

1999 Meeting of Commonwealth Law Ministers and Senior Officials

Port of Spain, Trinidad and Tobago
3-7 May 1999

Memoranda Volume 1



Commonwealth Secretariat

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The Publications Unit
Commonwealth Secretariat
Marlborough House
Pall Mall

London SW1Y 5HX

United Kingdom

Telephone: +44 (0)20 7747 6342

Facsimile: +44 (0)20 7839 9081

Email: r.jones-parry@commonwealth.int

Website: www.thecommonwealth.org

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Preface

Commonwealth Law Ministers from [42] jurisdictions met in Port of Spain, Trinidad and Tobago from 3 to 7 May 1999. Most of the Memoranda prepared for the Meeting, together with the Meeting's Annotated Draft Agenda (which was adopted as the Meeting's Agenda) and the Communiqué are published in a separate volume from the Minutes, and is available to the public.

The Minutes of the Meeting and classified Memoranda are published separately, as these are available only to member governments.

Commonwealth Law Ministers meet regularly at approximately three-year intervals. They are scheduled to meet next in 2002. Previous Meetings have been held in London (1966 and 1973), Lagos (1975), Winnipeg (1977), Bridgetown (1980), Colombo (1983), Harare (1986), Christchurch (1990), Mauritius (1993) and Kuala Lumpur (1996).

*Legal and Constitutional Affairs Division
Commonwealth Secretariat*

[August 1999]

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3-4 MAY 1999 - MEMORANDA**

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COMMUNIQUE

1. The 1999 meeting of Law Ministers of the Commonwealth was held at the Hilton Hotel, Port of Spain, Trinidad and Tobago from 5-7 May 1999. It fell just a few days after the 50th Anniversary of the London Declaration which laid the foundations of the modern Commonwealth. The meeting was attended by Ministers, Attorneys-General and other law officers and officials from 46 countries and 2 overseas territories. The meeting was chaired by the Honourable Ramesh Lawrence Maharaj, S.C., M.P., Attorney-General of the Republic of Trinidad and Tobago.

2. The Opening Ceremony was attended by His Excellency the Acting President of the Republic of Trinidad and Tobago, Mr Ganach Ramdial, and was addressed by the Prime Minister, the Honourable Basdeo Panday, the Secretary-General of the Commonwealth, His Excellency Chief Emeka Anyaoku, and the Attorney-General of the Republic of Trinidad and Tobago, the Honourable Ramesh Lawrence Maharaj. On behalf of Ministers, the Honourable Dr A. Omar, Minister of Justice of the Republic of South Africa expressed to the Government and people of Trinidad and Tobago their thanks and appreciation for the generous welcome and hospitality extended to them and to their delegations from the time of their arrival in Trinidad.

3. Ministers welcomed observers from the CARICOM Secretariat, the International Committee of the Red Cross, the South Pacific Forum Secretariat and the United Nations Commission on International Trade Law, No Peace Without Justice, as well as from legal associations which form part of the Commonwealth family, notably the Commonwealth Lawyers Association, the Commonwealth Legal Education Association and the Commonwealth Magistrates and Judges Association. The Meeting received a message from the Asian-African Legal Consultative Committee, and looked forward to continued collaboration between the Commonwealth Secretariat and that Committee.

GOOD GOVERNANCE ISSUES

4. Respect for the rule of law is the foundation of any democratic society and a key element in good governance which the Commonwealth's fundamental political values seek to secure. Ministers began their Meeting by addressing a number of issues explicitly concerned with questions of good governance.

Strategies for Consolidating and Enforcing Fundamental Political Values of the Commonwealth

Access to Justice

5. Ministers recognised the importance of access to justice without which there could be no confidence in the legal system. They shared their recent experiences in seeking to eliminate delays in the administration of both civil and criminal justice and in the overhaul of procedures to produce simpler and more cost-effective processes. In some countries a radical change in legal culture might be needed, with the introduction of modern case-management techniques, and this would require the active co-operation of the judiciary and the legal profession.

6. A strong theme in Ministers' discussion of this topic was the need to secure community participation in the legal process. This implied heightened public awareness of legal rights. Several Ministers mentioned that it was important to make adequate provision for public interest litigation. It was also important to give particular attention to the provision of legal services to disadvantaged groups, individuals and localities, with effective systems of legal assistance. Ministers heard of an experiment which sought to provide access to justice, at low cost, through courts presided over by private practitioners. It was unacceptable that legal remedies should, for whatever reasons, be available in practice only to a limited section of the population.

7. However, Ministers emphasised that access to justice involved more than the conventional court system. A growing number

of countries had experience of alternative methods of dispute resolution such as community-based mediation. Ministers encouraged the Commonwealth Secretariat to continue to provide information and advice on all developments which might help member countries reduce obstacles to access to justice.

Rule of Law and Independence of the Judiciary

8. Ministers expressed their warm appreciation of the work undertaken by the Australian Attorney-General's Department to collect information from member countries on the independence of the judiciary and in developing a database which would prove to be an invaluable research tool. Ministers encouraged countries to complete and return outstanding surveys to the Commonwealth Secretariat, welcomed the proposed transfer of the database to the Secretariat and asked the Secretariat to maintain it as a useful resource for all Commonwealth countries.

