking and the needed counter-measures.

More recently, a variety of treaties tackle the issue of trafficking with increasing emphasis on a human rights perspective from the angle of protection of the victims. These include:

- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)[7];
- the Convention on the Rights of the Child (CRC) (1989) [8];

- the International Convention on the Protection of the Rights of All Migrant Workers and their Families (1990)[9];
- the Hague Convention on the Protection of Children and Cooperation in respect of Inter-country Adoptions (1993)[10].
- the International Labour Organisation (ILO)'s Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)[11];
- the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000)[12].

There are also a number of other treaties related to the ILO, such as those against forced labour, which have bearing on the issue of trafficking.

Taken together, these human rights instruments advocate a range of actions to respond to the rights of women and children which have bearing on the issue of trafficking and smuggling. For instance, the approach based on human rights calls for effective and woman-and-child sensitive laws, policies, programmes, mechanisms, resources and information/education to protect women and children. These instruments also have various monitoring mechanisms such as international committees to oversee the performance of countries. They imply greater transparency and accountability, as well as the empowerment of women and children in the process. Yet, the key challenge in practice is their implementation, particularly at the national and local levels. Lax implementation or poor enforcement is, in reality, often the order of the day, and it is shaped in several settings by five key C's: Corruption, Collusion, Cronyism, Clientelism and Crime.

In addition, a range of international declarations and plans of action call for action against trafficking. These include the Plan of Action of the International Conference on Population and Development (1994)[13], the Beijing Platform of the World Conference on Women (1995)[14], and the Declaration and Agenda for Action against Com-

mercial Sexual Exploitation of Children adopted by the Stockholm World Congress on this issue (1996) (supplemented by the Yokohama Global Commitment (2001) as the follow-up process for the Stockholm Congress and Declaration)[15]. The principles espoused by such instruments pertain to both trafficking and smuggling, although the former is more explicitly targeted. The human rights approach inherent in them calls for responsive laws, policies, programmes, practices, mechanisms, resources, monitoring and joint cooperation. A key tenet is to advocate comprehensive actions - in law and in other fields - to thwart those who abuse the persons concerned, while being victim sensitive. The issue of individual responsibility for crimes has been given added impetus by the Rome Statute of the International Criminal Court (1998)[16] which confers jurisdiction on this new Court to tackle a number of international crimes such as crimes against humanity and war crimes which may cover elements of trafficking and smuggling directly or indirectly.

The most recent treaties specifically on the issue of trafficking and smuggling are two of the three Protocols attached to the United Nations Convention against Transnational Organized Crime (1998)[17]. This Convention covers transnational crimes involving a structured group of three or more persons. Of the three Protocols, the two most pertinent to this study are as follows:

- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (1998)[18];
- the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (1998)[19].

By the middle of 2002, none of the three instruments mentioned were yet in force. There were 141 signatories and 8 State Parties to the U.N. Convention; 104 signatories and 6 State Parties to the anti-trafficking Protocol; and 100 signatories and 6 State Parties to the anti-

smuggling Protocol. Each of these instruments needs 40 ratifications (State Parties) to enter into force.

With regard to the anti-trafficking Protocol, this definition of "trafficking in persons" is stipulated :

> "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. "(Article 3)

The Protocol provides the following directives for action:

- not only is coercion/force covered but also abuse of authority as a part of the trafficking;
- the exploitation behind the trafficking encompasses sexual exploitation and other forms, e.g. forced labour, slavery and removal of organs;
- consent on the part of the victim is irrelevant;
- "child" means any person under 18 years old;
- legislation to criminalize the trafficking is to be adopted by States parties;
- a wide range of measures to protect the human rights of the victims is provided for, e.g. legal assistance, counseling, shelter and medical help in appropriate cases ;
- measures to permit the victims to remain in the territory of the transit/destination country are to be considered in appropriate cases;
- in relation to the State Party of which the victim is a national or has a right of permanent residence, safe return of the victim to that State is to be facilitated;

- measures to prevent the trafficking and to promote cooperation are to be adopted, e.g. media campaigns, information exchange and training, border controls, and security of travel documents;
- monitoring of the implementation of the Protocol is provided for by the Convention against Transnational Organised Crime through periodic conferences of States Parties.

This Protocol endeavours to answer the question concerning the trafficked victim who is a refugee or seeking refugee status as follows:

> "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." (Article 14)

In practice, this means that the rights of refugees are to be guaranteed, even though such persons may also be victims of trafficking. By implication, refugees are not be sent back to areas of dangers ("non-refoulement") and those seeking refugee status are to have access to asylum procedures/refugee determination procedures.

Granted that the U.N. Convention against Transnational Organised Crime and the anti-trafficking Protocol above (as well as that on smuggling below) were drafted primarily by governments, NGOs have been critical of some of their contents as being deficient.[20] In particular, these instruments are seen as anti-crime measures without being sufficiently human rights sensitive. For instance, in the provision in the anti-trafficking Protocol on the assistance to the victims of trafficking, instead of there being a clear commitment from member States to render effective assistance, such States are only committed to providing assistance "in appropriate cases"(Article 6). This "diluted" style

of commitment from governments is also seen in other Articles of the Protocol. For instance, in regard to Article 7 on the status of the victims of trafficking in receiving States, there is the following stipulation:

> "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." (emphasis added by the author)

On another front, the anti-smuggling Protocol provides this definition of migrant smuggling:

> "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident." (Article 3)

The Protocol provides the following directives for action:

- migrants are not to be liable to criminal prosecution for the fact of having been smuggled;
- migrant smuggling is to be criminalized;
- a State Party which suspects that a vessel flying the flag or displaying the marks of registry of another State Party is engaged in smuggling of migrants by sea may notify the flag State and request authorisation from the flag State to board and search the vessel and take appropriate measures vis a vis the smuggling ;
- where a State Party suspects that a vessel is engaged in migrant smuggling and is without nationality, it may board the vessel, search it and take appropriate measures;

- measures taken in relation to migrant smuggling at sea are to take account of the need not to interfere with the rights and obligations under the international law of the sea;
- measures to prevent migrant smuggling and to promote cooperation are to be taken, e.g. information exchange, training and information dissemination programmes, checks on travel documents, and border measures;
- protection and assistance measures for the victims are to include access to consular help under the relevant international treaty on consular relations;
- return of the smuggled migrants to the country of nationality or country where they have permanent residence is to be facilitated;
- protection for refugees under international law is ensured with a provision similar to Article 14 of the anti-trafficking Protocol above.

Upon scrutiny, while it is not altogether easy to distinguish between trafficking and smuggling, one difference may be that while trafficking is always exploitative of the victims, those being smuggled by smugglers may at times be gaining some kind of benefit from the smugglers (e.g. assisted passage to another country). From the angle of the victims, therefore, trafficking is more objectionable than smuggling, although the latter may also be abusive.

Read together with the Convention against Transnational Organised Crime, the anti-trafficking Protocol and the anti-smuggling Protocol advocate at least a three- pronged approach, namely:

- prevent and combat the trafficking and smuggling, particularly by criminalizing such acts;
- treat those who are trafficked and smuggled as victims with inherent rights;
- promote international cooperation such as through mutual cooperation between law enforcers and extradition of the culprits.

Furthermore, even if the victims enter a country with false documents, this should not **per se** lead to an offence being committed by them as they may have had no option but to use such documents. This is particularly pertinent to those seeking refugee status.

What then has been the impact of the U.N. Convention against Transnational Organised Crime and its two Protocols? Since they are not yet in force, it may be premature to offer a prognosis of their full impact. However, it is ostensible that the process leading up to these instruments and their finalisation has had substantial impact in a variety of ways, including the following:

- greater public exposure to the issue of trafficking and smuggling, and more extensive media coverage;
- greater political will of and more cooperation between governments to address the issue, especially from the angle of anti-crime measures, evident in some of the regional and national actions cited below;
- greater sensibility towards the rights of the victims, exemplified by by various new laws on the subject, as seen in the sections below;
- broader networking among civil society, such as NGOs.

However, implementation of anti-trafficking and anti-smuggling measures remains weak or selective on several fronts. Anti-crime measures are often not victim sensitive enough. There is a tendency among governments to propose new laws and policies on the issue, without adequate attention to the question of how to promote quality law enforcement. The emphasis on anti-trafficking and anti-smuggling may also undermine the position of those seeking refugee status - the latter may all too easily become "reclassified" from "refugee status" with substantial guarantees - to "trafficked or smuggled status" with fewer guarantees.

b) Regional

An array of regional initiatives has arisen in recent years against trafficking and smuggling, ranging from treaties to plans of action, dialogue processes and joint actions. Most recently in treaty-making, there is the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution adopted by the South Asian Association for Regional Cooperation in 2002[21]. The treaty is more limited in scope that the anti-trafficking Protocol noted above since it only covers trafficking for prostitution and it only encompasses protection for women and children. It defines trafficking as " the moving, selling or buying of women and children for prostitution within or outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking" (Article 1). It calls for measures for prevention, interdiction and suppression of such trafficking, paralleling many of the measures voiced by the anti-trafficking Protocol above, particularly the criminalization of those who traffic in women and children. Protection of the victims is called for ; this ranges from information programmes to care, protective homes/shelters, counseling, job training and repatriation of the victims. Measures of cooperation between countries, such as mutual assistance in the legal field, are stipulated. Interestingly, the role of non-governmental organizations is explicitly recognised, particularly in providing care and protection of the victims.

With regard to other parts of Asia and the Pacific, there are various policies/plans of action and cooperative processes currently at work. The Association of South-east Asian Nations has a plan of action against transnational organized crimes which can also be used to counter trafficking and smuggling[22]. There is the Asia-Pacific Consultations (APC) Process dealing with refugees, displaced persons and migrants; it holds periodic meetings to discuss issues which cover smuggling and trafficking[23]. Likewise, the Asian Initiative against Trafficking (ARIAT) which has a plan of action ranging from measures of prevention to prosecution of the traffickers, rescue and reintegration of the victims[24]. A regional plan of action against trafficking has also

been adopted under the umbrella of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)[25]. There are various projects on the issue under the United Nations in the Mekong region.

A key declaration preceding both the APC and ARIAT processes was the Bangkok Declaration on Irregular Migration adopted by Asia-Pacific countries in 1999 resulting from the International Symposium on Migration "Towards Regional Cooperation on Irregular/ Undocumented Migration"[26]. This called for closer cooperation, information exchange and dissemination, criminalization of smuggling and trafficking, and humane treatment of the victims. The Symposium leading to this Declaration was propelled by the escalation of irregular migration in the region and the need felt by governments to come together to cooperate more closely to address the issue. This was conditioned by the many types of irregular migration - including forced migration interrelated with human trafficking, the search for asylum and other displacements- needing comprehensive responses. The follow-up to this Bangkok Declaration has been linked with the APC and ARIAT mentioned above; it has manifested itself in more consultations and closer cooperation between governments, with emphasis on more legislation/policies to criminalise human trafficking, and related information sharing and dissemination.

The European, American and African regions all have intergovernmental human rights protection systems in the form of human rights treaties and mechanisms such as regional courts which can help to protect victims. In recent years, they have been exploring more avenues for policies/ plans of action and cooperation dialogues specifically on the issue of trafficking and smuggling. In Europe, there have been several initiatives from the Council of Europe and the European Union in the form of recommendations and joint actions[27]. The European Charter of Fundamental Rights proclaimed by the European Union in 2000 has a provision related to the trafficking phenomenon[28], while the Union itself is moving, through framework decisions, towards more harmonisation of laws on this matter. There are various dialogue

processes related to the Baltic Sea States Council and the Black Sea Economic Council on the phenomenon[29]. Central Europe has been involved since 1991 with the Budapest Process which also counters organized crime and trafficking[30].

In America, there is the Puebla Process involving North and Central America in information exchange and cooperation on the issue of irregular migration[31], while South America began a parallel process pursuant to the Lima Declaration of 1999[32]. In Africa, there is the Migration Dialogue for Southern Africa (MIDSA) and a parallel process for West Africa[33].

In terms of transcontinental dialogue, various cooperation meetings are held periodically between countries of North America, Europe and Australia under the umbrella of the Intergovernmental Consultation on Asylum, Refugees and Migration Policies (IGC)[34]. In relation to the European and Asian countries formerly linked with the Soviet Union, there is the process which emerged from the Geneva Conference on Refugees, Displaced Person and other forms of involuntary displacement under the umbrella of the Commonwealth of Independent States (CIS) (1995)[35]. The Asian-African Legal Consultative Committee has also decided to take up the issue of migration recently, especially the protection of migrant workers[36]. Meanwhile, the Asia-Europe Meetings (ASEM) have been targeting more measures against human trafficking and have set up a computerised data base on laws concerning child sexual exploitation[37].

The most recent "pulse" on this issue was felt at the Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime in 2002 in Bali on the initiative of Indonesia and Australia. It had transcontinental participation at the ministerial level from across the globe, involving over 50 countries and key international agencies. While the refugee issue was discussed to some extent by participants at the conference, there tended to be a shift of interest towards the trafficking and smuggling issue rather than refugee protection. The message from the Co-Chairpersons' Statement under-

lines priorities at this point in time, at least from the viewpoint of governments, including the following[38]:

- more information and intelligence sharing arrangements;
- more cooperation between law enforcement agencies to enhance deterrence and fight against illegal immigration networks;
- more cooperation on border and visa systems;
- more public awareness programmes;
- enhancement of return to the source country as a strategy to deter illegal migration through the conclusion of appropriate arrangements;
- cooperation in verifying the identity and nationality of illegal immigrants;
- assistance from the international community to tackle to root causes.

Consequently, two working groups have been set up to promote more interchanges; one on information exchange coordinated by New Zealand and the other on laws/law enforcement coordinated by Thailand.

There are various similarities between the regional approach and the multilateral approach above. Both aim for criminalization of smuggling and trafficking. Both recognise the question of victims' rights. Both propound the need for more cooperation. The value added of the regional approach is that precisely because it is smaller in scale, as compared with the multilateral approach, there are more opportunities for more focused activities and closer cooperation between countries in each region. However, in reality, care should be exercised so that the regional pre-occupation with "deterrence" should not be used to deter migration (vis a vis the migrants) without other humane options. The verbal commitment against trafficking and smuggling still need to be matched by an equally strong commitment to protect victims' rights in practice, rather than lip service, and to ensure that those seeking refuge have effective access to asylum procedures/refugee determi-

nation procedures and international protection in the absence of national protection.

c) National

All countries have some laws which may be used against trafficking and smuggling. The most obvious is the ubiquitous presence of national criminal laws. These are supplemented by various labour laws and other more specific laws, e.g. laws on child protection, on violence against women and children, which may indirectly counter trafficking and smuggling.

In recent years, several countries have taken a more focused approach of passing targeted laws, particularly against trafficking. A case in point is the United States which in 2000 passed the Trafficking Victims Protection Act[39]. It takes a strong crime suppression approach while having broader vistas. For instance, in addition to strong penalties of fines and imprisonment for the traffickers, it provides for the possibility of giving temporary visas - T visas - to the victims to stay on temporarily in the United States to help prosecute the traffickers. It establishes an interagency task force to monitor the trafficking, and offers economic alternatives to source countries to prevent and deter trafficking, such as micro-credit lending programmes, programmes to promote women's participation in decision-making, educational programmes to help children access education, and assistance to non-governmental organizations to help in the development process. It provides for annual reports covering the globe on what countries are doing to curb the trafficking, with the possibility of sanctions to be imposed on those failing to take adequate measures. While there are many positive aspects of this new law, there remains a question concerning whether the threat of sanctions is appropriate, especially if it is based upon a degree of unilateralism. There is also a query concerning whether the T visas will undermine the access of asylum-seekers to refugee determination procedures.

Another example is Thailand which has adopted a specific law against trafficking in women and children. The 1997 law provides for severe penalties against traffickers[40]. It provides for more victim-friendly procedures and opens the door to taking testimonies by videotape. It allows early depositions to be taken from victims and witnesses so that they will not have to stay in the country too long, pending their return to the country of origin. Interestingly, it provides for the role of non-governmental organizations to provide shelters to the victims. This has been supplemented by a memorandum of understanding between government agencies and non-governmental organizations to treat the victims of trafficking as victims rather than as illegal immigrants where they enter the country in breach of the immigration law. The approach is to shift them to welfare shelters rather than to incarcerate them in immigration jail, pending their return home. In the return process, safety is to be ensured for the victims. These responses are coupled with various national policies and plans of action against trafficking and child sexual exploitation.