9. Ministers noted a set of Guidelines on good practice governing relations between the Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights, drawn up by a conference sponsored by the Commonwealth Parliamentary Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates and Judges Association and the Commonwealth Lawyers Association which was held at Latimer House, London, in June 1998. They asked their Senior Officials to study the Guidelines and to report to the next Law Ministers Meeting.

Corruption and good governance

10. Ministers recalled the Statement on corruption that was issued by them at the close of their previous Meeting in Kuala Lumpur in 1996 and welcomed the appointment by the Secretary-General of an Expert Group on Good Governance and the Elimination of Corruption in Economic Management. Ministers were pleased to welcome to their meeting the Chairman of the Expert Group, Dr Kwesi Botchwey, who gave a presentation of the main features of the Group's Report.

11. In considering the Report of the Group, Ministers welcomed the multidisciplinary approach adopted by the Group and the wide-ranging consideration which had been given to this complex topic, one of great relevance to member countries. Ministers also expressed concern not only with corruption in the exercise of public office (including judicial office) but also with corruption in the media and the private sector generally, and expressed concern about the issue of the funding of political parties and election campaigns.

12. Ministers considered a draft Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption prepared by the Expert Group on Good Governance and the Elimination of Corruption in Economic Management. Whilst generally welcoming the principles contained in the document, several Ministers questioned some aspects of this document, including its suggestion that the judiciary should have the responsibility for administering its own operational budget and its use of the concept of "zero tolerance", and asked that the various concerns expressed be taken into account in the further work which was necessary before the document could be considered by Commonwealth Heads of Government.

13. Ministers noted that the Commonwealth practice was to use Declarations and Schemes rather than legally binding Conventions. They were unwilling to see any departure from this settled practice in the context of further work on corruption, and noted the extensive work undertaken in other international fora which, where appropriate, could be used to inform the development of a Commonwealth strategy to address the problem. In this regard, it was noted that Commonwealth initiatives could include the development of a Commonwealth scheme, accession to existing international conventions or the promotion of initiatives within the United Nations for an international convention.

FOREIGN AND INTERNATIONAL LAW ISSUES

14. The second phase of the Ministers' discussions covered a range of topics enabling the Meeting to reflect on current issues in international law.

Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters; and of Maintenance Orders

15. Ministers noted recent work under the auspices of the Hague Conference on Private International Law on issues of Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. They recognised the growing importance of this topic in international trade, and the fact that much Commonwealth legislation was in need of revision. For these reasons they welcomed the work of the Hague Conference and asked to be kept informed of progress. Similar considerations applied to the proposed review by the Hague Conference of international arrangements for the enforcement of maintenance orders.

Implementation of International Conventions

WTO Dispute Settlement Mechanism

16. The recent decision in the *Bananas case* served to illustrate both the importance of and the problems with the Dispute Settlement Mechanism of the World Trade Organisation. Ministers noted the objectives of the new procedures - to contribute to the security and predictability of international trade - but considered that its utility could be considerably diminished unless there was effective participation therein. They recommended that the Commonwealth Secretariat continue its work in WTO related matters especially in facilitating continued training for government legal officers involved in the implementation of the WTO Agreements. They also asked the Secretariat to continue its work in collaboration with other relevant international and regional organisations in providing technical assistance to ensure that member countries, especially developing and least developed member countries which do not have the resources to protect their trading interests, are given the

necessary assistance. Ministers recognised the propriety and importance of the proposed Advisory Centre on WTO Law, and gave their support to this proposal.

United Nations Framework Convention on Biological Diversity 1992

17. Ministers recognised the importance of the provisions relating to access to biological resources in Article 15 of the United Nations Framework Convention on Biological Diversity 1992. Many developing countries were rich in biological diversity, but relatively few had taken steps to implement the provisions of Article 15 in national legislation and practice. The Meeting also noted the significance of the Convention's provisions on intellectual property rights, not least in the context of rights in plants used in traditional medicine. Ministers asked the Commonwealth Secretariat to continue its work in this important field including the provision of advice and assistance in the implementation of the Convention.

International Criminal Court

18. Ministers recalled the support given by many member countries for the establishment of the International Criminal Court and the need for countries becoming parties to the Rome Statute to take appropriate steps to review the scope of their domestic criminal law as they embark upon the process of ratification. A number of Commonwealth countries are signatories to this Statute and their Ministers urged those who have not signed to do so. The Ministers recommended that the Commonwealth Secretariat monitor and, so far as practicable, participate, together with member countries, in the work of the Preparatory Commission.

HUMAN RIGHTS ISSUES

19. It has been a regular feature of recent Law Ministers Meetings that time has been devoted to human rights issues. The Port of Spain Meeting was no exception.

Human Rights Impact Assessments

20. Ministers received a paper introducing the concept of a Human Rights Impact Assessment as a technique that would assist in the entrenchment of the Commonwealth's fundamental values for the benefit the citizens of member countries. The principle of a Human Rights Impact Assessment which recognises the principle of the indivisibility, the inter-dependence and the interconnectedness of human rights and which is applicable at both the national and international levels was welcomed. Ministers noted that some member countries already had in place satisfactory alternative methods (such as the scrutiny of proposed legislation by specialist Human Rights units or parliamentary committees) to further the same objectives. The Secretariat was urged to further refine the concept for consideration by Senior Officials and ultimately by Ministers at their next meeting.

Contemporary Issues Affecting the Enjoyment of Human rights

The Right to Information

21. Ministers received a set of draft Principles and Guidelines on the Right to Know prepared by an Expert Group in March 1999. They recalled that at their meeting in Barbados in 1980 they emphasised the importance of access by citizens to official information in the promotion of public participation in a democratic governmental process. The benefits which such access can bring include the facilitation of public participation in public affairs, enhancing the accountability of government, providing a powerful aid in the fight against corruption as well as being a key livelihood and development issue. Towards this end Ministers decided to adopt Annex 1 to this communiqué (Commonwealth Freedom of Information Principles). Ministers recommend that the Commonwealth Secretariat promote these Principles and also encourage other Commonwealth groups to consider ways in which they could contribute to the promotion of these principles.

The Environment

22. Ministers reaffirmed their commitment to the programme of action adopted in Langkawi in 1989 by the Commonwealth Heads of Government Meeting and endorsed the suggestions that those Commonwealth countries which had not yet done so to ratify international and regional environmental agreements. They asked the Commonwealth Secretariat to continue to monitor developments in this field.

23. Some Ministers were, however, unwilling to consider the protection of the environment as a human right and judged it inappropriate to give national human rights institutions an extended remit to include environmental concerns

Trafficking in persons

24. Ministers noted that the United Nations was preparing an international convention to combat transnational organised crime with Protocols (a) to Prevent, Suppress and Punish Trafficking in Women and Children; (b) on the Illegal Trafficking of Migrants; and (c) Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Materials. They welcomed the participation of the Commonwealth Secretariat in this work. They also noted the Stockholm Declaration of the World Congress Against Sexual Exploitation of Children in August 1996 which Commonwealth Ministers Responsible for Women's Affairs had urged governments to adopt and implement. Law Ministers noted the important legal implications of this multi-faceted problem, and welcomed the action of the Commonwealth Secretariat in commissioning the preparation of Guidelines on Administrative and Legislative Measures to Address the Commercial Sexual Exploitation and Abuse of Children in the Commonwealth. Ministers expressed the hope that the Guidelines with the already existing Commonwealth schemes for mutual assistance and co-operation in criminal matters would constitute a solid base for co-ordinated, collective Commonwealth action to fight this abhorrent practice.

Violence against Women

25. Ministers recalled that the Vienna Conference on Human Rights (which called for the development of National Action Plans on Human Rights) had emphasised the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice, and the eradication of all conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. They noted the 1995 Commonwealth Plan of Action on Gender and Development which identified violence against women as a priority area for action by Commonwealth governments, and endorsed the work of the Gender and Youth Affairs Division of the Commonwealth Secretariat in developing a holistic model framework for an integrated approach to combat violence against women using a Gender Management Systems methodology.

26. Ministers also noted the value of the Model Strategies and Practical Measures adopted in 1997 by the United Nations Commission on Crime Prevention and Criminal Justice (as endorsed by the United Nations General Assembly Resolution 52/86) and their relevance in the drafting of national legislation. Ministers recognised the importance of training and awareness-raising programmes for law enforcement personnel and the general public. Legal provisions could not provide a panacea but had an important place in the total strategy.

The Domestic Application of International Humanitarian Law

27. Ministers received from the Observer from the International Committee of the Red Cross a presentation of a paper from the Advisory Service in International Humanitarian Law of that Committee which contained information on the various Conventions in the field of International Humanitarian Law and a summary of the position of each Commonwealth country in

respect of their ratification and implementation.

28. The Meeting noted that International Humanitarian Law continued to develop, with the Ottawa Convention on the Prohibition of Anti-Personnel Mines having been negotiated since Law Ministers last met. Commonwealth countries were encouraged to make further progress in ratifying and implementing the relevant conventions and welcomed the offer of the International Committee of the Red Cross to provide advice and assistance.

LAW AND TECHNOLOGY ISSUES

29. Developments in Information Technology can have profound legal implications, and Ministers gave attention to a number of current issues in this field.

Electronic Commerce

30. Ministers recognised that the development of electronic commerce was of importance to all countries, with the potential to bring about major changes in business practices. The Meeting received a paper identifying the legal issues to be addressed as well as a number of papers outlining steps taken by member countries in developing the legal structure for electronic commerce. While Ministers recognised that existing legal principles could be rendered applicable to new forms of commerce, they stressed the need to ensure that existing rules and laws did not prevent full advantage being taken of new technology. There were some difficult issues, notably in the protection of privacy and the area of encryption, and there needed to be a careful assessment of the degree of regulation that was appropriate.

31. The Meeting received a presentation from the Secretary-General of the United Nations Commission on International Trade Law, and agreed that the UNCITRAL Model Law provided a suitable basis for a legislative action in Commonwealth countries, being both flexible and technologically neutral. Member countries were encouraged to adopt the UNCITRAL model law.

Computer and Computer Related Crime

32. Ministers recognised the challenge to law enforcement agencies presented by the computer and computer related crime. They agreed to the following courses of action:

- (a) that the Secretariat distribute to member countries as much material as possible on international developments in the field of high-tech crime, including national laws;
- (b) that the Secretariat seek to co-operate with and, to the extent possible, participate in work of other international organisations in this area;
- (c) that the Secretariat review, as necessary, the Commonwealth Schemes on the Rendition of Fugitive Offenders and Mutual Assistance in Criminal Matters to ensure that they are capable of supporting essential international co-operation to combat high-tech crime;
- (d) that, following conclusion of the Council of Europe Convention, expert volunteers from member countries participate in a group to be convened by the Secretariat with a view to drafting a model law for use by Commonwealth countries.