These developments are now being coupled with bilateral agreements with neighbouring countries to ensure safe return of the victims to the country of origin; potentially the first bilateral agreement will be with Cambodia.

Have these laws and related policies led to a decline in trafficking and smuggling ? There are no easy answers. In some countries, there have been huge caseloads of prosecutions of traffickers and smugglers, e.g. China[41]. Potentially, this may prevent many other cases of trafficking and smuggling from taking place. In other countries, it has been very difficult to prosecute the wrongdoers, precisely because generally law enforcement is poor and corruption is a major hurdle to law enforcement as a whole.

The normative framework also needs to be re-appraised from the angle of how some national laws may regrettably (re)victimise the victims rather than protect them. The stakes include the following:

i. National immigration laws. The immigration laws of several countries still have no adequate provision to exempt the victims of trafficking and smuggling from their strictures. In effect, this means that the victims who enter a country without proper immigration papers are classified as "illegals" or "illegal immigrants" subject to fines and imprisonment. Matters are aggravated by those systems which impose upon their nationals the need to acquire exit visas before leaving the country; those failing to do so may be treated as "illegals" or "illegal emigrants". The juridical traumas suffered by the victims may thus be three-fold: as victims of trafficking and smuggling, as illegal immigrants and as illegal emigrants.

ii. National Anti-prostitution Laws. Several countries still criminalize prostitution, and those landing up in prostitution - including victims of trafficking and smuggling - may find themselves criminalized as prostitutes. Thus the double stigma of being victims of trafficking and smuggling, and criminals/prostitutes.

iii. National Juvenile Justice Laws. Several countries still treat children and adolescents who find themselves in various criminal activities as "delinquents" rather than as victims, including in regard to sexual exploitation. The approach taken by the law is thus punitive rather than child-rights-centered and victim-responsive. The punitive approach may lead to incarceration of the young people rather than their treatment as victims leading to a healing process and social reintegration.

There is, therefore, a need for transparency of the normative responses so as to ensure that they do not re-traumatise the victims and to ensure that those laws and policies which fail to meet international standards are reformed accordingly.

Finally, a **caveat** may be entered: it does not suffice to promote the normative framework based only upon a crime suppression and punitive approach. There are many other laws and policies beyond the criminal law which need to be promoted. These include, for example, laws promoting people's development and to counter poverty so that people will become less gullible to the trafficking and smuggling. Such laws may include law to promote access to education, law to foster employment opportunities, law to provide micro-finance, law to offer social security, and law to promote people's participation and freedom of association as a vigilant force against crime.

Collateral to these, labour laws can be used to give incentives to employers so that they do not resort to employing victims of trafficking and smuggling. They can also lead to regularisation of the status of the victims, e.g. through registration of migrant workers (who initially entered without proper papers/documents) with the authorities, so that the illegal status is transformed into legal status. This helps to prevent an underground situation whereby the victims are manipulated and blackmailed by criminals and their syndicates concerning their illegal status, in a vicious cycle of enslavement.

Above all, there is the pervasive issue of effective implementation with sensibility towards the victims, and this is regrettably lacking in many countries.

The impact of the above has thus to be appraised at least from the angle of quality law enforcement, good governance vis a vis corruption, non-discrimination, and access to justice for all.

Orientations:

While the range of initiatives against trafficking and smuggling at the multilateral, regional and national levels above are generally welcome, an assessment of their operationalisation reveals various challenges which need to be addressed more concretely.

First, despite the definitions of trafficking and smuggling offered by the normative framework, the overlap(s) or conflict(s) in the application of these definitions should not be in underestimated in practice. A key concern is that while some quarters may classify a situation as smuggling, others may view that situation as a matter of trafficking. Others may simply view it as an illegal situation of "illegals". The scenario becomes more complex when there are also claims of asylum, opening the door to the possibility of refugee status. Legal technicalities at the national level may regrettably be used to impede rather than promote access to protection and justice for the victims. A key question is to ensure that the victims are accorded the highest protection and standard of treatment - and not the lowest.

Second, there is the related challenge of how the victims of trafficking or smuggling are categorised by the legislation of source countries, transit countries and destination countries. As already noted, the victims are re-traumatised or re-victimised by various national laws and policies when they are seen as "illegals"' rather than as victims. This exemplifies the situation where the law enforcement itself is counter-productive because it aggravates the plight of the victims, and such enforcement is rendered more reprehensible if it is influenced by corruption. The preferred method of classifying the victims is to regard them as "irregulars" or " irregular migrants", implying that although in strict law, they are "illegals", they should not be treated negatively by the law and that other avenues for preventing and solving their dilemmas should be explored. This would imply, for instance, that if they enter a country without proper travel documents, humane options should be explored, e.g. housing them in shelters pending their return home rather than detaining them in immigration jail.

Third, many responses to the issue of trafficking and smuggling are not yet gender-sensitive enough and women's rights have not been mainstreamed sufficiently into national legislation and policies in several settings. This is compounded by the belt of patriarchy which exists in many regions and negative traditional practices which dis-

criminate against women. A parallel situation pertains to child victims whose rights have not been integrated adequately into the national and local framework, compounded by a patriarchal culture.

Fourth, it is important to view the various responses to combat trafficking and smuggling from the angle of how they address both the demand and supply behind the phenomenon. Often, the environment of poverty and underdevelopment is seen as a key factor propelling the supply. By contrast, the demand side interrelates with the spread of crime, related intermediaries and the pull of the market in terms of clients, customers and members of the business sector worldwide. Yet, the profiles of those behind the demand side, especially their psychological patterns and distortions, are often not adequately documented or understood, thus weakening the needed counteractions.

Fifth, there is a tendency on the part of several States to deny that migration is a normal rather than an exceptional phenomenon. This is enmeshed in a "zero immigration" policy that is counterproductive and unrealistic. It also adds fuel to the premise that the less the possibility of legal and orderly immigration channels into a country, the greater the likelihood of clandestine channels being used by those seeking entry who then land up in the trap of trafficking and smuggling into that country.

Finally, while international cooperation is emerging on many fronts against trafficking and smuggling and this is welcome, a persistent challenge is to ensure that it reaches those in need and that there is effective implementation of the norms which are victim-sensitive. It depends upon effective programming and related monitoring with disaggregated data on a long term basis; these demand actions beyond by the mere presence of laws and policies.

The preferred orientations for the future include the following:

- there is a need to propagate the message that migration is a natural process and that the better way of dealing with it is through orderly and regular channels giving rise

to managed migration rather than clandestine migration, with the realisation that the lack of such channels may fuel human trafficking and smuggling;

- it is important to bear in mind the population projections for the future and their interrelationship with migration; the fact that in the next century, population growth will take place primarily in developing countries, especially Asia and Africa, with an ageing society in the North should provide a prognosis for the type of out-migration which will take place towards developed countries[42];
- the positive features of migration, especially the contributions of the migrants to the destination countries, should be recognised, and there is a need to nurture, from an early age, an appreciation of the diversity of different ethnic groups to prevent racism and discrimination;
- trafficking and smuggling of persons are the negative side of migration; to counter them, criminalization of such conduct is essential and this can be done by means of national criminal laws or more specific legislation targeted against trafficking and smuggling, coupled with effective law enforcement; such laws should abide by international standards, especially the two new Protocols and the various human rights instruments mentioned;
- ratification of the two Protocols and related human rights instruments should be fostered, together with effective implementation against the traffickers and smugglers; national actions complying with these instruments should be to the benefit and not to the detriment of the victims– they need to be tested from the angle of how they respect human rights ;
- the crime suppression and punitive approach by itself is inadequate; it needs to be coupled with a variety of measures aimed at people's development, countering poverty and promoting livelihood opportunities;

- laws, procedures, policies and programmes countering trafficking and smuggling should be victim friendly, gender-sensitive and attuned to international human rights standards; they need to be transparent, open to reforms and be part of a socialisation and mobilisation process and educational/awareness campaigns respectful of human rights, while not impeding people's right to leave and seek asylum in other countries;
- access to help for the victims needs to be enhanced; this implies a role not only for State organs and international organizations but also for civil society actors, including NGOs, the media, the business sector and survivors of the trafficking and smuggling to protect and assist the victims, in addition to international protection where national protection is deficient;
- actions against trafficking and smuggling should target both the supply and demand, and the good practices on this front need to be identified and supported, while overcoming the not-so-good-practices; a systematic monitoring programme and long term data collection and surveys are required;
- in-country and inter-country cooperation is a key to countering trafficking and smuggling, and it needs to be bolstered by political will and adequate resources; it should avoid duplication and wastage, while being targeted to efficacy and sustainability in implementing the normative framework, with due regard to the need for empowerment of women and children.

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Notes

1. For general reading, see: M. Wijers and Lin Lap Chew, **Trafficking in Women, Forced Labour and Slavery Like Practices in Marriage, Domestic Work and Prostitution** (Utrecht: Global Alliance against Trafficking in Women (GAATW), 1997); V.Muntarbhorn, **Extra-territorial Criminal Laws against Child Sexual Exploitation** (Geneva: UNICEF, 1998); S. Farrior, "The International Law on Trafficking in Women and Children for Prostitution: Making it live up to its Potential", **Harv.Hum. Rts. J.**, 10(1977), pp.213-255; "Trafficking in Children for Sexual Purposes", background paper of the Second World Congress against Commercial Sexual Exploitation of Children, Yokohama, 17-21 December 2001.

2. May 18, 1904, I **L.N.T.S.83.** As commented by S. Farrior, **ibid.**, p.20: "The title of the instrument shows that only the exploitation of white women was of enough concern to prompt treaty protection. The goal of the Agreement was to halt the sale of women into prostitution in Europe at a time when economic conditions were so dire that women were increasingly vulnerable to being forced into prostitution. The provisions of the Agreement were aimed at protecting the victims, not at punishing the procurers. This approach proved ineffective, thereby prompting the adoption in 1910 of the International Convention for the Suppression of White Slave Traffic."

3. May 4, 1910, III **L.N.T.S.** 278. There were only thirteen signatories to this treaty. This instrument and the others which followed until the rise of the United Nations (U.N.) were particularly concerned with the growing sex trade affecting Europe. However, these treaties were limited in terms of geographic participation, since many developing countries were still colonies at the time such treaties were formulated. Moreover, the emphasis on the "white slave trade" had a racial undertone, more oriented to protecting white women than all women irrespective of race.

4. September 30, 1921, 9 **L.N.T.S.** 431.

5. October 11, 1933, 150 **L.N.T.S.**431.

6. March 21, 1950, 96 **U.N.T.S.**271. While nearly 80 countries have signed and or ratified this Convention, it is seen as a flawed treaty, compounded by limited accessions, weak implementation and lack of a specific monitoring mechanism. In terms of impact, arguably it has been superseded by more recent instruments.

7. G.A.Res. 34/180, **U.N. GAOR, 34th Sess., Supp. No.46** (1979).

8. G.A.Res.44/25, **U.N.GAOR, 45th Sess.,Supp. No.49,** U.N. Doc. No. A/44/49 (1990); 1577 **U.N.T.S.**3. This is the most universally ratified human rights treaty, with 191 State parties by the year 2002.

9. G.A.Res.45/158, reprinted in 5 **ILM** 352(1966).

10. http://www.hcch.net/e/vconventions

11. 38 **ILM** 1207(1999).

12. 39 **ILM** 1285(2000).

13. http://www.unfpa.org/icpd

14. http://www.un.org/womenwatch/daw/beijing/platform

15. For Stockholm World Congress documents, see: **Report of the World Congress against Commercial Sexual Exploitation of Children, Stockholm, Sweden, 29-31 August 1996** (Stockholm: Regeringskansliets, 1996) ; for Yokohama World Congress documents, see: **Second World Congress against Commercial Sexual Exploitation of Children (The Yokohama Congress), Yokohama, Japan, 17-20 December 2001** (Tokyo: Ministry of Foreign Affairs, Japan, 2002).

16. 38 **ILM** 999(1998).

17. 40 **ILM** 335(2001).

18. **Ibid.,** pp.377-84.

19. **Ibid.,** pp.384-94.

20. For the lead-up to the U.N. Convention against Transnational Organised Crime and its two Protocols, including the various governmental and non-governmental positions, see: **Report of the Ad Hoc Committee on the Elaboration of a Convention against Transna-**

tional Organized Crime on the Work of its First till Eleventh Sessions, U.N. Doc. A/55/383 (November 2000); http://www/catwinternational.org/

21. htpp://www.saarc.org

22. htpp://www.aseansec.org

23. **IOM,** " Migrant Trafficking and Trafficking in Persons", background paper of the Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, 26-28 February 2002; IOM, "Cooperation in International Migration Management through Regional Consultative Processes on Migration", ibid.

24. **Ibid.**

25. **1998 Regional Conference on Trafficking in Women: Bangkok Accord and Plan of Action** (Tokyo: Asian Women's Fund, 1998).

26. **Op.cit.** note 23.

27. See further: F.G.Jacobs and R.C.A.White, **The European Convention on Human Rights** (Oxford: Clarendon Press, 1996); P. Alston (ed.), **The EU and Human Rights** (Oxford: OUP, 1999); **op.cit.** note 23.

28. See further: J.Meyer, **The Charter of Fundamental Rights as a first step towards a European Constitution** (Jakarta: Frierich Ebert Stiftung, 2000).

29. **Op.cit.** note 23.

30. **Ibid.**

31. **Ibid.**

32. **Ibid.**

33. **Ibid.**

34. **Ibid.**

35. **Ibid.**

36. **Ibid.**

37. **ASEM Action for Children** (London: ASEM, 1998).

38. "Bali Ministerial Conference on People Smuggling, Trafficking in persons and Related Transnational Crime: Co Chairs' Statement", Bali, 26-28 February 2002.

39. See further:146 **Cong Rec H** 8855 (October 5, 2000); htpp://www.state/gov/g/inl/rls/tiprpt/2001

40. **Memorandum of Understanding on Common Guideines of Practices for Agencies concerned with Cases where Women and Children are Victims of Human Trafficking B.E.2542(1999) and National Policy, Plan of Action and Legal Measures in the Elimination of Sexual Abuse and Exploitation of Children** (Bangkok: Office of the National Commission on Women's Affairs, 1999).

41. See further: **Proceedings of the 1997 Regional Conference on Trafficking in Women and Children, Bangkok, Thailand** (Bangkok: Mekong Region Law Center and Office of the National Commission on Women's Affairs of Thailand, 1999).

42. See further: IOM, **World Migration Report 2000** (Geneva/ New York: IOM and U.N., 2000).

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Chapter IX | *De-mining South-east Asia: An Overview of Current Challenges*

The havoc caused by anti-personnel mines, namely, mines targeted to harm humans upon contact or when humans are near them, is already well-known internationally. It is estimated that there are over 100 million uncleared mines globally causing thousands of deaths and injuries each month. While a mine costs a few dollars to produce, it may cost more than 1000 dollars per mine for mine clearance. As noted by one humanitarian worker:

> "Mines may be described as fighters that never miss, strike blindly, do not carry weapons openly, and go on killing long after hostilities are ended. In short, mines are the greatest violators of international humanitarian law. They are the most ruthless terrorists."

Anti-personnel mines cause multiple damage for individuals, families and communities, and the dire consequences are long term. Where they destroy bread-winners, families are often pushed into situations of poverty. The traumas inflicted are both physical and mental, generational and inter-generational. Precisely because these mines are situated mainly in developing countries, they add to the depletion of resources which could otherwise be spent on national and human development. The fact that so many of the victims are children adds to the shame facing the global community when the destinies of young lives - and societies - are destroyed and mutilated beyond repair.

Like other regions of the world, South-east Asia has been a regrettable crucible for the use of anti-personnel mines and other weapons such as unexploded ordnances (UXOs), particularly in the form of "bomblets". The various armed conflicts - old and new - have infested

the region with these weapons which lie in wait to inflict hidden tragedies on innocent lives. Various areas are particularly plagued by them. These areas - past and or present - include the borders between Thailand and Cambodia, Myanmar and Thailand, Malaysia and Thailand, Vietnam and China, Laos and Thailand, and internally in the Philippines, Laos, Cambodia, Myanmar, Indonesia, Vietnam, and Malaysia.

A pivotal development to reverse the expansive tide of anti-personnel mines was the advent of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (otherwise known as the "Ottawa Convention") in 1997. It entered into force in March 1999. This international treaty provides the framework for banning such mines and establishes the steps to be taken progressively for their eradication. While the Convention is only open to membership by States, the principles inherent therein can be said to be part of customary international law binding on all persons and groups/organizations, in addition to States. This is particularly pertinent to various non-State actors in the form of armed opposition groups which often deploy such mines.

In this Convention, "anti-personnel mine" is defined as "a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons" (Article 2(1)), and "mine" means "a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle" (Article 2(2)). Member States undertake not to use any of the anti-personnel mines, not to develop, produce, acquire, stockpile, retain or transfer them, and not to assist in any of such actions. They are obliged to destroy those anti-personnel mines which they have stockpiled not later than four years after the entry into force of the Convention for the member State. They are obliged to destroy such mines under their jurisdiction or control not later than ten years after the entry into force of the Convention for the State, subject to possibly an extension for a

period of up to ten years. The Convention calls for legal, administrative and other measures to implement the Convention at the national level.

International cooperation and assistance, including on mine clearance and mine destruction, are stipulated, and various transparency measures, including annual reports on how each member State is implementing the Convention - to be sent to the United Nations Secretary-General, are provided for. Fact-finding missions may be sent by member States to another member State for the purpose of clarifying how the latter is implementing the Convention. There are to be review conferences to assess the Convention in action, the first of which is to take place five years after the entry into force of the Convention. There are also various standing committees of experts (established in 1999) helping in the process leading to the first review conference; they cover mine clearance, victim assistance, stockpile destruction, relevant technologies, and operation of the Convention.

In this setting, there has been active participation by some South-east Asian countries in the Ottawa Convention. Currently, Cambodia, Malaysia, Philippines and Thailand have ratified the Convention, thereby accepting it as fully binding. Brunei and Indonesia have signed it, while Laos, Myanmar, Singapore, Vietnam and China have not yet done so. Of these eleven countries, ten (the exception being China) are members of the Association of South-east Asian Nations (ASEAN).

Those countries which have ratified the Convention have taken various positive steps to implement it. These include the enactment of implementing legislation in Cambodia and Philippines, the adoption of a national plan of action on the issue in Thailand, the setting up of various bodies to oversee and or implement the Convention, such as a national committee in Thailand and the Thailand Mine Action Centre, de-mining activities, such as an active mine destruction programme in Malaysia and the decision not to keep any mines for training purposes, and anti-mine training and dissemination programme in many countries, in addition to more victim assistance. These countries have been improving their data base by undertaking land-

mine impact surveys, as well as sending their reports to the United Nations. Countries which have not signed or ratified the Convention have also undertaken some constructive programmes, such as on training and dissemination in relation to de-mining activities and victim assistance.

A number of key challenges pertain to the region in the perspective of globalization.

First, the fact that various countries have not yet become parties to the Convention is a loophole which means that these countries do not yet wish to participate fully in the international framework to ban anti-personnel mines. This is despite the fact that at the beginning of 2002, over 140 countries had signed and or ratified the Convention, representing some three quarters of the world's nations. Yet, it may be noted that some of the world's superpowers have failed to set a good example on this front, since they too have not ratified and have distanced themselves from the Convention.

Second, there are both the supply and demand factors -both licit and illicit - which have not yet been tackled effectively. Some South-east Asian countries are producers/exporters of anti-personnel mines, others are consumers/importers, or they are concurrently both part of the supply and demand. Positively, one South-east Asian country - Singapore - which is a producer has imposed a moratorium on exports of such mines. Yet, some countries from and beyond the South-east Asian region have set a negative precedent by persisting to be both part of the supply and demand.

Third, in spite of the clear international message against anti-personnel mines, some countries in this region and beyond are still deploying anti-personnel mines. At times, there may be a cross-border situation whereby the authorities of a country or various non-State actors intentionally deploy mines on the other side of the border.

Fourth, there are some difficulties in interpreting the Convention. One issue pertains to the definition of "anti-personnel mine" given

above. Does it cover those command-detonated mines, described by one academic publication as "munitions which can only be triggered manually by a combatant and cannot be detonated simply by the presence, proximity or contact of a person" ? In this regard, Claymore mines are a key example. It seems that the Convention does not prohibit them. However, in practice, the Convention has inspired at least one South-east Asian country (Thailand) to destroy them. Moreover, it should be noted that the Convention does not cover anti-tank mines.

On another front, there is an issue concerning whether the Convention prohibits the "transit" of anti-personnel mines , for example, mines stocked on ships passing through the coastal waters of the region. In the latest issue of the Landmine Monitor (2001), a non-governmental publication, this submission deserves note: "The International Campaign to Ban Landmines believes that if a State party wilfully permits transit of anti-personnel mines which are destined for use in combat, that government is violating the spirit of the Mine Ban Treaty, is likely violating the Article 1 ban on assistance to an act prohibited by the treaty, and possibly violating the Article 1 prohibition on transfer."

Fifth, the situation is rendered more complex by the fact that several non-State actors are active in the region and they are using anti-personnel mines extensively. A key concern is how to engage them at the humanitarian level so that they will commit themselves to avoid using such mines and to destroy them. Real-politik also dictates the need to be sensitive to finding non-violent avenues for dealing with the claims of national liberation movements and ethnic minorities to self-determination (often the motivating factor of these non-State actors).

Sixth, whether among States or non-State actors, there is the perennial "security" argument used by them to retain such mines for the purpose of defence or self-defence. This is in spite of the international advocacy that anti-personnel mines are not strategically all-important for winning wars; that there are more effective military options

without having to use anti-personnel mines; that these mines often injure those deploying them; and that they create more havoc among innocent civilians than combatants. In reality, the security debate has been exacerbated by the threat of terrorism, especially in the wake of the attacks on New York on September 11, 2001, and it is an area needing more balanced and rationalised dialogue.

Seventh, the national measures to implement the Convention vary in terms of their effectiveness. They range from the use of laws pre-existing the Convention (e.g. Thailand) to new legislation (e.g. Cambodia and Philippines). Yet, the mere presence of national laws and related plans or policies are not necessarily a guarantee for upholding the Convention unless there are activities in action, e.g. actual destruction of stockpiles, an end to the manufacture, use, export and import of these mines, surveys to assess impact on the population, de-mining through mine clearance, training for these purposes, mine awareness programmes, victim assistance and long term reintegration into the community, including non-discrimination against those with disabilities.

Eighth, the transparency process still leaves much to be desired. Several countries do not yet have an adequate data base on the situation of mines within their countries. Such data need to be collected and channeled well into the national reports submitted to the United Nations. Some of the data currently available also reveal that some countries are keeping too many mines for research and training purposes, although in principle under the Convention, mines for these purposes are permitted to a limited extent.

Ninth, there is the issue of resources. While international financial aid and technical help have been forthcoming on many fronts and this is welcome, there is the fear that such assistance may not be sustainable. There is also a question concerning whether the recipient State itself has tapped national resources sufficiently, since the State itself has committed itself to implementing the Convention. Yet, there lies the potential paradox that external aid may create a dependency

syndrome, while the national commitment to the Convention on the home front may be more verbal than material.

Tenth, while victim assistance and civil society participation are essential to provide the Convention with a human face, the realities are more complicated. It is worth recalling that the massive advocacy and mobilization in favour of the Convention were very much due the work of non-governmental organizations, key components of civil society. It is worth realising that today much of the transparency in relation to the implementation of the Convention is due to civil society monitoring, e.g. in the form of the Landmine Monitor Reports. Yet, such participation is limited, if not suppressed, in less liberal systems. On a related front, there is at times failure to ensure that the mine victims receive long term help, that they are able to reintegrate into society, that they have livelihood options and opportunities, and that they are treated humanely without discrimination.

In conclusion, the challenges noted above can only be responded to effectively if the following orientations are borne in mind:

- the need for States to accede to or ratify the Ottawa Convention as a common platform for global action, in addition to other international humanitarian law Conventions andthose on disarmament.
- the need to tackle both the supply and demand factors behind anti- personnel mines in both developing and developed countries, and to call upon all South-east Asian countries and ASEAN to adopt a policy against such mines;
- the need to ensure effective implementation of the Convention through comprehensive and inter-sectoral measures , e.g. adequate laws, policies/plans, programmes, good practices, mechanisms, personnel and resources;
- the need to engage not only States but also non-State actors to commit themselves not to use anti-personnel mines, e.g. by making a public declaration on the issue;

- the need to deal with the "security" issue and terrorism constructively, to identify military options without having to use anti-personnel mines, to highlight that the Convention exemplifies the quest for human security, and to underline that there is no inconsistency between the Convention and self-defence;
- the need to improve national data by building a more systematic data base and ensure compliance with the transparency conditions under the Convention;
- the need to attend to the needs of victims accessibly with gender-and-child sensitive programmes;
- the need to provide space for civil society participation in implementing the Convention, in monitoring and reviewing its implementation, and in following up the needed reforms;
- the need to ensure that developing countries are assisted efficaciously to implement the Convention and that the flow of development assistance is sustainable, while being paralleled by equitable national allocation of resources to eliminate anti-personnel mines;
- the need to target not only curative action but also preventive action with a broad socialization, awareness raising and educational process from a young age, conducive to the spirit of peace, human rights, democracy, sustainable development and good governance, so as to forestall the use of anti-personnel mines.

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Chapter X | *Humanitarian Intervention: An Emerging Rule of International Law?*

The terrorist attack on New York on September 11, 2001 (the "9/11" incident) has raised - to fever pitch - international and national debate on the question of use of force against the perpetrators. In essence, action in response to "9/11" has been a matter of self-defence, namely, the aggrieved state and its allies defending themselves against an armed attack.

The issue of "humanitarian intervention" relates to a different type of use of force; it involves military (and other coercive) measures taken by an international actor, especially a state, against another state due to gross human rights violations - a humanitarian crisis - in the latter. Classic cases on this front include the military action of India in 1971 in a neighbouring country - what was then East Pakistan - which later led to the birth of Bangladesh, and the military action of Tanzania in 1979 in Uganda which helped to restore normalcy after the dictatorial regime of Idi Amin. A more recent candidate for heated debate is the military intervention of the North Atlantic Treaty Alliance (NATO), a collective self-defence pact, in 1999 in Kosovo - a part of (former) Yugoslavia, where the government of the latter had created a humanitarian crisis of epic proportions. All these instances bypassed the United Nations(UN) system in that they did not seek prior authorization from the UN, the main channel for multilateral action globally; they were thus unilateral acts.

Humanitarian intervention is a double-edged sword, principally because one man's so-called humane action to help those in need in another country may simply turn out to be another person's pretext for an aggressive act steeped in illegitimacy. The term itself is rendered

more complex because it is often coupled with another term embodied in the notion of a "right", namely, "the right to humanitarian intervention", which raises additional issues of interpretation enmeshed in ambivalence. Interestingly, both "humanitarian intervention" and "the right to humanitarian intervention" are not found explicitly in the UN Charter - the international treaty of almost biblical importance which establishes ,to a large extent, international law on the subject of the use of force.

At the outset, a variety of norms emerging from the UN Charter shaping the parameters of use of force may be noted. Generally, the use of force is illegal in international law. Article 2(4) of that Charter stipulates that states are to refrain from "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations". In addition, its Article 2(7) underlines the sovereignty of the state and the norm of non-intervention by adding that nothing in the UN Charter allows the UN "to intervene in matters which are essentially within the domestic jurisdiction" of the state. Such norm is subject to two main exceptions recognised by the UN Charter, First, states have the right of self-defence as defined by Article 51 of the UN Charter. Second, enforcement measures - including military action - taken under Chapter VII of the UN Charter sanctioned by the primary organ of the UN system, the Security Council, are permitted.

The preferred forum for sanctioning the use of force consistent with the UN Charter is visibly the Security Council. Yet, it was dysfunctional for decades due the Cold War and the threat of veto by the permanent members of the Council in the face of any advocacy of enforcement measures from the UN. The situation improved in the 1990s after the end of the Cold War, and various measures equivalent to military measures by the UN have been taken in some countries, such as Somalia in 1992, albeit with many difficulties and even failure. A crucial question in this regard is : if the UN fails to take or procrastinates in taking action to prevent human rights violations or to protect

people from such violations in a state, can individual states (or related organizations) take military action tantamount to humanitarian intervention legitimately ? The answer is not clear-cut and is replete with ambiguities as follows:

First, it is debatable whether the term "humanitarian intervention" should be used to cover UN action as contradistinguished from action on the part of states without UN backing. In much of the literature on the subject, the term has been used to cover the action of the latter rather than the action of the former. Intriguingly, UN resolutions, particularly from the Security Council, do not generally use the term "humanitarian intervention" or "the right to humanitarian action", perhaps expressly to avoid terminological difficulties. For example, Security Council Resolution 794 (1992) in relation to Somalia permitted members states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations" under Chapter VII of the UN Charter.

Second, should "humanitarian intervention" be seen as a right and whose right is it, anyway ? As seen above, if it is used in the context of UN-sanctioned measures, actions related to such term are legitimate, while actions beyond such measures are open to query, if not illegitimacy.

Third, does "humanitarian intervention" pertain to military action to protect a state's nationals in another state - "our nationals", or does it cover only military action to protect the nationals of the latter - "their nationals" ? Much of the literature on the subject relates to the latter rather than the former. However, the distinction is not always clear. For example, United States (US) military action in Grenada in 1983 was arguably to protect US nationals rather than the local population.

Fourth, given the fact that since the end of the Second World War, armed conflicts and related tensions have tended to be intra-state ("civil wars" and "ethnic cleansing") rather than inter-state ("international wars"), military action is rendered more complex by the notion of the sovereignty of states in such situations and the alleged "intangi-

bility" of such notion. Some states persist in advocating an absolute form of state sovereignty, but the international trend is to limit such absolutist mindset. For example, it is the general international position that advocacy of human rights is a part of international jurisdiction; it cannot be classified by a state as interference in the domestic affairs of such state and it cannot be subjected to state sovereignty. Yet, whether such position should be open to military action to protect human rights as part of international jurisdiction is unclear and is at the heart of the heated discourse on humanitarian intervention. This is further complicated by potential or actual double standards inherent in the fact that often it is more difficult to take action against the acts of developed countries and the powers-that-be than against those of developing countries in relation to human rights violations.

Fifth, there is an intriguing lobby which claims that while the right to humanitarian intervention is not found in the UN Charter, it may find itself in the perimeters around the Charter, particularly in the form of an emerging international custom. Generally in international law, for an international custom to arise, there must be two elements concerning the alleged rule or norm : uniformity of practice, on the one hand, and acceptance of the rule as having legally binding force, on the other hand. Does the right to humanitarian intervention fit this bill ?

On the one hand, one incident attesting possibly to the emergence of a rule of international law on this front is the Kosovo crisis. Although there was no attempt by NATO to seek UN Security Council backing for its military action against (former) Yugoslavia (for fear of a veto from Russia and China), a proposed resolution by three members of the Security Council "after the event" of the intervention to reprimand the action of NATO as an illegality was defeated, thus impliedly legitimising NATO action to a certain degree. Subsequent resolutions of the Security Council backing the despatch of peace-keeping troops to Kosovo also did not question the action of NATO, thus indicating acceptance of a fait accompli which may reinforce the argument for the emergence of a norm in favour of humanitarian intervention.

On the other hand, it may countered that the instances related to humanitarian intervention by states **vis a vis** another state (rather than the UN **vis a vis** another state) are the exception rather than the rule and that there is little state practice to prove the uniformity of practice and legally binding nature of the rule being advocated. In reality, it may be argued that the Kosovo-related military action and others falling into the realm of humanitarian intervention were/are a rarity which would not embody extensive or uniform state practice. At most, therefore, there is a practice based upon political necessity ("opinio necessitatis") rather than a practice based upon binding law ("opinion juris").

Another lobby may go even further by simply claiming that all forms of military-style humanitarian intervention which are not sanctioned by the UN are illegal, and that the Kosovo-related action was not just an anomaly but an illegality. Given these contra-posed views, there is a potentially vicious, if not vacuous, cycle of claims and counter-claims concerning whether humanitarian intervention really is emerging as an international rule. A lawyer's paradise or a politician's nightmare ?