33. Ministers agreed further that the working group, in addition to developing

- (i) a model law, or were that not feasible a set of principles or guidelines to guide the development and enactment of laws to criminalise various forms of computer-related abuse;
- (ii) a model law or guidelines on the admissibility of computerised evidence;
- (iii) taking into account work in other international fora, a model law or guidelines to ensure that members of the Commonwealth have adequate laws to investigate computer

related crime, both domestically and internationally, including search and seizure of computer systems and determining the source and destination of communications;

should pay attention to issues relating to the admissibility of computer evidence and make such recommendations consistent with the laws of evidence in member countries as may be appropriate and/or necessary for the modernisation of laws.

COMMONWEALTH SCHEMES OF CO-OPERATION IN THE ADMINISTRATION OF CRIMINAL JUSTICE

34. Another regular item on the Agendas of Law Ministers and of Senior Officials concerns the monitoring, and where necessary, revision of the Commonwealth Schemes of co-operation in the field of criminal justice.

The Commonwealth Scheme on the Rendition of Fugitive Offenders

35. Ministers recalled that at their 1996 Meeting, they had noted that developments in international practice and in the case-law of a number of Commonwealth jurisdictions suggested a need to modernise the provisions of the London Scheme for the Rendition of Fugitive Offenders. Senior Officials had considered, at their meetings in London in 1998 and in Port of Spain, suggested amendments drawing in part on the United Nations Model Extradition Treaty. Ministers decided that, notwithstanding the view of some member countries that the London Scheme was working satisfactorily, Senior Officials would continue their work with a view to making firm recommendations as to possible amendments for consideration at the next Law Ministers Meeting.

The INTERPOL Red Notice System

36. Ministers noted the changes made in the INTERPOL Red Notice System in 1997 and resolved to:

- (a) acknowledge that the new INTERPOL Red Notices provide significant information on proposed requests for extradition;
- (b) agree that INTERPOL Red Notices in the new form should be treated by all member countries as requests for provisional arrest or, in cases where the locating country requires more information than is contained in the Red Notice, as advance notice of formal requests for provisional arrest;
- (c) agree that where they treat INTERPOL Red Notices as advance notices of formal requests for provisional arrest they will immediately notify the country which sought the issue of the Red Notice when the subject is located within their jurisdiction and seek the additional information required for the making of an application for the issue of a warrant within their own country;
- (d) agree that when making application to the INTERPOL General Secretariat for the issue of a Red Notice, they will send all relevant information to INTERPOL, including a copy of the relevant warrant and include in the application, the text of the laws creating the offence/s for which surrender will be sought and selecting the third option listed under extradition in part 3 of the application form and adding to that section the names of any Commonwealth country which has designated the applicant country under its law.

The Commonwealth Scheme on Mutual Assistance in Criminal Matters

37. Ministers agreed to adopt two amendments to the Harare Scheme, which had been considered by Senior Officials. They noted that the amendment to paragraph 27 of the Scheme reflected a recommendation of the Oxford Conference held in August 1998. The text of the amendments is annexed as Annex 2 to this Communiqué.

Resource Implications of Mutual Assistance

in Criminal Matters

38. Ministers recalled that the Law Officers of Small Commonwealth Jurisdictions had in 1995 expressed their concern that a number of small countries had not enacted legislation to implement the Harare Scheme on Mutual Assistance in Criminal Matters because they were concerned over the potential implications of such legislation on their human and financial resources. They further recalled the consideration which had been given by them and their Senior Officials to the development of a Set of Guidelines on the Apportionment of Costs in mutual assistance cases.

39. They took note of a number of concerns of some Ministers on the Guidelines recommended by Senior Officials. In particular that they could give rise to an expectation that requests for assistance could be routinely refused when the granting of a request imposed any constraint on the resources of the requested country. They also noted the views of some Ministers that the issues of cost sharing, asset sharing or the provision of human resource assistance by the requesting country should be seen as the primary means of solving resource issues in individual cases.

40. Ministers however decided to adopt the Guidelines on the clear understanding that they should be the subject of further consultation between member countries with a view to ensuring that their application and operation in no way affected the realisation of the legitimate expectation of a requesting country that requests which comply with the Harare Scheme will, subject to the express provisions of the Scheme, be granted and that issues of costs are best resolved by bilateral consultations between the requesting and requested countries.

41. The Secretariat was asked to report to the next meeting of Ministers on the operation of the Scheme and the Guidelines and Senior Officials were directed to co-operate with the Secretariat to ensure that the views and experiences of all member countries were reflected in that report. Ministers asked that,

should the report reveal any difficulties with the operation of the Guidelines, they be given the opportunity to review the wording of the document to resolve the difficulties expressed by member countries whose reservations they accepted as expressions of real national concern.