Sixth, recent reflection on the subject has opened the door to another approach. It is better to avoid talking about the right to humanitarian intervention. Rather, the approach should be to advocate the duty or responsibility to protect victims; while the primary responsibility rests with the state to protect its nationals, the international community can step in - even militarily - to help victims where the state fails to do so (subject to a number of conditions dealt with below). This approach has been espoused by the 2001 Report of the International Commission on Intervention and State Sovereignty, an independent think tank with high-powered political affiliations. The core principles behind that responsibility are identified by the report entitled "The Responsibility to Protect" as follows:

"(1) Basic Principles:

A) State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

B) Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.

(2) Foundations:

The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

A. obligations inherent in the concept of sovereignty;

B. the responsibility of the Security Council, under Article 24 of the UN Charter, for the maintenance of international peace and security;

C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;

D. the developing practice of states, regional organizations and the Security Council itself.

(3) Elements:

The responsibility to protect embraces three specific responsibilities:

A. the responsibility to prevent: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk.

B. the responsibility to react: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases, military intervention.

C. the responsibility to rebuild: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of harm the intervention was designed to halt or revert."

This approach is more comprehensive than "humanitarian intervention" since it also address prevention and recovery factors. While this position is persuasive , it has yet to be espoused more broadly internationally. It also needs the green light from the UN, perhaps by means of a resolution or a declaration, to make it more convincing.

Seventh, even if one espouses the right to humanitarian intervention or the obligation to protect one's citizens (and non-citizens on one's territory), various criteria still have to be formulated to test the legitimacy of military action. For example, it could be argued that even if there is a right to humanitarian intervention, it can only be exercised legitimately if the use of force is genuinely necessary and proportional to the harm suffered by the people in the country being sanctioned against, if the military invasion is only temporary and leads to a withdrawal after the harm has been remedied, and if the Security Council is notified of the military act (although not necessarily approved of by a resolution of the Security Council). However, in reality, there are no universally accepted criteria on this front, precisely because the right to humanitarian intervention has not been accepted unequivocally internationally.

The latest thinking on such criteria is found in the report on the Responsibility to Protect already mentioned. The criteria or principles for military intervention are as follows:

"1) The Just Cause Threshold:

Military intervention for human protection purposes is an exceptional and extraordinary measure. To be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

A. large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
B. large scale 'ethnic cleansing', actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.

2) The Precautionary Principles:
   A. Right intention: The primary purpose of intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
   B. Last resort: Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
   C. Proportional means: The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
   D. Reasonable prospects: There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction."

While these criteria are generally laudable, they still need to be mainstreamed into international law, especially as linked with the UN system.

Eighth, no analysis of the issue of humanitarian intervention would be complete without attention to the actors at stake. The UN

Security Council is the primordial organ of the UN system to help maintain international peace and security, and it is to this organ that one should look first and foremost to respond to the need for military action in dire situations of human rights violations and humanitarian crises. However, as already noted, it was dysfunctional in the Code War phase, and even in the post Code War phase, it is often tardy if not ineffective. For instance, its delays in maintaining peace in Rwanda in 1994 contributed, to a lesser or greater extent, to the genocide in that country. Moreover, it has hardly been successful in preventing a range of conflicts and human rights violations in many parts of the world. Yet, in reality, the Security Council is merely the sum total of the states inhabiting it - and the lack of commitment, and even selectivity of approach, is often evident. There is thus a call for it to become more proactive and more effective.

What if the Security Council continues to dysfunction ? One of the rare instances in which the General Assembly, another key organ of the UN, has stepped in to address the issue of maintaining international peace and security was in the early 1950s when in the absence of Security Council action, it intervened on the basis of its unique Uniting for Peace Resolution to support the formation of a UN-backed military force to help repel an invasion of South Korea by its northern neighbour. However, it is known that in law, unlike the Security Council, the General Assembly does not have the power to adopt binding resolutions (with legal effect) - the most that it can do is to adopt non-binding, although highly persuasive resolutions (albeit at times embodying existing law or helping to crystallise new law). Should the General Assembly step in more when the Security Council fails to do so - when the General Assembly's own powers are less forceful that those of the Security Council ?

What if the UN system as a whole fails to function ? Should regional organizations, collective self-defence organisations such as NATO, or even individual states be able to step in ?

The report on Responsibility to Protect responds to these dynamics as follows:

"3) Right Authority

A. There is no better or more appropriate body than the United Nations Security Council to authorise military intervention for human protection purposes. The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.

B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention should formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter.

C. The Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life or ethnic cleansing. It should in this context seek adequate verification of facts or conditions on the ground that might support a military intervention.

D. The Permanent Five Members of the Security Council should agree not to apply their veto power, in matters where their vital interests are not involved, to obstruct the passage of resolutions authorising military intervention for human protection purposes for which there is otherwise majority support.

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

    I. consideration of the matter by the General Assembly in Emergency Special Session under the Uniting for Peace Procedure; and

    II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation - and that the stature and credibility of the United Nations may suffer thereby."

Obviously a key message is reform of the UN system itself, a longstanding and elusive task. If it is to be credible in maintaining its mandate on international peace and security, the UN needs to be more efficacious - and democratic. While the key role of the Security Council is undisputed in a sense, the fact that it is a limited club with veto powers in the hands of its permanent members points to its elitist rather than democratic nature - a post-war fait accompli which needs to be revisited in this era of globalization. Where it fails to act, other actors should come into play, including the General Assembly, regional organizations and beyond.

In conclusion, the question: Humanitarian Intervention - an Emerging Rule of International Law ? can be answered in a number of ways. On the one hand, a possible answer is that there is a diversity opinions on the issue. Some say yes, some say no, some say perhaps. On the other hand, another possible answer is that we are asking the wrong question. We should be addressing it from the angle of the responsibility or obligation to protect rather than the right to humanitarian action.

Or perhaps the question is rhetorical, anyway, depending upon whether one is bewitched, bedazzled or bewildered by the construct of Law. Instead, the answer could/should be found not in law alone but in the melting pot of law, politics and beyond. In that perspective, there is a need to respond to this volatile situation by asking another voluble question: do we believe in multilateralism or unilateralism ?

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Chapter XI

Current Initiatives for the Development of Regional and Sub-regional Arrangements for the Promotion and Protection of Human Rights in the Asia-Pacific Region

The term "arrangements" is used in this paper in a flexible manner. It may open the door to formal treaty-making to establish a system for human rights' promotion and protection, or it may comprise a loose framework or network of activities conducive to guaranteeing human rights; this can be informal and without treaty-making.

In this light, there is an inevitable truth that the Asia-Pacific region is a vast and heterogeneous region which does not lend itself easily to "arrangements" for the promotion and protection of human rights. Added to this is the complex fact that while the situation concerning human rights has improved in some parts of the region, other areas have been faced with a very volatile situation. A key test case in the 2001-2002 period has been the tumultuous armed conflict in Afghanistan which has affected millions of innocent lives, and the pervasive threat of terrorism and its interface with human rights.

In this elusive setting, how feasible is the possibility of building regional or sub-regional arrangements in the pursuit of human rights? At the outset, while not neglecting the role played by civil society in setting up its own arrangements or networks on this issue, the arrangements inviting particular reflection in this paper would tend to be of the governmental type - an inter-governmental framework, network or system, so as to ensure broad governmental commitment, participation and accountability. It is well-known that while an inter-governmental system for the protection of human rights in the form of treaties, coupled with regional courts and related mechanisms, exists at the regional level in Europe, the Americas and Africa, the Asia and Pacific region does not have such a system.

Developments:

The idea of establishing some kind of regional or sub-regional arrangements for the Asia-Pacific is nothing new. For instance, in the 1980s a group of advocates put forward the suggestion that there should be an inter-governmental Charter for the Pacific region. However, governments did not think that it was timely to establish such a Charter. There have been a number of efforts since then to propose a treaty or Charter for the Asian or Asia-Pacific region, but none has yet borne fruit. Yet, the fact that no such system exists should not obscure the fact that in recent years, several initiatives have emerged with a series of options for the region. They include those discussed below; the range varies from the macroscopic, large-scale level - the Asia-Pacific level - to the medium-scale level of sub-regional activities, such as in the western, southern and southeastern parts of Asia :

1. An inter-governmental framework of activities for the Asia-Pacific region.

A large-scale, macroscopic initiative of this kind has existed for the past few years. It is based primarily upon the framework evolved with the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR). For the past decade, Asia-Pacific countries have been meeting at annual workshops to converge on actions which they consider to be jointly acceptable. The approach adopted has been a step-by-step approach based upon various "building blocks" acceptable to them all. In particular, in 1998 these countries adopted, in Tehran, four building blocks known as the Tehran Framework which are operationally being implemented, to a lesser or greater extent, today. They comprise:

- the adoption of national human rights plans;
- the promotion of human rights education at the national level;
- the establishment of national human rights institutions;
- the realisation of economic, social and cultural rights and the right to development.

The annual workshops were bolstered in 2000 by the Beijing Plan of Action adopted at the workshop held in Beijing. A variety of activities were agreed upon as a programme for implementation in the 24 months subsequent to the workshop. The activities range from the regional level to the sub-regional level to t he national level. They cover the four elements of the Tehran Framework noted above. For example, activities in the two-year period include , at the regional level, the dissemination of a handbook on national human rights plans, support for the Asia-Pacific Forum of National Institutions (see below, for the activities of this Forum), and a regional workshop on globalization and economic, social and cultural rights. Examples of projected activities at the sub-regional level include a sub-regional workshop on national human rights planning, a sub-regional workshop on training in the administration of justice, a sub-regional workshop on media and human rights education, and a sub-regional workshop on ratification of international treaties. Various opportunities for technical support to the national level are provided for.

This framework has been complemented by smaller-scale inter-sessional workshops related to the four elements mentioned. Three such "intersessionals" were organised in coordination with the OHCHR in 2001: a workshop on the impact of globalization on the full enjoyment of economic, social and cultural rights and the right to development (Kuala Lumpur, Malaysia, May 2001); a workshop on the role of national human rights institutions and other mechanisms in promoting and protecting economic, social and cultural rights (Hong Kong, People's Republic Of China (PRC), July 2001); and a workshop on the justiciability of economic, social and cultural rights in South Asia (Delhi, India, November 2001).

It may be noted that the implementation of the Tehran Framework was evaluated in 2000 and the results of the evaluation were presented to the OHCHR in 2000 and to participants at the (annual) workshop for the Asia-Pacific region which was held in Bangkok in 2001. The evaluation made a variety of recommendations, some of which are now being implemented. For instance, the evaluation called

for more access by non-governmental organisations (NGOs) to the Tehran Framework and the annual workshops mentioned. An NGO workshop was thus convened for the first time preceding the workshop held in Bangkok in 2001.

Another key recommendation from the evaluation was for the OHCHR to have a physical presence in the Asia-Pacific region, using the facilities of the Economic Commission for Asia and the Pacific (ESCAP). This has now been implemented through a memorandum between the OHCHR and ESCAP. A special representative on human rights for the Asia-Pacific region appointed by the OHCHR is now stationed in Bangkok at ESCAP with much potential for interlinking directly with the region and helping to follow-up the various recommendations of the annual Asia-Pacific workshops, as well as to support capacity-building on human rights at the regional, sub-regional and national levels.

2. A network of national human rights institutions in the Asia-Pacific region.

For the past few years, there has been a network operating in the region as a forum for national human rights commissions under the umbrella of The Asia-Pacific Forum of National Human Rights Institutions. It now encompasses nine human rights commissions, the latest member being Mongolia, and the Forum promotes a number of joint activities between its members, such as workshops on topical issues. It abides by the UN-backed "Paris Principles" on the work of national human rights institutions, emphasising the independence and pluralism of such institutions. Its latest annual meeting was held in Colombo in 2001. At this meeting, the Forum adopted its Constitution and outlined a variety of future activities interlinking between the members, including a regional meeting on the issue of trafficking and HIV/AIDS, internally displaced persons and women's rights, the Rome Statute of the International Criminal Court, and human rights education.

This Forum is represented at the annual OHCHR-backed Asia-Pacific workshops above, and provides a direct input for the growing number of national human rights commissions in the Asia-Pacific region. The OHCHR also offers some technical support to the Forum. Interestingly, the Forum has set up an Advisory Council of Jurists, drawn from candidates - eminent jurists - proposed by the member national commissions. The mandate of this Council is primarily to advise on various issues referred to it by the members. So far, it has given advice on the issue of the death penalty, on the one hand, and child pornography on the Internet, on the other hand. It was recently asked to advise on the issue of human trafficking.

3. An inter-parliamentary association for the Asian region.

An interesting innovation in the past couple years has been the birth and functioning of the Association of Asian Parliamentarians for Peace (AAPP). At its meeting in Phnom Penh in 2001, it considered its draft Charter of Human Rights for Asian Nations. Intriguingly, while this draft embodies many of the internationally guaranteed human rights in the civil, political, economic, social and cultural fields, such as the right to life, freedom from torture, and the right to an adequate standard of living, it has been criticised for lowering the standards for human rights protection in some areas. These include the following:

- the position that it is lawful to detain persons for preventing infectious diseases;
- broad discretion to the courts to prevent the media from covering trials;
- the proposal for the establishment of an Asian Commission of Human Rights elected by the AAPP, without genuine guarantees for the independence of the members of the Commission.

An equally intriguing question relates to the status of the would-be Charter if it is adopted by Asian parliamentarians. Usually in setting up an inter-governmental human rights protection system,

a treaty is required - initiated by the executive branch and ratified by the legislature. The initiative of the AAPP seems to bypass the role of the executive branch. In 2001 the AAPP set up a drafting group to refine the current draft Charter and it will be interesting to see related developments at the next AAPP meeting chaired by the PRC.

4. Networks of civil society actors in the Asia-Pacific region.

Several of these networks exist, and they encompass a broad array of NGOs and other members of civil society. One entity known as the Asian Human Rights Commission based in Hong Kong, PRC, propelled the adoption of the Asian Human Rights Charter by NGOs in 1997. The Charter is, of course, not an inter-governmental treaty but an expression of civil society aspirations. It highlights the universality and indivisibility of human rights, while rejecting some negative particularities in the Asian region, such as authoritarianism. It calls for a variety of activities from a civil society perspective with a key message to governments including the following:

- reinforce human rights guarantees in national Constitutions;
- ratify international human rights instruments;
- review domestic legislation and administrative practices for consistency with international standards;
- maximise the role of the judiciary in human rights' enforcement;
- enable social organisations to take action on behalf of the victims;
- set up national human rights commissions;
- recognise people's tribunals, not as courts but as moral instruments of pressure.

5. Sub-regional inter-governmental treaties on human rights.

These are emerging in various sub-regions, and they vary from the adoption of a general human rights treaty to the formulation of a treaty with focus on a specific human rights issue.

The only example of the former - a general human rights treaty - in a sub-region of Asia and the Pacific is the Arab Charter of Human Rights, which pertains most directly to west Asia. Although adopted in 1994, it has not yet received the requisite number of ratifications to enter into force. It guarantees many internationally recognised human rights such as the right to life and equality before the law. Yet, there is an open question concerning whether it guarantees the right to change one's religion. It has also been questioned for differentiating between the rights of citizens and non-citizens in some areas, whereas international human rights standards would advocate the rights of all persons irrespective of citizenship. Under the Charter, there will also be a monitoring body in the form of a human rights committee, and an essential test will be to ensure its independence.

A key example of the more focused approach - directed at a specific issue - is the advent of two recent treaties in South Asia, initiated by the South Asian Association for Regional Cooperation (SAARC), an inter-governmental regional organisation. One treaty is directed against the scourge of human trafficking in the South Asian region. The other treaty relates to regional arrangements to protect and assist children in that region.

The first SAARC treaty above takes the form of the SAARC Convention on Preventing and Combating Trafficking in Women and Children in Prostitution 2002 ; it has been adopted by all seven countries of SAARC, although subject to ratification. Basically, the Convention attacks trafficking in relation to prostitution; it calls for criminalization of the practice, for the provision of gender-sensitive and child-sensitive judicial procedures, mutual legal assistance and extradition, prevention measures such as through training and education on the issue, and care and repatriation of the victims. It proposes to set up a Regional Task Force to help implement the Convention and undertake periodic reviews. Bilateral mechanisms may also be explored, e.g. to cooperate to interdict trafficking in women and children for prostitution.

The other SAARC treaty is the SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia 2002. This Convention reinforces the implementation process of the global Convention on the Rights of the Child to which all Asia-Pacific countries have acceded. The SAARC Convention proposes to set up "appropriate regional arrangements to assist the Member States in facilitating, fulfilling and protecting the rights of the child". It calls for the development of national plans of action to protect children, as well as multi-pronged strategies. The regional arrangements referred to in this SAARC Convention include:

- bilateral and multilateral information sharing;
- annual SAARC Advanced Training Programmes on Child Rights and Development;
- special arrangements for judicial inquiries and transfers of children from one SAARC country to another;
- regional strategies to prevent inter-country abuse and exploitation of children.

With respect to South-east Asia, the primary regional inter-governmental organisation existing since 1967 is the 10-member Association of South-east Asian Nations (ASEAN). In 1993, partly influenced by the World Conference on Human Rights, ASEAN foreign ministers mentioned in their joint communique the possibility of establishing an appropriate regional mechanism on human rights. However, since then ASEAN has never proposed what the mechanism should be. A number of civil society actors have thus formed the Working Group for an ASEAN Human Rights Mechanism which ,in 2000, submitted to the governments of ASEAN a draft agreement - a potential government-backed treaty - to establish an ASEAN Human Rights Commission. Its composition and function would be as follows: (as summarised by the Working Group's Secretariat)

"2. The draft Agreement proposes the establishment of a sub-regional inter-governmental mechanism in the form of a seven-member ASEAN Human Rights Commission.

Commission members have a single non-renewable five-year mandate.

3. The draft Agreement adheres to the universality of human rights and is inspired by the international law on human rights, and regional/national laws, policies and practices consistent with international law.
4. The proposed Commission is to act independently and is to be elected by the Foreign Ministers of the ASEAN countries which have ratified the Agreement. The Ministers must consult civil society in the choice of the candidates for the Commission and gender balance must be borne in mind.
5. The ratification of the Agreement by at least three ASEAN countries is needed to bring the Agreement into force, and the mandate of the Commission only pertains to these countries.
6. The function of the Commission is to promote and protect human rights in the region with powers, including the following:
    - to recommend to the governments concerned the adoption of measures in favour of human rights;
    - to investigate on its own initiative violations of human rights;
    - to take petitions and communications concerning human rights violations;
7. The competence of the Commission covers petitions and communications from individuals, NGOs, and countries which have ratified the Agreement.
8. The Commission proceeds on the basis of amicable settlement first.
9. Failing that, the Commission can make findings on whether human rights violations have taken place. These findings are persuasive recommendations and not judgements as the Commission is not a court of law.

10. The Commission can cross-refer the findings to the Foreign Ministers for additional pressure for compliance. There can then be another cross-referral to the heads of Government if needed."

The reaction from the ASEAN governments to the proposed ASEAN Commission has been muted. In their latest communique (2001), ASEAN foreign ministers suggested that the proposal for a mechanism should be discussed with various security-related think tanks - Institutes for Security and International Studies (ISIS) - from the ASEAN region as part of an emerging People's Agenda. A meeting between members of the Working Group which proposed such Commission and ISIS will take place in Manila at the end of February 2002.

The optimistic scenario is that there may be a greater opening to the governments ("Track 1") via ISIS ("Track 2").. The less optimistic prognosis is that there will be procrastination in the process. However, on the constructive side, irrespective of the issue of whether to establish an ASEAN Commission, some governments are becoming more open to dialogue on human rights. For example, a team sent out by the Working Group to one ASEAN country in January 2002 to sound out opinions on the proposed Commission was informed by the Government of that country that it would explore the possibility of a national focal point on the issue. That Government also indicated that it would be interested to have more training on the reporting process under the International Covenant on Economic, Social and Cultural Rights, which it had signed not so long ago.

6. Networks of activities on human rights in the Asia-Pacific region and sub-regions.

Even without a formal treaty for the region and sub-regions, many activities can take place whether at the inter-governmental level or civil society level. For example, the ASEAN group has a network of desk-officers to deal with the issue of child assistance and protection.

There is an ASEAN programme to offer training on early child care and education. On the non-governmental front, there is the example of LAWASIA, a non-governmental association many of whose members are government personnel; it has had a human rights committee for many years, and this was partly instrumental in proposing a human rights' Charter for the Pacific in the 1980s. There are also various active documentation centres on human rights, as well as NGO networks monitoring the human rights situation and organising various training programmes on human rights especially in South Asia and South-east Asia.

Retrospect/Prospect:

In retrospect, while the idea of setting up a formal arrangement through a treaty between Asia-Pacific countries as an inter-governmental system for the promotion and protection of human rights seems somewhat elusive at present, there are other entry points which can be explored actually and prospectively, including the following:

- periodically, there should be a consultation among Asia-Pacific leaders - pitched high among policy makers and in terms of political will - about human rights;
- there should be more training programmes interlinking between the regional, sub-regional and national levels on key human rights issues with support, such as seed money, for the participants to undertake follow-up activities;
- at the sub-regional level, there should be more room for treaties and mechanisms , such as Commissions, on human rights either in a general sense and/or on specific issues such as trafficking, women's rights, and child rights;
- there should be more support for national capacity-building on human rights, such as through law and policy reform, with a pool of local/national/regional consultants to help guide the process;

- even without treaties, support for human rights-oriented activities, programmes and networks can be fostered at the regional, sub-regional and national levels, and they all need to be well planned, well implemented and well evaluated;
- accession to international human rights treaties can be pursued consistently with all countries, coupled with effective implementation in terms of follow-up through law, policy and other reforms;
- an approach based upon human rights can be fostered generally in programming and education, embodying a participatory process, reflective of international human rights standards, responsive to local wisdom, and sensitive to the concerns of marginalised groups and communities;
- a participatory process - at any level - in evolving arrangements for human rights promotion and protection requires broad representation from NGOs and other members of civil society;
- good governance and accountability in such arrangements call for access to and from the victims of human rights' transgressions, effective remedies, and measures to prevent such transgressions;
- all activities concerning the promotion and protection of human rights - formal and informal - need to be tested from the angle of sustainability, including through a sustained process of monitoring, review and reform to raise standards, with adequate resource allocations.

This paper was prepared for the 10th Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asian and Pacific Region, Beirut, 4-6 March 2002.

Appendices

Appendix I

Bangkok NGO Declaration on Human Rights 1993

Introduction

Some 240 participants from non-governmental organisations (NGOs) concerned with issues of human rights and democratic development from the Asia-Pacific region - representing women, children, indigenous peoples, workers, community development and other concerns, met in Bangkok from 24-28 March 1993 to review the current human rights situation in the region and to formulate strategies for the future promotion and protection of human rights.

This gathering was motivated by the need to offer, in a spirit of international solidarity, ideas and suggestions in the lead-up to the Asian inter-governmental conference on human rights (Bangkok, 29 March - 2 April 1993), the World Conference on Human Rights (Vienna, June 1993), and beyond.

The participants concentrated on a range of issues including the following:

Challenges

The participants identified the following essential challenges:

1. **Universality.** We can learn from different cultures in a pluralistic perspective and draw lessons from the humanity of these cultures to deepen respect for human rights. There is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures.

Universal human rights standards are rooted in many cultures. We affirm the basis of universality of human rights which afford protection to all of humanity, including special groups such as women, children, minorities and indigenous peoples, workers, refugees and

displaced persons, the disabled and the elderly. While advocating cultural pluralism, those cultural practices which derogate from universally accepted human rights, including women's rights, must not be tolerated.

As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty.

2. Indivisibility. We affirm our commitment to the principle of indivisibility and interdependence of human rights, be they civil, political, economic, social or cultural rights. The protection of human rights concerns both individuals and collectivities. The enjoyment of human rights implies a degree of social responsibility to the community.

Violations of civil and political rights are perpetrated every day. These include the stifling of self-determination, military occupation, killings, torture, political repression, and suppression of freedom of expression and other freedoms. By contrast, poverty and the lack of basic necessities constitute key violations of economic, social and cultural rights.

Violations of civil, political and economic rights frequently result from the emphasis on economic development at the expense of human rights. Violations of social and cultural rights are often the result of political systems which treat human rights as being of secondary importance.

Economic rights involve a fair distribution of resources and income, the right to freedom from hunger and poverty. These can only be protected where people are able to exercise their civil and political rights, for example, the right of workers to organise and form unions to protect their economic rights. Poverty arises from maldevelopment in the face of systemic denial of human rights.

There must be a holistic and integrated approach to human rights. One set of rights cannot be used to bargain for another.

3. Women's Rights as Human Rights. The issue of women's rights has not been sufficiently visible in the human rights discourse, in human rights institutions and practices. Patriarchy which operates through gender, class, caste and ethnicity, is integral to the problems facing women. Patriarchy is a form of slavery and must be eradicated. Women's rights must be addressed in both the public and private spheres of society, in particular in the family.

To provide women a life with dignity and self-determination, it is important that women have inalienable, equal economic rights, (e.g. right to agricultural land, housing and other resources, and property). It is imperative for governments and the United Nations (UN) to guarantee these rights.

Crimes against women, including rape, sexual slavery and trafficking and domestic violence are rampant. **Crimes against women are crimes against humanity, and the failure of governments to prosecute those responsible for such crimes implies complicity.**

In the Asia-Pacific region, women's rights are violated by increasingly militant assertions of religious and ethnic identity; the fact that these violations often take place through private actors is used by states as a pretext for failing to counter them as transgressions of human rights. In crisis situations ethnic violence, communal riots, armed conflicts, military occupation and displacement- women's rights are specifically violated.

In the case where countries have acceded to the relevant international instruments on women's rights, many countries have entered too many reservations to exempt themselves from responsibility. This illustrates the lack of political and social will to protect women's rights.

4. Solidarity. We are entitled to join hands to protect human rights worldwide. We commit ourselves to international solidarity and to voice the concerns of our brothers and sisters without boundaries and barriers. Discrimination based upon race, gender, political, economic, social, religious or ethnic origin must not be tolerated. **International**

solidarity transcends the national order to refute claims of state sovereignty and non-interference in the internal affairs of a state.

5. **Sustainable Development.** No country can attain genuine development if it is not truly free, if it has not been able to successfully liberate itself from foreign domination and control. A major cause of maldevelopment and gross violations of human rights is the dominance and consequence of imperialism in the Asia-Pacific region. A pre-condition to genuine development is the attainment of national liberation and self-determination of the peoples in the region.

We re-emphasise the need for balanced development, bearing in mind maximisation of people's development; integrated approaches on civil, political, economic, social and cultural rights; equity and social justice; income distribution and fair resource allocation. Particular attention must be paid to the needs of different groups including women, children, rural people, the urban poor, minorities, and indigenous peoples, refugees and displaced persons, workers, and others in disadvantaged positions. The natural environment must be protected as part and parcel of human rights.

Various top-down development models have led to maldevelopment. Action against national liberation and the people's rights of self-determination against political/military repression are key constraints for the realisation of development. These are compounded by regional peculiarities whereby state boundaries are at times artificial when viewed from the commonalities between peoples across frontiers.

On the one hand, we must restructure the international development framework to respond more directly to the needs of people in our societies and communities- both men and women, including debt relief, reform of the international financial, economic and commercial systems, and greater democratisation of the decision-making process. The role of international aid agencies - multilateral and bilateral - and financial institutions has given rise to a number of human rights vio-

lations; they must be held accountable for the human rights violations caused by their policies and deeds.

International economic forces have great impact on human rights. The divide between North and South in terms of global equity and resource base, compounded by elitism, perpetuates social and economic disparities. The shift to a market economy has led to various human rights violations linked with development. Market rights do not mean human rights. "One dollar, one vote" does not mean democracy. Freedom to exploit does not deliver economic rights to the poor.

On the other hand, reform is also required at the national level. Maldevelopment leads to increasing poverty, income disparities, dispossession and deprivations, including land and resource holdings, environmental degradation, and over-emphasis on macro-economic development without sufficient enhancement of human development, freedoms and dignity, including dignity of men and women.

There is an urgent call to democratise the development process at both the national and international levels so as to ensure a harmonious relationship between humanity and the natural environment, and to create processes to enhance the empowerment of women and gender equality. The thrust is to promote human and humane development.

6. Democracy. Democracy is more than a legalistic or formal process. Democracy is more that the ritual casting of a ballot at one party or multi-party elections. True democracy involves participatory democracy by the people at all levels so that the people have a voice in the discussions by which they are governed.

It must be realised in the form of people's empowerment and participation at the grassroots and other levels with responsive and accountable processes and institutions at both the local and national levels. It demands good governance, freedom from corruption, and accountability of state and other authorities to the people. It involves the protection and participation of those groups which are not in the

majority, namely minorities and disempowered groups. It is intertwined with the issue of land and social justice for rural people and other disadvantaged groups.

Democracy is a way of life; it pervades all aspects of human life - in the home, in the workplace, in the local community, and beyond. It must be fostered and guaranteed in all countries.

7. Militarisation. We express deep concern over the increasing militarisation throughout the region and the diversion of resources for this purpose. Militarisation has led to the destruction of civil society, undermined the right of self-determination, and denied the people the right to liberate themselves and their freedom from fear. At times, militarisation has taken the guise of civilian groups, such as vigilantes.

It has particularly harmed indigenous peoples and has resulted in forced migration. It is interrelated with violence against women, such as sexual slavery, rape and other crimes committed in armed conflicts. It has particularly harmed the children. They suffer from physical health problems, emotional disorders, and social maladjustments due to traumatic events such as arrest and torture, evacuation, massacre, disappearance, and other forms of human rights violations.

Militarisation is closely linked with religious fundamentalism and ethnic discord, including ethnic cleansing fanned by certain governments.

Militarisation of smaller, less militaristic states is often abetted by superpowers and regional powers. Profiteering from the sale of weapons of mass destruction has been a prime cause of economic growth in developed countries and maldevelopment in developing countries. It is aggravated by the proliferation of nuclear weapons and energy, and environmental damage due to toxic wastes.

The quest for peace and human rights is intertwined with the need to demilitarise.

8. Self-determination. The right of self-determination of peoples is well-established in international human rights instruments and international law. The root cause of most internal conflicts can be traced back to this fundamental human right.

We affirm that all peoples have the right to self-determination. By virtue of that right, they freely determine their political status, and freely pursue their economic, social and cultural development. The right of peoples to self-determination must, therefore, be observed by all governments.

It is understood also that self-determination does not necessarily imply secession or independence. Self-determination can mean independence, free association, integration with an independent state or other constitutional arrangement arrived at through popular consultation and consent.

9. Torture. The existence of torture and inhuman and degrading treatment in the Asia-Pacific region gives rise to increasing concern. **These practices must be eradicated.**

In many countries, suspects are tortured by law enforcement personnel for extracting "confessions". This inhuman practice is officially encouraged by some authorities as a cheap and convenient method of crime control. These so-called "confessions" are used as "evidence" in court cases.

The action needed to counter such practices needs to be both preventive and curative. The latter implies prosecution of those responsible, as well as rehabilitation assistance for torture victims.

10. Freedom of expression. This freedom is constrained in many Asia-Pacific countries. It is necessarily interrelated with the call for civil and political rights, and democracy.

In several countries, there are no independent media. People cannot express themselves without fear. Many people are persecuted, jailed, and even killed because they speak out their thoughts. **The**

pretext for constraining these channels of expression is often national security and law and order; this is a facade for authoritarianism and for the suppression of democratic aspirations.

11. Human rights education and training. Human rights education and training have so far not been incorporated sufficiently into both formal and non-formal education. Illiteracy remains widespread.

School curriculum tends to favour the ruling elites. Not only are millions of people unaware of their rights, but also receive no encouragement or assistance in asserting their rights. Human rights education and training have both preventive and curative impact - they can empower people to prevent problems from arising by nurturing respect for other people's rights, and vice versa, as well as to inform people of the possibilities of redress.

If we wish to promote democracy and respect for human rights, we must develop comprehensive human rights education and training in both governmental and non-governmental programmes, in and out-of-school.

12. Indigenous Peoples. The Asia-Pacific region is home to many indigenous peoples. **A basic issue among these indigenous peoples is the fact that many are not recognised as indigenous by governments and as such are denied the right to self-determination.**

They are denied their specific cultural identity and entitlement to protection under relevant international human rights instruments. They are victims of ethnocide and genocide perpetrated by certain governments whether from the North, the South or together, international financial institutions and transnational corporations. International legal instruments presently available are weak in ensuring collective human rights protection.

In many parts of the region, their right to land and other rights are not respected. Among the consequences are the expropriation and

despoliation of their lands, armed conflicts and displacement as refugees. This has been accompanied by persecution and suppression by force. On another front, tourism has at times led to the degradation of indigenous lifestyles through commercial exploitation.