The Balance between Individual Rights and Global Interests in International Co-operation to Combat Crime

42. Ministers received a report of the conclusions and recommendations of the 1998 Oxford Conference on International Co-operation in Criminal Matters, convened by the Commercial Crime and Human Rights Units of the Commonwealth Secretariat's Legal and Constitutional Affairs Division to consider issues referred to the Secretariat by Law Ministers at their 1996 meeting.

43. The Meeting welcomed the production of the Report and the proposed publication of the papers presented to the Conference and gave general support to the conclusions of the Conference. It was noted that one of the Conference recommendations (concerning the protection of bona fide third parties in respect of restrained or confiscated property) had already been acted upon in the course of the Meeting.

44. Ministers asked Senior Officials to consider the Conference Report in detail, and to give specific consideration to the feasibility of adopting recommendations concerning (a) the possible amendment of the London Scheme for the Rendition of Fugitive Offenders so that a requested state would be required to refuse extradition if there were substantial evidence that the return of a fugitive would incur a real risk of a serious violation of a human rights treaty to which the requested state is a party, or to an obligation under customary international law.; (b) the possible development of proposals for national laws and any necessary amendments to the Commonwealth Schemes on conditional extradition, and the extension or creation of extraterritorial criminal jurisdiction to permit prosecution in lieu of extradition; (c) the

availability of court-based mutual legal assistance channels to the defence; (d) issues relating to privilege, including legal privilege and privilege against self-incrimination; (e) the interception of (and evidence obtained from the interception of) telecommunications and other forms of electronic surveillance; and (f) the taking of personal samples. Ministers asked Senior Officials to advise whether there would be benefit in developing a common Commonwealth approach to any of the other issues identified by participants at the Conference.

OTHER ACTIVITIES OF THE COMMONWEALTH IN THE LEGAL FIELD

Money Laundering

45. Ministers took note of the conclusions of two meetings that had examined issues connected with money laundering: a workshop held in May 1998 on money laundering through emerging cyberspace technology, and a joint meeting of Senior Officials of Law and Finance Ministries in London in June 1998. Ministers

- (a) took note of the results of the second self-evaluation of progress in implementation of the 40 Recommendations of the FATF and mandated the Commonwealth Secretariat to undertake such evaluations (in concert with other relevant anti-money laundering organisations) prior to each meeting of Law Ministers;
- (b) expressed their strong support for the initiative of the Government of Tanzania in its efforts to take forward the proposal to establish a regional anti-money laundering group in Eastern and Southern Africa;
- (c) asked Senior Officials to consider and report to them on the question whether or not a Scheme relating to Mutual Assistance Between Business Regulatory Agencies could assist Commonwealth countries in their effort to co-operate to combat abuse of

cyberspace and, in particular, to prevent money laundering through emerging cyberspace technology;

- (d) asked Senior Officials to consider the issue of establishing a procedure which will enable criminal proceedings in cyber crime cases to be brought in the most appropriate jurisdiction; and
- (e) asked for the preparation of a report for their next meeting on the international law and sovereignty issues which arise when computer search techniques result in cross border investigative action.

Model Bill to Implement the Scheme for the Protection of the Cultural Heritage

46. Ministers agreed to adopt a Draft Model Bill as a guide for countries to use in enacting the necessary legislation to implement the Commonwealth Scheme on Protection of the Cultural Heritage. The Bill was based on an original draft prepared by Attorney General's Department, Australia, and which had been the subject of detailed scrutiny by Senior Officials. They asked Senior Officials to undertake further work to clarify a number of points where clarification or amplification of the Scheme itself might be desirable.

Cross-border insolvency

47. The Meeting heard from the Secretary-General of UNCITRAL an account of the main features of the Model Law on Cross-Border Insolvency adopted in 1997. Ministers encouraged governments to study the Model Law and welcomed the offer by the UNCITRAL Secretariat of assistance in the technical aspects of the preparation of national legislation.

Computerisation

48. Ministers discussed the impact of computerisation on both the working methods of the courts and the process of law revision. Their consideration of the latter aspect was assisted by a study of experience in the Caribbean region. Ministers reiterated that

access to the law, both statute and judge made, is necessary and, indeed, critical to an effective system of justice; and that accurate, accessible and secure court and civil legal records which facilitate the proper administration of justice were essential. They acknowledged that many Commonwealth countries and jurisdictions are experiencing problems in maintaining one or more of the essential components of an effective justice system; and asked the Commonwealth Secretariat, using available resources, to examine, in consultation with relevant bilateral and multilateral donors, the possibility of developing and putting into place systems which will ensure access to the law and the development of effective systems of administration of justice.

Training of Legislative Drafters

49. Ministers noted the difficulties experienced by the Commonwealth Secretariat and the Commonwealth of Learning in maximising the benefits of the innovative distance-learning training programme and acknowledged that they had a responsibility to identify and nominate suitable trainees and to provide those trainees with the necessary support to enable them to complete the course.

Other matters

50. Ministers received a range of useful papers containing information on other current legal developments and heard reports on the problems of publishing law reports experienced in some countries and on the coming Constitutional referendum in Australia.

Strategies for future Law Ministers Meetings

51. Ministers recognised that there was already in place a procedure for the organisation and administration of ministerial meetings which facilitated an effective consultation process. Nevertheless, they believed that there was room for reform. They considered therefore that it was an opportune time to give consideration to the question of how they might maximise the opportunities given by their meetings both for the development of pan-Commonwealth solutions

to shared problems and for the devising of means of advancing the shared legal tradition of the Commonwealth and maintaining and implementing the core values of the Association. They shared a concern that their meetings should be clearly focussed and accordingly acknowledged that in the procedure for setting the agenda of future meetings they must participate in active dialogue with the Secretariat to ensure that major issues of common concern were covered.

52. While recognising the value of the diversity of Commonwealth traditions, they concluded that meetings should balance the tradition of sharing national experiences with the need to ensure time for adequate debate on new issues. They asked the Commonwealth Secretariat to facilitate the submission and circulation of written national reports on agenda items. Ministers asked that the Secretariat consider how they might have the opportunity to benefit from the presence of experts from organisations with observer status and by receiving in depth presentations on major issues from among their own number. They expressed the view that their deliberations would be rendered more effective if supported by an early indication of the views of the Senior Officials and the records of their meetings, and by a system of distinguishing between papers dealing with issues to be considered by Ministers and upon which decisions are required and those papers which are submitted for their information.

APPRECIATION

53. Ministers expressed their very warm appreciation to the Government and people of Trinidad and Tobago for their most generous hospitality. In particular they paid tribute to the Honourable Attorney-General, Mr Ramesh Lawrence Mahabir, for the consummate skill with which he guided the meeting through its agenda. Ministers also acknowledged the untiring efforts of the Trinidad and Tobago Organising Committee that had gone to great lengths to ensure the smoothness of the arrangements for their stay in Trinidad and

Tobago from the time of their arrival until their departure.

54. Ministers expressed their warm appreciation for the work of the Secretariat in preparing for this meeting. On the occasion of the last Law Ministers Meeting to be attended by the Commonwealth Secretary-General, they took the opportunity to express their appreciation for his inspired leadership. They also noted that the Director of the Legal and Constitutional Affairs Division, Mr Richard Nzerem, would retire before their next meeting and recorded their sincere appreciation of his signal dedication over many years to the development of a Commonwealth legal tradition evidenced by enhanced and effective co-operation between member countries. Mr. Nzerem, in response, expressed his thanks for the friendship and support of Ministers and their officials over the years.

Port of Spain,
Trinidad and Tobago
7 May 1999

ANNOTATED PROVISIONAL AGENDA

Paper by the Conference Secretary

Note: A revised version of the Annotated Provisional Agenda will be produced on the eve of the Meeting. This will include references to all relevant papers that have been circulated by that date. Where relevant, references will be made to any papers contained in the Report of the Meeting of Senior Officials held on 3 and 4 May prior to the Ministerial Meeting.

OPENING CEREMONY

A separate note on the arrangements for the Opening Ceremony will be available for consideration by Senior Officials at their preliminary meeting in Port of Spain prior to the Ministers' Meeting.

AGENDA ITEM 1. GOOD GOVERNANCE ISSUES

(a) Strategies for Consolidating and Enforcing the Fundamental Political Values of the Commonwealth

(i) Access to Justice

A recognition of the community of interest which both the governors and the governed have in ensuring that good governance prevails lies at the heart of the Harare Commonwealth Declaration. Since 1991 a considerable part of the Secretariat's resources has been devoted to promoting the Commonwealth's fundamental political values and in so far as the law is concerned to facilitating the raising of awareness among the public and enhancing the capacity of public officials to improve access to justice in respect of which there are wide variations in Commonwealth jurisdictions.

Apart from raising awareness among public officials and the public generally of the role of administrative law in promoting a culture of

respect for the law, the series of workshops conducted by the Commonwealth Secretariat since 1992 have sought to identify the causes of exclusion from access to justice and measures that might be taken to remove the obstacles to access to justice. Ministers may wish to discuss what steps they can take as a matter of priority to improve access to justice .

Paper before the Meeting:

LMM(99)23 - Access to Justice - The Rule of Law and the Legal System

(ii) Rule of Law and Independence of the Judiciary and a Report of the Working Group appointed by Law Ministers

Respect for the rule of law is unquestionably the foundation on which every democratic society must be built. Without it, there is a high risk of society being dysfunctional. A respected and independent judiciary is vital for upholding and maintaining respect for the rule of law.

The activities of the Commonwealth Secretariat, particularly since 1991, have always been guided by the fundamental values set out in the Singapore Declaration and as elaborated by the Harare principles to which governments are committed. Given the public perception of ever increasing encroachments on the liberty of the individual and the impact this perception has on the ability of the government to effectively address its responsibility to govern in an open, just and accountable manner, it is appropriate that issues of good governance and in particular the role the judiciary should play in promoting the fundamental values of the Commonwealth should continue to engage the attention of Ministers. A report of the working group established by Ministers to study the subject of the independence of the judiciary will be before Ministers and Ministers will have an

opportunity to consider what further steps they might wish to take in their respective jurisdictions in order to more effectively implement the Harare principles. A report on the project prepared on behalf of the working group by the Attorney General's Department Australia, for the Senior Officials Meeting held in London in May 1998 is presently before the Meeting. An updated Report on the project will be ready for presentation to Ministers at the Meeting.