13. Children. A variety of abuses and exploitation of children arise in the region. These include child labour, children in bondage and sexual slavery, child prostitution, sale and trafficking of children, children in armed conflict situations, children in prison, children in poverty situations and other deprivations, and children abused in families compounded by family break-up and breakdown. Basic needs, such as physical and mental health, nutrition, education, shelter, and participation are often unsatisfied. The advent of AIDS has increased the plight of children; discrimination is increasing both against children with AIDS and orphans of AIDS affected families.

Children's rights are endangered in a wide variety of situations. At a very early age, they are exposed to violence in many forms by governments, poverty, malnutrition, disease, and lack of education which stultify their growth and deprive them of their childhood.

The scenario is much linked with discrimination against the girl child, militarisation, and the distorted development process. Although many countries have now acceded to the International Convention on the Rights of the Child, implementation remains weak, with much lip-service rather than effective action to protect children and to assist their families.

Implementation of the rights of children to survival, protection, development and participation as embodied in the International Convention on the Rights of the Child must be a paramount concern of every state regardless of considerations of national capacity and security.

14. Workers. Workers of the Asia-Pacific region do not enjoy acceptable standards of human rights. **Too often it is workers and trade union leaders who endure the worst cases of human rights**

abuses in the region. The right of freedom of association and the right to organise trade unions are very restricted in several countries.

In this setting, human rights that are taken for granted in the civil society are ignored within the factory and the workplace. The human rights of workers such as women, migrants, bonded labourers, children and youths, and those in the informal/organised sector are in an even more critical situation.

The economic rights of workers, especially their access to an adequate standard of living, is often neglected in the region. Transnational corporations and agencies such as the International Monetary Fund and the World Bank at times work to undermine this right in the name of economic freedom. Many abuses of worker rights in this region come from the same countries of the North which preach human rights to the South.

15. Refugees and Displaced Persons. The problem of refugees and displaced persons is widespread and growing in the region; it is becoming a permanent phenomenon. It is intermingled with political repression, armed conflicts, ethnic discord, and other factors. Economic factors also push people to move in search of a livelihood elsewhere.

Inadequate attention is paid to their plight. Their position is compounded by the lack of effective national and international machinery to ensure their protection and assistance.

The safety of refugees and displaced persons is often jeopardised by restrictive state policies and discrimination. The basic right of refugees not to be pushed back to the frontiers of dangers is violated on many occasions. The procedures established to determine refugee status are often defective, and voluntary repatriation to the country of origin is not always guaranteed. **The human rights of refugees and displaced persons, including freedom of expression, are violated in the name of restrictive national policies.**

Few countries have acceded to the relevant refugee instruments. This displays a reticence to recognise international human rights standards and to render the situation more transparent internationally.

16. Derogations. Several countries seek to constrain the enjoyment of human rights by means of derogations. In cases of increasing militarisation, military occupation and rule - at times in the guise of civilian governments, the space for civil society is becoming narrowed with negative impact for human rights.

We re-emphasise that states must not derogate form human rights standards for reasons of national security, law and order, or the equivalent. **We reiterate that states are bound to respect human rights in their totality in all circumstances.**

17. Human Rights Activists/Defenders. Increasing restrictions are being imposed on the work of human rights activists/defenders - peoples from all walks of life involved with human rights - and social movements in the region, including the operations of NGOs. Often they are intimidated, harassed, and even murdered. In some countries, NGOs are not even allowed to exist.

As these groups voice the interests of the people and work for their advancement, it is imperative that they be permitted to work freely; their right to participate in community life and to enjoy the totality of human rights must be respected.

18. Judicial independence and responsibility. In many societies, the independence of the judiciary and the administration of justice are being jeopardised by authoritarian elements. This is compounded by various national laws that conflict with human rights standards, particularly discrimination and inequality, and the complicity of certain judges in perpetuating authoritarian regimes.

The legal structure is also distant from many communities. There is a key question concerning access by people to the courts

system. This is intertwined with the issue of legal aid, assistance and dissemination of legal knowledge.

We re-affirm the need for judicial independence and call for judicial responsibility to render justice more accessible to the people.

Issue

The participants highlighted the following concerns as issues requiring urgent and effective action, both in terms of prevention and remedies:

- increasing lawlessness on the part of governmental authorities
- governmental action undermining the universality and indivisibility of human rights
- failure to enhance human freedoms and dignity, including the dignity of men and women
- threats to the right to self-determination
- non-recognition of and continuing violations of women's rights due to patriarchy, including economic rights, and inadequacy of processes to enhance the empowerment of women and gender equality
- breaches of children's rights due to economic need, socio-cultural constraints, criminality, consumerism, discrimination and militarisation
- increasing environmental degradation and depletion of natural resources
- proliferation of armed conflicts, enmeshed in ethnic discord, with threats to civilians
- political repression by means of killings, disappearances, and torture, and political prisoners, and suppression of civil and political rights, including self-determination, freedom of expression and assembly
- violation of the right to health, and underdeveloped health care system characterised by maldistribution and inaccessibility of resources to the poor majority

- denial of health services to survivors of human rights violations
- attacks on the rights of workers
- insecurity of migrant workers
- threats to agrarian and rural communities
- harassment of persons, including health and church workers, carrying out their humanitarian functions
- widespread sexual exploitation
- religious intolerance mixed with extremism, and other forms of discrimination on the basis of religion
- lack of legal and other redress for human rights violations
- impunity of those who commit human rights violations
- numerous constraints imposed upon the mass media
- lack of access to information to empower people to protect their human rights
- discrimination and national oppression of minorities and indigenous peoples, and inadequate protection of tribal peoples
- discrimination and violence perpetrated against the "untouchables" and the process of untouchability
- increasing number of and threats to refugees and displaced persons, particularly through lack of fair and effective refugee screening procedures, violations of their human rights, and menace to their right to seek asylum and safety
- insufficient protection of the disabled, including both physical and mental dimensions
- lack of services and assistance for the elderly
- escalation of AIDS and related discrimination
- spread of drugs and related exploitation
- low levels of education, in particular unavailability of essential human rights information, lack of awareness and skills

- paucity of accession to international human rights instruments (as well as too many "reservations" upon accession) and failure to implement them at the national and local level
- restricted access by individuals and NGOs to the international human rights system
- lack of regional and national inter-governmental mechanisms to protect human rights in an independent and accessible manner
- Asia-Pacific governments to reduce arms purchases and divert the funds from militarisation to human rights promotion and protection. Reallocation from other sources is also required so as to ensure that human rights have the first call on state resources.

We, representatives of NGOs, urge the following:

1. Industrial powers and global financial agencies in the North to write off the external debts of poverty-stricken nations in the South. "Adjustments with economic growth" must be altered to espouse "adjustments with a human face".

2. The global community should democratise the structure of the UN so as to ensure greater participation of developing countries in the Security Council and greater efficacy of the General Assembly, particularly in prevention of and remedies for human rights violations.

The UN human rights mechanisms, including those established under the Commission on Human rights (e.g. Special Rapporteurs and Working Groups) should be strengthened and be made more effective and efficient, with correlative technical and other support. Stocktaking and maximising use of existing human rights mechanisms should be undertaken.

New machinery which should be advocated for the future include:

- A UN High Commissioner on Human Rights
- A World Human Rights Court and/or International Criminal Tribunal

Access by individuals and non-governmental organisations from the South to the existing human rights mechanisms should be improved, at times through the adoption of Protocols to existing international human rights instruments.

3. The global community to allocate more funds for the promotion and protection of human rights. The funds should be directly accessible to human rights activists and victims.

4. All UN agencies to incorporate human rights standards into their work. This implies accountability of such agencies for human rights violations, as well as the need for human rights impact assessment to be included into all development projects.

Recommendations for Actions by Governments of the Asia-Pacific Region

General Recommendations

We, representatives of Asian-Pacific NGOs, call on Asia-Pacific governments:

i) to promote and protect the **universality and indivisibility** of human rights by :

- recognising and guaranteeing the interrelationship between human rights, development and democracy as propounded by this NGO Declaration;
- guaranteeing the rights of collectivities, such as minorities, indigenous peoples and the unorganised sectors of labour as well as individual rights.
- eliminating the root causes of human rights violations - civil, political, economic, social and cultural.

ii) to **review and reform laws, policies and practices** which are detrimental to the full realisation of the civil, political, economic, social and cultural rights of their people

iii) to ensure that **development strategies are sustainable,** equitable, people-based and in a balance with the natural environment, with the aim of assuring equity and enhancing the freedoms and the dignity of all women and men.

iv) to **counter socio-cultural practices** and extremism which constrain human rights, particular women's rights, and in particular to reform laws, policies and religious and cultural practices that tend to deny women's independent existence and to take measures, such as community mobilisation, mass education and long-term development, to initiate and enhance the process of empowerment and equality.

v) to **lift constraints on political rights** imposed by national security and law and order, by repealing repressive laws, ending arbitrary arrests, and releasing all political prisoners before the UN World

Conference on Human Rights, and liberalising the political system so as to democratize the decision-making process, guarantee people's participation at all levels of government, and abide by good governance.

vi) to **address the root causes of armed conflicts** which are foreign domination, widespread landlessness and powerlessness among the people, and the collaboration of ruling elites with foreign powers and their instrumentalities;

vii) to **reduce arms purchases and re-allocate arms expenditure** to development needs, the improvement of preventive mechanisms and the promotion of human rights promotion and protection, and to initiate and pursue consultative processes, social services and peaceful settlement of disputes, bearing in the mind the special concerns of women, children, minorities, indigenous peoples, workers in the organised and unorganised sectors, refugees and displaced persons peasants, and other disadvantaged groups.

viii) to **respect the work of human rights activists/defenders** and social and legal movements, including non-government organisations, to cease harassment, intimidation and other malpractices against this sector and to facilitate, rather than obstruct, the operations of these catalysts of social change.

ix) to **guarantee the independence of the judiciary,** while nurturing a commitment to responsibility to the people, providing adequate remedies for human rights violations through judicial and other channels, including the availability of legal aid and assistance, and to counter the impunity of violators by effective legal and other measures.

x) to ensure that **human rights have the first call on state resources,** by reducing arms purchases and diverting the funds from militarisation to human rights promotion and protection, and by reallocation from other sources;

xi) to promote **comprehensive human rights education and training,** including an increase in the provision of information, the development of awareness and of skills. Participatory learning methods will enrich the process and contribute to the promotion and protection

of universal human rights standards by utilizing the cultural wealth of the region.

Specific Recommendations

1. We call on governments in the Asia-Pacific region:

i) **to accede to and effectively implement international human rights instruments,** and to protect international human rights standards contained in the:

- International Covenant on Civil and Political rights (ICCPR);
- International Covenant on Economic, Cultural and Social Rights;
- Optional Protocol I and II to the ICCPR;
- Convention Against Torture;
- Convention Against the Elimination of All Discrimination Against Women(CEDAW);
- Convention on the Elimination of all forms of Racial Discrimination;
- Convention on the Rights of the Child;
- Convention on the Status of Refugees;
- Convention on the Non Applicability of Statutory Limitations to War Crimes against Humanity
- ILO Conventions;
- UN Declaration on the Rights of Minorities;

and **as a matter of priority to protect the rights of women by ratifying CEDAW, of indigenous people by ratifying ILO Convention 169 and of workers** by ratifying all other ILO Conventions.

ii) to guarantee the totality of human rights by **withdrawing reservations,** in particular those applying to CEDAW and the Convention on the Rights of the Child, removing reservations determined to be incompatible, and establishing an expeditious procedure for reviewing the compatibility of reservations;

iii) to **support the adoption** of the proposed Optional Protocol to the Convention Against Torture, the Draft Declaration on Violence against Women and an Optional Protocol to the Covenant for Economic, Cultural and Social Rights(ICESR) and subsequently to ratify the protocol to the ICESR.

iv) to introduce or amend **domestic legislation**

- to ensure compliance with these international obligations, in particular with the standards of equality and non-discrimination, and to resolve conflicts between the customary laws of a group or people and those of the state, in conformity with the universality of human rights according priority to those which conform to the spirit of the Universal Declaration on Human Rights.
- to ensure the protection of the rights of women, children, indigenous peoples, peasants and workers and all marginalised groups;
- to guarantee the freedom of religious organisation and expression;
- to abolish the death penalty.

v) to **cease immediately al forms of political repression,** including organised sexual violence, torture, enforced or involuntary disappearances, extrajudicial executions and arbitrary detention;

vi) to **ensure protection** of the rights of all victims of human rights violations, particularly torture victims and prisoners;

vii) to provide the basic needs of **political prisoners, torture victims, refugees and displaced persons;**

viii) to provide **compensation, indemnification and total health services, including rehabilitation to survivors and families of victims** of organised violence sponsored and sanctioned by the State, including torture, sexual slavery(including victims of the devadasi (slaves of god) system), forced labour, involuntary disappearances, summary execution, police and military oppression, political repression, unjust detention and internal displacement;

ix) while welcoming any initiative by governments to set up a **regional mechanism for the protection and promotion of human**

rights in the Asia-Pacific region, to ensure that it is subject to the following conditions:

- if a regional commission is set up, it should be mandated to apply without reservations the International Bill of Human Rights, CEDAW, the Convention against Torture, the Declaration of the Right to Development and other relevant human rights instruments;
- member states of this regional Commission must ratify or accede to the above international instruments prior to their membership;
- the right of individuals and NGOs to petition the regional Commission must be guaranteed;
- such petitions or appeals should not preclude concurrent appeals to the various UN mechanisms for the protection of human rights;
- no member of this regional Commission should hold an official position in Government concurrently, and members should be appointed in consultation with NGOs;
- there should be a regular reporting system by states on their implementation of human rights standards domestically with NGO participation in the drafting of the reports;
- meeting of this regional Commission and its deliberations should be generally open to the public;
- no aspect of government operation and no official should be immune from scrutiny or investigation, including the military and security forces;
- the regional commission should have full investigative powers;
- a separate body should be set up to adjudicate complaints;
- member governments must be required to disseminate information on the regional commission and how it operates.

x) to adopt, following public consultation, **a gender-sensitive national policy on human rights education** and training which provides, among other things, for specific programs designed for government officers and employees, law enforcement officials. These should

be programs, both formal and nonformal, on human rights in the curricula of all educational institutions, for which governments should held primarily responsible, and effective use of the mass media. Particular emphasis should be given to programmes designed specifically for marginalised members of the community, NGOs should be assisted and encouraged to conduct Human Rights Education and training.

xi) to **translate and disseminate materials** relating to human rights instruments and mechanisms into the vernacular languages of the Asia-Pacific.

Action By The United Nations

International Mechanisms

i) We call upon the United Nations to **undertake a gender analysis of all human rights instruments to remove gender bias and to address gender specific abuses, and to ensure that** such issues are addressed in all reports, documents etc. produced by UN treaty bodies, thematic and country rapporteurs and working groups, independent experts and all bodies entrusted with protecting human rights in all areas that fall within their mandate;

ii) Welcoming the Draft Declaration on Violence Against Women and urging its adoption by the General Assembly, we recommend that the World Conference **recognise women's rights as human rights** and develop more effective **implementation procedures to eliminate violence against women in both the public and private spheres,** which constitutes the gravest form of sexual discrimination, (for example by adding a supplementary article to CEDAW to outlaw the use of biological engineering to determine the sex of the foetus), and urge consideration of the initiative by the Coalition Against the Trafficking of Women in introducing a **Draft Convention Against Sexual Exploitation**;

iii) We reiterate **the importance of the Secretary General in monitoring state compliance** with Article 4 of the International Covenant on Civil and Political Rights which requires that he be notified of derogations during times of national emergencies;

iv) We urge that the **UN Rapporteur on States of Emergency be given adequate powers** to play a more active role in effectively monitoring derogations of human rights by governments during states of emergency;

v) We urge the United Nations World Conference on Human Rights, to adopt a Convention on the Right to Development embodying the existing Declaration, and to move towards the adoption of Declaration on the Rights of Human Rights Defenders.

vi) We recommend a rethinking and review of the existing definitions of human rights, including the definition of torture, the inclusion of rape, forced migration and the destruction of habitats as war crimes and a recognition of the right to be free from sexual exploitation, including sexual harassment, incest, trafficking and prostitution.

vii) We call on the UN to take appropriate steps to eradicate the practice of untouchability, which is a crime against humanity, and discrimination on the basis of caste, religion and other factors by the year 2000, failing which sanctions will be imposed, keeping in view that development projects financed by UNDP and IFIs of the poor are not affected.

viii) We call on the UN to take appropriate steps for the speedy realisation of the decolonisation of indigenous peoples.