Additionally, the attention of Ministers is drawn to the "**Latimer House Guidelines**", the product of a Joint colloquium on Parliamentary Supremacy and Judicial Independence held in London in June 1998. The colloquium was attended by members of Parliament and the judiciary among others and was sponsored by a number of Commonwealth organisations including the Commonwealth Parliamentary Association and the Commonwealth Magistrates and Judges Association. Copies of the Latimer Guidelines have been circulated with the Meeting documentation to Ministers for their information.

Papers before the Meeting:

LMM(O)(99)5 - A Report on the Independence of the Judiciary Project
LMM(99)35 - The Rule of Law and Independence of the Judiciary
LMM(O)(99)7 - A Report on the Project on the Independence of the Judiciary

(b) Corruption and Good Governance

Ministers will recall the special statement on corruption which was issued at the Meeting in Kuala Lumpur in 1996 since when the matter has been under active consideration by the Secretariat. As a result of the concerns expressed by both Law Ministers and Finance Ministers and endorsed by Commonwealth Heads of Government, the Secretary-General convened a small Group of Experts to undertake a study of the impact of corruption on economic management and to report to him. The Group had earlier submitted to the Secretary-General an Interim Report which he referred to Finance Ministers for their

consideration at their Meeting in Ottawa in October 1998.

A revised Report taking into account comments by Finance Ministers has now been submitted to the Secretary-General and this is being placed before the Meeting by the Secretary-General to solicit the views of Ministers. The Group Chairperson will be in attendance at the Meeting to brief Ministers and the Report will also be considered by Finance Ministers.

Attached to the Report of the Group is a **Draft Framework for Commonwealth Principles to promote good governance and combat corruption** which Ministers are asked to examine critically and upon which the Secretary-General would welcome their views and advice particularly regarding the most appropriate means of evidencing and advancing the Commonwealth commitment to effective action to combat corruption as well as regarding the vexed question of how to secure the repatriation of funds illegally or irregularly exported from the country by corrupt officials and leaders.

Papers before the Meeting:

LMM(99)21 - Good Governance and Corruption
LMM(99)36 - Good Governance and Corruption

AGENDA ITEM 2. FOREIGN AND INTERNATIONAL LAW ISSUES

(a) The Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters

Prior to the establishment of the World Trade Organisation (WTO) and the liberalisation of global trade practices, difficulties in enforcing foreign judgments in ordinary civil matters were already a familiar enough occurrence. This often depended on the existence of reciprocal arrangements between the two jurisdictions for the enforcement of judgments. Following the emergence of the WTO as the world's premier international trade regulator and the increase in trade globalisation, it is not

surprising that the pattern of trade flows should become the focus of the concern particularly of every trading nation and the impact this will have on the inevitable disputes that are bound to occur and how the rights and obligations that will arise under them are to be enforced.

The Hague Conference on Private International Law has been at the forefront of the development of the law pertaining to this area and the primary means of inter-state co-operation to harmonise and simplify the relevant rules of law. Ministers will have an opportunity to examine how recent developments can best be managed to ensure that the benefits of globalisation are not lost through inaction on the part of governments.

Papers before the Meeting:

LMM(99)3 - The Reform of Rules Governing Jurisdiction and the Enforcement of Foreign Judgments

LMM(99)33 - The Reciprocal Enforcement of Maintenance Orders

(b) The Implementation of International Conventions

(i) WTO Agreements

All countries including Commonwealth member countries form part of the wider international community. For all countries, whether they are big or small, the question whether or not to become party to multilateral treaties has to be decided and would depend on their appreciation of the full implications of the treaties concerned and the relevance of such treaties to their national interest. Ministers may wish to discuss some of the more urgent issues arising from the WTO Agreements given, in particular, the time bound provisions which severely restrict the time within which countries must take action in order to bring themselves within the regime of the Agreements.

Paper before the Meeting:

LMM(99)20 - The World Trade Organisation Dispute Settlement Mechanism

(ii) The United Nations Framework Convention on Biological Diversity 1992

Similarly, as with the WTO Agreements, the protection of the environment and its rich and biologically diverse resources has become a matter of global concern. Of concern for instance, is the protection of medicinal plants and the patenting and acquisition of intellectual property which has already engaged the attention of Commonwealth Ministers.

Paper before the Meeting:

LMM(99)30 - Access to Plant Genetic Resources under the Convention on Biological Diversity

(iii) The International Criminal Court

The idea of the establishment of a permanent international criminal court to exercise criminal jurisdiction over individuals, as opposed to states, has been on the agenda of the United Nations ever since the end of the second world war. This became an issue in international relations due to the conviction that major war crimes or crimes against humanity wherever they are committed should not go unpunished but was put to one side because of the cold war that followed the end of the second world war. The revival of the subject became possible, among other reasons, because of the virtual end of the cold war and growth of concern about the nature and extent of the threat posed by various forms of transnational criminality. A series of negotiations for the establishment of the court which started in 1994 and in which many Commonwealth member countries participated led to the adoption of the Statute of the International Criminal Court in July 1998 in Rome. The Statute will enter into force after it has been ratified by 60 states. Ministers may wish to take note of this and to consider what influence they can bring to bear to facilitate early ratification of the Statute in their respective countries.