Effectiveness

We call for specific improvements in the United Nations' capacity and to establish new mechanisms to **effectively promote** and protect human rights:

i) A special UN office, perhaps under the Under-Secretary general, should be set up to consider the issue of self-determination;

ii) by applying sanctions against governments engaged in gross human rights violations;

iii) by ensuring individual access to UN bodies and providing for individual complaints procedures - to this end, a working group should be established in the Commission on the Status of Women to outline procedures for drafting an Optional Protocol establishing individual complaints procedure under CEDAW;

iv) by expanding the impact of the treaty monitoring bodies including in the following ways: requiring a clear report on the extent to which a country has fulfilled its obligations and the extent to which it has failed; insisting on the submission of state reports and submission on time; encouraging consultation by states with NGOs and inclusion of NGO reports in State reports (with the NGO's consent);

officially allowing for NGOs to submit parallel reports; full public disclosure of the proceedings of each session;

v) by reinforcing the work of existing country and thematic Rapporteurs and Working groups and by establishing new mandates as required, and enhancing the effectiveness of such mechanisms by: providing for greater investigatorial powers; setting up a system to follow-up on recommendations for implementation by governments; regularisatoin of on-site visits; more accessibility for victims and their families; improving security for UN delegations, rapporteurs, working group members;

vi) by requiring that serving members of the Sub-Commission on Human Rights not be drawn from government ranks (such as politicians or diplomats) but should be sought from academia, NGOs, the media or other appropriate sectors and allowing for candidates to be nominated by countries other than own;

vii) by the formation of a UN Special Commissioner for Human Rights as a new high-level political authority to bring a more effective and rapid response, coherence and coordination in the protection of human rights;

viii) by the formation of a UN Commission on Indigenous Peoples with a permanent status and with the functions of monitoring, raising consciousness of the public on the situation of indigenous peoples and others;

ix) by improving the operation of the UN Commission on Human Rights through the inclusion of discrimination against indigenous peoples as a permanent item on the agenda; and, by not precluding as a result of using the 1503 procedure, the raising of an issue in other fora;

x) by improving emergency mechanisms through: an "early warning device" enabling the UN to respond more effectively before a situation deteriorates into crisis; maximising the use of special envoys by the Secretary General; expanding the powers of the Under-Secretary for Human Rights to enable a response to emergency situations; strengthening Urgent Action procedures;

xi) by establishing a Permanent International Court on Human Rights with compulsory jurisdiction over all cases of human rights violations;

xii) by establishing a Permanent International Criminal Court, to which individuals have direct access, to provide both criminal sanctions and civil remedies against war crimes, crimes against peace and crime against humanity including gender-specific abuses - in international, internal and armed conflicts;

xiii) by establishing a war crimes tribunal in Asia to adjudi-cate on military atrocities, including sexual slavery;

xiv) by establishing Special rapporteurs on the rights of indigenous peoples, on gender discrimination and violence, and on children's rights, on the trafficking in women, authorized to receive and report on information from governments, NGOs and inter-governmental institutions, to respond effectively to allegations of violations of human rights and to recommend measures for their prevention. The rapporteur on gender violence should also report to the commission on the Status of Women;

xv) by sending fact-finding missions to countries in our region where gross violations of indigenous peoples' rights are reported;

xvi) by providing mandatory gender training for UN person-nel and independent experts;

xvii) by the integration of a gender perspective programme in all UN advisory services on human rights;

xviii) by allocating at least 5% of the UN budget to human rights work;

xix) by increasing resources available to UN human rights bodies, such as CEDAW - by extending meeting sessions and providing more support staff - and the UN Voluntary Fund for the Victims of Torture;

xx) ensuring periodic evaluations of the effectiveness of UN monitoring, reporting and complaints procedures and its advisory services and training programs in addressing violations of the rights to women, children and indigenous peoples;

Human Rights Education And Training

We call upon the UN to

i) declare a "Peoples' Decade for Human Rights Education and Training"

ii) implement mechanisms for the review of Human Rights Education and Training possibly by the relevant treaty monitoring bodies;

iii) establish an International Fund for Human Rights education and Training activities for states and NGOs

iv) instruct each UN body to prepare a report on the effectiveness of their initiatives to address women's human rights for the 1995 World Conference on Women;

v) ensure that the rights of indigenous peoples finally gain a place on the formal agenda of the UN Commission on Human Rights.

Democratisation

We recommend the democratisation of relevant UN processes in the following ways:

i) by **democratization of the Security Council,** in particular by abolition of the veto and permanent membership and the transfer of additional responsibilities to the General Assembly; moreover, membership of the Security Council should be denied to any State responsible for war crimes against humanity, such as military sexual slavery, before it accepts its state responsibility;

ii) by establishing mechanisms to ensure that the concerns, experiences and struggles of hitherto marginalised groups, including women, children, indigenous peoples and workers, can be represented in all UN structures and its ongoing activities; in particular by the granting of consultative status, the inclusion of such concerns in the agenda of the regional meeting and the World Conference; and by recognising their representatives to speak at the meetings;

iii) taking into account the absence of an inter-governmental human rights mechanism in the Asia-Pacific region, we call on the UN Commission on Human rights to develop procedures and provide the means to enable NGOs to access the UN system both within Asia and beyond; specifically, we call for the sittings of the Sub-Commission on Human Rights in August every year to be held in rotation in the Latin American, African and Asian-Pacific regions; ECOSOC rules and procedures limiting NGO participation should be waived; the accreditation decisions should always be by majority and may be by secret ballot;

iv) by recognising, promoting and supporting NGO activities on human rights by making available technical, human and financial resources from the UN.

Specialised Agencies

With regard to UN institutions and their specialised agencies, we call upon the UN, governments of the North and the South to actively monitor, regulate and ensure:

i) the policies of the IMF, World Bank, GATT and other multilateral agencies - and bilateral agencies - to ensure their conformity with UN/ILO standards;

ii) the protection of all workers, trade unions and labour rights groups not officially recognized by their governments, by: strengthening ILO policies relating to workers in the unorganized/informal sector and to the trade union rights of government employees; and addressing the practice of the expulsion or forced migration of workers, especially women, in occupied territories;

iii) the activities of TNCs operating in the Asia-Pacific region so as to ensure compliance with international labour standards;

iv) procedures for the accountability of the UN delegates. Personnel and agents for human rights violations, including gender specific abuses.

Militarisation

We call on governments:

i) to adopt measures to bring to an immediate end the production, sale, exhibition and advertising of weapons of mass destruction and nuclear weapons, and military exercises of all kinds;

ii) to dismantle all existing weapons of mass destruction and to end the military training of Asia-Pacific defence, military and security personnel by Western countries for combat against their own people;

iii) to re-allocate military budgets to development needs, improved preventive mechanisms, consultative processes, social services and peaceful settlement of disputes;

iv) to disband all paramilitary forces;

v) to take immediate steps to ensure that Asia and the Pacific are not host to foreign bases and are free of nuclear weaponry and power;

vi) to make publicly available information on military expenditure;

vii) with specific reference to the operation of UN peace-keeping forces, emergency response mechanisms and humanitarian assistance, to ensure an effective response to the particular vulnerabilities of women as a group in situations of armed or ethnic conflict; to address the impact on women and children of all measures taken and the effect on the local female population of the discipline and behavior of male military personnel;

viii) to release all Prisoners of War and civilians detained in contravention of international humanitarian law;

ix) to ensure all citizens have the right to conscientious objection.

We do not only want to
Express ourselves and let
The governments know that
We have rights. We want
These rights respected and
Our humanity upheld. We are
Prepared to fight until
Justice is done and freedom
Is won!

Asia Pacific NGO Conference
Plan Of Action

Immediate

- Maximization of the Bangkok Inter-government Meeting through:

1) widest possible use of media
2) direct lobby to governments
3) direct intervention during the meeting
4) follow-ups of a, b and c when we get back to our respective countries

- Formation of a working group that will ensure the continuity of the efforts made during the meeting. The working group shall be composed of four full time workers who will be responsible for:

1) ensuring the coordination of regional networks, task forces and country initiatives in relation to the Vienna events
2) ensuring the sourcing of funds to bring regional participants to the Vienna events
3) updating regional networks and national organizations on the developments on the preparation for the Vienna events to ensure broadest and quality participation
4) preparing a directory of all regional networks and national human rights organizations to facilitate linkages among countries and organizations
5) Facilitate the drafting of the Asia-Pacific Human Rights Declaration

- Formation of Special Task Forces to study, organize and coordinate implementation of joint actions/responses to countries in most difficult situations Countries for special adoption are:

1) East Timor
2) Cambodia
3) Burma

4) Vietnam
5) Bougainville
6) Palestine Occupied Territories
7) Bhutan
8) China
9) Kashmir and Naga territories of India

- Formation of Special Task Forces on:

1) Women Victims of Rape by Military
2) Women
3) Children
4) National Security

- Passing of urgent resolutions on the following issues:

1) A resolution seeking for immediate and unconditional release of all political prisoners in the region, with urgent call to release immediately women and children in prison.

2) A resolution seeking for immediate release of Aung Sann Suu Kyi of Burma

3) A resolution seeking for the immediate release of Aung Sann Suu Kyi of Burma and other persecuted political leaders in the region

4) A resolution calling on PNG to lift immediately its blockade on Bougainville which has caused the death of 2,000 children as a result of lack of medicines and vaccines

Medium and Long term

- Formation of an Asia Pacific committee on Regional Instruments that will be responsible to:

1) study obstacles of regional enforcement of UN Mechanisms and propose recommendations for action

2) monitor compliance/non-compliance of Asia countries of UN mechanisms

3) input directly to governments and non-government bodies issue related to UN.

- Formation of a Legal Group composed of lawyers, jurists and other experts like doctors, sociologists, etc. to:

1) receive reports of violations

2) study and give expert and authoritative opinion as basis for further action.

- Formation of an Asia-Pacific Commission as a permanent body to coordinate regional activities beyond Vienna.

- Convening of an NGO conference after two years to make an assessment of the post Bangkok and Vienna regional and national efforts and develop an action plan for the next period.

- Conducting trainings for NGOs based on commonly felt needs.

Identified areas of training are on human rights education and UN systems.

- Pursuing joint studies, discussions and other projects on common issues like national security, militarisation, women trafficking, colonization, etc.

- Strengthening urgent action, fact finding mission and other support action capabilities within the region.

- Undertaking support campaigns on the following issues:

1) ethnicity and inter-racial strife

2) ongoing peace processes (North and South Korea, Philippines, Cambodia)

3) Environmental degradation

Recommendations

A. General Recommendations

1. Patriarchy is violative of women's human rights. Patriarchy is a form of slavery and must be abolished. We support and recommend the active pursuit of feminist objectives in the formulation, assessment and implementation of all human rights.

2. We recommend that human rights abuses in both the public and private spheres be addressed. The private sphere for women constitutes the family. The family is recognized as "the natural and fundamental unit of society" in the Universal Declaration of Human Rights and this creates a risk for individual family members, that they may not be protected as individuals. Most frequently it is women who suffer from this phenomenon.

3. We recommend that a broader definition of family be adopted by the UN system. There can be no single definition of family because family formations differ with time and place throughout our region. "Family" should not be associated with marriage or with a union. Western and common law defines families as nuclear, but many other realities exist as to family, which are neither recognized nor protected by law.

4. We recommend that the implementation of human rights and the inter-relationship and indivisibility of economic, social, cultural, civil and political rights be strengthened by ensuring that gender specific information and analysis be included in consideration of human rights, and of the means for advancing the equal realization of economic, social, cultural, civil and political rights.

5. We recommend the appointment of UN Special Rapporteur on gender-discrimination and violence against women through the Human Rights Commission. The Rapporteur should be authorized to receive and report on information from governments, non-governmental organizations and inter-governmental institutions; to respond effectively to allegations of violations against women; and recommend mea-

sures to prevent continuing violations. The Rapporteur should also report to the Commission on the Status of Women to assist its policy-making function.

6. In order to strengthen the implementation procedures under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), we make the following recommendations:

*Call upon governments who have not yet ratified CEDAW to do so before 1995.

*Encourage governments to withdraw those reservations to the Convention which are obstacles to its effective implementation.

*Establish an expeditious process for reviewing the compatibility of reservations with CEDAW and removing those reservations determined to be incompatible with the principles and spirit of the Convention.

*Establish a working group in the Commission on the Status of Women to outline procedures for drafting an optional protocol establishing an individual complaints procedure under the Convention, and support the adoption of such an optional protocol.

*Expand the resources of the Committee on the Elimination of All Forms of Discrimination Against Women which is charged with overseeing the governmental implementation of the Convention. In order to carry out its mandate effectively, the Committee urgently needs extended meeting sessions, more support staff, and other forms of financial and structural support.

*Call upon states to effectively implement CEDAW through the elimination of discriminatory laws, policies, practices and customs and through the implementation of positive measures necessary to advance the equality of women, as called for in the Convention.

7. We urge governments to ensure that UN treaty committees, thematic and country rapporteurs and working groups, independent

experts and all bodies entrusted with protecting human rights address violations of women's human rights, including gender-specific abuses, in the areas that fall within their mandate (through advisory services and training programs, reporting, monitoring and complaints procedures, etc.). Measures necessary to effectively carry out this charge include:

*Support training for all UN personnel and independent experts to ensure that they will address the full range of human rights abuses specific to women and carry out their work without gender-bias.

*Enable the Program on Advisory Services in Human Rights to assist in the integration of a gender-perspective in all its work.

*Ensure periodic evaluations of the effectiveness of the UN monitoring, reporting and complaints procedures, as well as its advisory services and training programs, in addressing and devising more effective responses to violations of women's human rights.

*Call upon each body to prepare a report on the effectiveness of these initiatives for the 1995 World Conference on Women.

8. We recommend that there be equal representation of women on all UN treaty committees and among the special rapporteurs and working groups established by the UN.

9. (a) The absence, at present, of an Asia Pacific inter-governmental mechanism and the lack of access, information and training skills of a majority of committed human rights non-governmental organizations and women's rights groups on how to effectively access the UN system, makes it imperative that both NGOs themselves and the UN Human Rights Commission develop procedures and provide the means to enable Asia-Pacific NGOs to access the UN system and to incorporate the concerns, experiences and struggles on women's rights in this region to all UN structures and activities relating to human rights including the work of specialized agencies and other bodies.

(b) We recommend that procedures be developed to expand access of NGOs with expertise in the field of the human rights of women to all UN structures and activities relating to human rights including the work of the specialized agencies and other bodies.

10. We recommend that the accountability of UN delegates personnel and other agents of the UN, for human rights violations, including gender-specific abuses, be recognized and develop procedures for implementing this accountability.

11. (a) We recommend the establishment of international criminal court, to which individuals have direct access, to provide criminal sanctions and civil remedies against war crimes in both international and internal conflicts, crimes against humanity, and violations of human rights including gender specific abuses based on international customary law and treaties. In the short term, an ad hoc War Crimes Tribunal should be established to adjudicate the atrocities, including rape, forced pregnancy and other forms of sexual slavery, in many parts of the world. Such a tribunal should have jurisdiction over crimes committed by United Nations personnel as well as by State officials and individuals.

(b) We recommend the re-structuring of the UN Security Council so that it becomes a truly democratic institution capable of reflecting the genuine aspirations of the vast majority of humanity. Towards this end, the veto and permanent membership within the Security Council should be abolished. Any state which is responsible for war crimes and against humanity, such as military sexual slavery, should not be allowed to take Security Council membership before it resolves the state responsibility according to international law.

Specific Recommendations for the Agenda of the Asian Inter-Governmental Meetings and the World Conference, 1993

1. (a) In reviewing the progress made in the field of human rights since the adoption of the Universal Declaration of Human Rights and in considering challenges to full realization of human rights of

men and women, governments should examine the issue of violence against women:

*We urge the World Conference to recommend more effective UN implementation procedures to eliminate the violence against women that is endemic to all societies. Various forms of violence against women breach guarantees established in the Universal Declaration, the Convention on the Elimination of All Forms of Discrimination Against Women, and other human rights instruments, including: the rights not to be arbitrarily deprived of life, liberty and security of person; the right not to be subject to torture or inhuman and degrading treatment; the right to just and favorable conditions of work; the right to equal protection of the law; and the prohibition of discrimination against women.

*We further urge the World Conference to recognize specifically that violence against women in both the private and public spheres is a violation of human rights and constitutes the gravest form of sexual discrimination. Governments have a responsibility to enforce or create new measures to prevent and respond to this gender specific violence in both these spheres, including affirmative measures to eliminate the conditions that breed this violence.

*We welcome the steps taken recently by the UN to enhance international protection from violence against women through the elaboration of the Draft Declaration on Violence Against Women, adopted by the 1992 inter-sessional meeting of the Commission on the Status of Women. We urge the adoption of this Declaration by the General Assembly as a first step toward more comprehensive and enforceable instruments.

(b) We call attention to the following particular instances of violence against women:

(i) Traffic in Women

Traffic in Asian women has increased dramatically in the last two decades. Women are sold, traded, exchanged for sexual slavery or prostitution and bonded labor across borders, such as from Bang-

ladesh to Pakistan and India, from Burma to Thailand, from Vietnam to Kampuchea, from the Philippines to Japan, and from many Asian countries to Europe, North America and Australia. We note that traffic in women has taken on a variety of forms-from mail order bride markets, to sex tours, to entertainment, to domestic labor, to dwadasi prostitution, among other. We further note the globalization and technologisation of syndicated business operations of recruitment agencies, groups and institutions that benefit from the sale of women's bodies. Government policies on economic development, tourism and migration have utilized women's cheap labour and sexuality to generate incomes, which violates women's human rights.

Traffic in women is a violation of women's human rights. It is a violation of peremptory norms of international law, particularly Article 4 of the Universal Declaration of Human Rights and other international instruments prohibiting slavery.

We urge governments to address this problem of grave magnitude. In line with this, we recommend the appointment of a UN special rapporteur on Traffic in Women who should be authorized to investigate the different forms of traffic in women towards recommending the adoption of measures to address the problem.

We note that women who are trafficked are often criminalised in the receiving states where they are without any legal protection. We urge our governments to take steps to ensure that victims of trafficking are given protection and not criminalised.

Towards this end, we recommend the review of the 1949 Convention on the Suppression of the Prostitution of Persons and the Exploitation of Others towards the adoption of a Convention that addresses the present realities of traffic in women. We welcome the efforts of the Coalition Against Trafficking in Women. We welcome the efforts of the Coalition Against Trafficking in Women in drafting a proposed Convention and we urge governments to consider the same.

(ii) Religion and Fundamentalism

The use of religion by states in the region, and by political forces wanting to gain political and cultural control has resulted in pitting states against the people, and communities against each other. This in turn has necessarily led to increasingly violent societies, a violence that is often played out even more intensely against women. We condemn the use of religion by governments or other forces to suppress the voice of a people. We also condemn the onslaught of religious fundamentalism which invariably leads to intolerance and violates various human rights and freedoms, particularly of women, which are guaranteed by the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women and other international human rights instruments.

Furthermore, some governments in the region, particularly those of India and Pakistan, have used religion as an excuse either for their non-ratification of or making of reservations to the CEDAW and other international instruments. We affirm the universality of women's human rights, and we call on governments to make the same recognition and affirmation through the ratification of the CEDAW and the withdrawal of reservations made to any of its provisions.

(iii) Military Sexual Slavery

We demand that our governments address all forms of military sexual slavery committed against women in the Asia-Pacific Region, particularly those committed by the Japanese Imperial Army during World War II against Asian women.

We reiterate our recommendation for the creation of an International War Crimes Tribunal to which individuals can have direct access, that can provide both criminal sanctions and civil remedies for the victims/survivors of military sexual slavery committed by Japan against Asian women.

We also reiterate our recommendation that any state, particularly Japan, which is responsible for war crimes and crimes against humanity such as military sexual slavery should not be allowed to be-

come a member of the Security Council unless it first resolves its state responsibility under international law.

(iv) Reproductive Rights

The reproductive technologies and family planning programs throughout most of our region are being introduced on the ground that overpopulation is the major cause of poverty. However, the dangerous and life threatening nature of these technologies, coupled with the forcible nature of the family planning campaigns, threaten and violate women's rights, particularly poor women's rights, to health, life and their reproductive choices. Far from eliminating poverty, these practices are increasingly succeeding in eliminating the poor, especially poor women.

We condemn these existing programs and the failure on the part of the governments to provide safe contraceptives for women. We affirm that women's reproductive rights are human rights and demand governments to recognize, promote and guarantee the exercise of these rights. We demand that any family planning program should be conceptualised and implemented within the framework of and consistent with women's rights to life, health and control over their reproductive choices.

We similarly condemn those governments that deny women their right to choose when and whether or not to have a child. We demand that governments, particularly of the Philippines, repeal all legislation, or amend state constitutional provisions, that deny this fundamental reproductive right of women, as well as take positive measures to guarantee the full and safe exercise of this right.

(v) Dalit Women

In addition to all the above, we condemn the violations of the human rights of the Dalit women. We note that Dalit women suffer from state violence, social and legal discrimination, and dehumanizing flying and working conditions, and illiteracy. They are denied of their land rights and civil liberties. Their reproductive rights are violated through contraceptives and newly invented family planning devices that do not serve their needs and violate their bodies.

We call on the governments in the Region to take action to put a stop to these violations.

2. We note that women's realities and the violations of their human rots are not reflected either in the language, substance or interpretation of most international human rights documents, particularly the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. We recommend the re-interpretation of these documents so as to cover gender specific violations of women's human rights, and to eliminate the false dichotomy between women's rights violations in the public sphere and women's rights violations in the private sphere.

The Women's Action Forum in Pakistan has already begun this process by recommending substantial changes, including changes in the language, in the Universal Declaration of Human Rights. We applaud this initiative, and recommend that the process be continued by all of us.

We also recommend that every human rights document that may be adopted by states henceforth, including the Charter that may be adopted by the Asia-Pacific Region, should have an integral gender dimension.

3. Major attention at the Asian preparatory meeting in Bangkok will focus on the function of the universality of human rights. Several governments in this region have used the notions of cultural and religious specificities to evade human rights violations especially the violations of women's human rights. While acknowledging the legitimacy of cultural rights, the rights to life, security of person, health and education are prior to that of culture, religion and ethnic identity, and in instances of conflict, the universality of women rights should take precedence over cultural and other forms of diversity. Further, in instances of conflict, wherever the customary laws of a group or people versus the state, the position which most closely reflects the spirit of the Universal Declaration of Human Rights should prevail.

4. In discussions of UN peacekeeping activities, emergency response mechanisms, and humanitarian assistance (such as aid to victims of the conflicts in Somalia and in the former Yugoslavia)

*There must be attention, and effective responses, to the particular vulnerabilities of women as a group in crisis situations such as armed or ethnic conflict at the international, national or local level.

*Consideration must be given to the impact on women of all measures taken.

*There must be attention given to the discipline and behavior of male UN peacekeeping, forces with the local female population.

5. In discussions of "vulnerable groups"

*We urge the World Conference to recognize that women and other groups which have traditionally been placed under this heading are not groups which are vulnerable per se. They have been made vulnerable to diverse forms of human rights violations by the structures which create and maintain the discrimination an oppression of people based on ethnic, racial, socioeconomic, sexual, geographical, differently abled and other considerations. Therefore, in order to achieve the full universalization of human rights, these structures of 'vulnerabilisation' and inequality must be addressed in order to guarantee all persons full participation and enjoyment of human rights.

*Situations which require that special consideration be given to the women in them include: refugees, racial and ethnic minorities, dalit women, migrant women, lesbians, women affected by HIV/AIDS; young or minor women; economically disadvantaged or exploited women; aging women, indigenous women, and women with disabilities.

NGO Proposals to the Asia-Pacific Regional Meeting for the World Conference on Human Rights 1993

Bangkok 31 March 1993

Universal human rights standards are rooted in many cultures. They afford protection to all of humanity, including women and special groups such as children, minorities, indigenous peoples, peasants, workers, refugees, disabled persons and the elderly. As human rights are of universal concern and are universal in value, the advocacy of human rights is a matter of international solidarity and should be, promoted in the spirit of international co-operation.

The international, regional and national orders should complement each other. The specificity of each context shall serve as a constructive element to strengthen universal minimum standards and mechanism designed to achieve global respect for human rights.

Human rights are indivisible and interdependent be they economic, social and cultural rights or civil and political rights. One set of rights cannot be used to bargain for another. The protection of human rights concerns both individuals and collectivities. Cultural practices which derogate from universal human rights, and women's rights in particular, shall not be tolerated.

The right to development is a basic human right. To be balanced and sustainable, development requires respect for civil and political rights as well as social, cultural and economic rights, equity and social justice and people's participation. Resources must be used to promote human development, not militarisation.

At the national level, there can be no development without human rights and democracy and vice versa. Development shall be guided by principles of equity and justice. Democracy is a way of life. It pervades all aspects of human life: in the home, in the workplace, in the local community. Participatory democracy is the basis of good

governance. It must be fostered and guaranteed in all countries, particularly through an independent and impartial judiciary.

The development process at the international level should also be guided by the same principles of equity and justice. Control and domination of the development process by the strong in the North, abetted by elites in the South, perpetrates vast social and economic disparities. At the same time, international institutions such as the United Nations shall be democratised in the interests of the poor and powerless.

Women's rights are human rights. Women's rights must be addressed in both the public and private spheres of society, in particular in the family.

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The promotion of democracy and respect for human rights require human rights education and training of various sectors of society, at both governmental and non-governmental levels.

Effective promotion and protection of human rights in the Asia-Pacific region requires governments in the region to ratify and implement without delay the principal international human rights instruments, including the International Covenant on Civil and Political Rights, and its two Optional Protocols, the International Covenant on Economic, Cultural and Social Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture the Convention on the Status of Refugees, and the Convention on the Rights of the Child.

Reservations on these human rights instruments must be withdrawn, including those on CEDAW and those on the Convention on the Rights of the child.

Effective promotion and protection of the rights of indigenous peoples in this Year of Indigenous Peoples requires strengthening the relevant legal instruments and, as a minimum ratifying ILO Convention 169. Ratification of all other ILO Conventions is required to protect and promote the right to freedom of association and the right to organise trade unions.

In addition, the strengthening of the capacity of a democratised United Nations to promote and protect human rights requires

(1) the establishment within the UN of a Special Commissioner for Human Rights,

(2) the establishment of an international criminal court with a human rights mandate,

(3) reinforcement and improvement of the operation of existing treaty monitoring bodies and mechanisms and

(4) regional, subregional and national mechanisms with guarantees of independence, impartiality and accessibility.

Source : **Our Voice** (Bangkok : ACFOD, 1993).

Appendix II

Bangkok (Governmental) Declaration on Human Rights 1993

Asia Intergovernmental Meeting

The Ministers and representatives of Asian States, meeting at Bangkok from 29 March to 2 April 1993, pursuant to General Assembly resolution 46/116 of 17 December 1991 in the context of preparations for the World Conference on Human Rights.

Adopts this Declaration to be known as **"The Bangkok Declaration"**, which contains the aspirations and commitments of the Asian region:

Bangkok Declaration

Emphasizing the significance of the World Conference on human Rights, which provides an invaluable opportunity to review all aspects of human rights and ensure a just and balanced approach thereto,

Recognizing the contribution that can be made to the World Conference by Asian countries with their diverse and rich cultures and traditions,

Welcoming the increased attention being paid to human right in the international community,

Reaffirming the commitment to principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights,

Recalling that in the Charter of the United Nations the question of universal observance and promotion of human rights and fundamental freedoms has been rightly placed within the context of international cooperation,

Noting the progress made in the codification of human rights instruments, and in the establishment of international human rights mechanisms, while expressing concern that these mechanisms relate mainly to one category of rights,

Emphasizing that ratification of international human rights instruments particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, by all States should be further encouraged,

Reaffirming the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of States,

Stressing the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization,

Recognizing that the promotion of human rights should be encouraged by cooperation and consensus, and not through confrontation and the imposition of incompatible values,

Reiterating the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the inherent interrelationship between development, democracy, universal enjoyment of all human rights, and social justice, which must be addressed in an integrated and balanced manner,

Recalling that the Declaration on the Right to Development has recognized the right to development as a universal and inalienable right and an integral part of fundamental human rights,

Emphasizing that endeavors to move towards the creation of uniform international human rights norms must go hand in hand with endeavours to work towards a just and fair world economic order,

Convinced that economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights,

Stressing the importance of education and training in human rights at the national, regional and international levels and the need for international cooperation aimed at overcoming the lack of public awareness of human rights,

1. **Reaffirm their commitment to the principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights as well as the full realization of all human rights throughout the world;**

2. **Underline** the essential need to create favourable conditions for effective enjoyment of human rights at both the national and international levels;

3. **Stress** the urgent need to democratize the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced and non-confrontational approach in addressing and realizing all aspects of human rights;

4. **Discourage** any attempt to use human rights as conditionality for extending development assistance;

5. **Emphasize** the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, (and the non-use of human rights as an instrument of political pressure);

6. **Reiterate** that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development;

7. **Stress** the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that non-violation of human rights can be justified;

8. **Recognize** that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds;

9. **Recognize further** that States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognize that remedies must be sought and provided primarily through such mechanisms and procedures;

10. **Reaffirm** the interdependence and indivisibility of economic, social, cultural,civil and political rights and the need to give equal emphasis to all categories of human rights;

11. **Emphasize** the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons;

12. **Reiterate** that self-determination is a principle of international law and a universal right recognized by the United Nations for peoples under alien and colonial domination or foreign occupation, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development, and that its denial constitutes a grave violation of human rights;

13. **Stress** that the right to self-determination is applicable to people under alien and colonial domination or foreign occupation, and should not be used to undermine the territorial integrity, nationalism, apartheid, colonialism, and political independence of States;

14. **Express concern** over all forms of violation of human rights, including manifestation of racial discrimination, racism, apartheid colonialism, foreign aggression and occupation, and the establish-

ment of illegal settlements in occupied territories, as well as the recent resurgence of neo-nazism, xenophobia and ethnic cleansing;

15. **Underline** the need for taking effective international measures in order to guarantee and monitor the implementation of human rights standards and effective and legal protection of people under foreign occupation;

16. **Strongly affirm** their support for the legitimate struggle of the Palestinian people to restore their national and inalienable rights to self- determination and independence, and demand an immediate end to the grave violations of human rights in the Palestinian, Golan and other occupied Arab territories including Jerusalem;

17. **Reaffirm** the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights which must be realized through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realization of such right;

18. **Recognize** that the main obstacle to the realization of the right to development lie at the international macroeconomic level, as reflected in the widening gap between the North and the South, the rich and the poor;

19. **Affirm** that poverty is one of the major obstacles hindering the full enjoyment of human rights;

20. **Affirm** also the need to develop the right of humankind regarding a clean, safe and healthy environment;

21. **Note** that terrorism, in all its form and manifestations, as distinguished from the legitimate struggle of peoples under colonial or alien domination or foreign occupation, has emerged as one of the most dangerous threats to the territorial integrity of States and destab-

ilizing legitimately constituted governments, and that it must be unequivocally condemned by the international community;

22. **Reaffirm** their strong commitment to the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women;

23. **Recognize** the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and socially in healthy and normal manner and in conditions of freedom and dignity;

24. **Welcome** the important role played by national institutions in the genuine and constructive promotion of human rights and believe that the conceptualization and eventual establishment of institutions are best left for the States to decide;

25. **Acknowledge** the importance of cooperation and dialogue between governments and non-governmental organizations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organizations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council resolution 1296 (XLIV);

26. **Reiterate** the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia;

27. **Reiterate further** the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States;

28. **Emphasize** the necessity to rationalize the United Nations human rights mechanism in order to enhance its effectiveness and efficiency to ensure avoidance of the duplication of work that exists between the treaty bodies, the Sub-Commission of Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights, as well as the need to avoid the multiplicity of parallel mechanisms;

29. **Stress** the importance of strengthening the United Nations Centre for Human Rights with the necessary resources to enable it to provide a wide range of advisory services and technical assistance programmes in the promotion of human rights to requesting States in a timely and effective manner, as well as to enable it to finance adequately other activities in the field of human rights authorized by competent bodies;

30. **Call for** increased representation of the developing countries in the Centre for Human Rights.

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