Paper before the Meeting:

LMM(99)27 - The Rome Statute and The Need for Comprehensive Domestic Penal Legislation

AGENDA ITEM 3. HUMAN RIGHTS ISSUES

(a) *The Role of Law Ministers in Implementing International Human Rights: Human Rights Impact Assessment*

Respect for human rights is increasingly seen as an attribute of a well balanced development policy. It is therefore not surprising that in some well informed societies, concern should often be expressed for human rights impact assessment of major development projects to ensure their compliance with the human rights provisions of the constitution and other relevant legislation. It is also not uncommon for bilateral aid agreements to be conditioned upon a commitment to compliance with national human rights policies. Ministers may wish to consider ways in which human rights impact assessment could be employed to ensure that while it is used to advance respect for human rights, it also facilitates development.

Paper before the Meeting:

LMM(99)29 - Introducing the Concept of Human Rights Impact Assessment

(b) *Contemporary Issues affecting the Enjoyment of Human Rights*

(i) The Right to Information

The right to information derives from the Universal Declaration of Human Rights which states that everyone has the right to freedom of opinion and expression including the right to seek, receive and impart information (Article 19). It is a fundamental right which facilitates the attainment of other rights. Although this right is guaranteed by the constitutions of many countries, very few countries have passed specific legislation to advance the realisation of this right. However, some of the most progressive legislation and case law on the subject are found in Commonwealth countries. It is increasingly recognised that access to information is of critical importance for establishing an open and accountable government. In this context, Ministers may

wish to consider and endorse the Recommendations of the Commonwealth Expert Group on the Right to Know, including the Commonwealth Good Practice Guidelines on the Right to Information and to commend the same to Commonwealth Heads of Government for their consideration at the Meeting in November 1999.

Paper before the Meeting:

**LMM(99)24 - The Right to Know and the Promotion of Democracy and Development
LMM(99)24(Supplement) - Final Document – Promoting Open Government**

LMM(99)37 - Contemporary Issues Affecting the Enjoyment of Human Rights: The Right to Information

(ii) Human Rights and the Environment

There is little doubt about growing public awareness of the importance of the wholesomeness of the physical environment in which people live. What may be in doubt is the extent to which it is appreciated that there is a link between human rights and the environment and that damage to the environment may affect the enjoyment of human rights. Unprincipled development often giving rise to environmental degradation also plays a role in eroding the ability to carry out national commitments and obligations arising from international conventions. Ministers may wish to discuss ways in which they could contribute to the efforts of the international community in making the environment safer to enable a better enjoyment of human rights.

***Paper before the Meeting:* LMM(99)22 - Human Rights and the Environment**

(iii) Trafficking in Persons including the Commercial, Sexual Exploitation and Other Forms of Abuse of Women and Children

Commercial, sexual exploitation and abuse of women and children have been recognised as some of the most blatant violations of the rights of women and children. The problem is rooted in both culture and poverty in most cases. It is a multifaceted problem requiring an integrated approach and collaboration by many different

players to deal with it effectively. Ministers may wish to examine the means that have been identified for addressing this phenomenon with a view to collaborating with others concerned about combating the problem effectively.

Paper before the Meeting:

LMM(99)12 - Proposed United Nations Convention Against Transnational Crime

LMM(99)28 - Trafficking in Persons: With Special Reference to the Commercial Sexual Exploitation and Abuse of Women and Children

(c) Violence against Women

No discussion of the fundamental values of the Commonwealth would be meaningful unless it included a discussion of the human rights of women. Ministers have in the past paid attention to this and have considered various strategies and activities that could be adopted to address the problem of violence against women which has persisted. Among these strategies is the adoption of Action Plans and a comprehensive review of the justice system. Ministers will be invited again to consider and review their existing strategies for dealing with this apparently intractable problem as a special challenge and especially against the background of the 50th Anniversary of the Universal Declaration of Human Rights.

Papers before the Meeting:

LMM(99)10 - Combating Violence Against Women: The Commonwealth Experience

LMM(99)32 - Violence Against Women

LMM(99)38 - Criminal Justice Strategies in the Elimination of violence against women

(d) The Domestic Application of International Humanitarian Law

1999 is a watershed year for many reasons. It is not only the end of one era and the beginning of another, it is also among other things the 50th Anniversary of the Universal Declaration of Human Rights, the Geneva Conventions and the modern Commonwealth. The establishment of the International Criminal Court in 1998 has helped to focus the attention of the international community on the Geneva

Conventions and their Protocols which seek to ensure that certain heinous crimes such as genocide and other crimes against humanity are punished. While a number of international mechanisms have been developed to promote compliance with humanitarian law, it is states themselves which have the primary responsibility for implementation. The problem of translating into national law and action states' legal obligations under international law is a common problem and the implementation of the Geneva Conventions and Protocols is no different. This remains the major challenge facing international humanitarian law. Ministers may wish to discuss how their shared legal heritage could be harnessed to promote and facilitate the adoption of national legislation and other measures to implement the Conventions to which many Commonwealth member states are party.

Paper before the Meeting:

LMM(99)5 - Strengthening International Humanitarian Law at the National Level

AGENDA ITEM 4. LAW AND TECHNOLOGY ISSUES

The Legal Implications of Developments in Information Technology

(i) Electronic Commerce

The globalisation of trade has led inexorably to the rapid developments affecting worldwide communications and trade for which appropriate legal frameworks need to be put in place to facilitate electronic commerce. Many international initiatives are being taken in this regard in which the United Nations Commission on International Trade Law (UNCITRAL) is playing a leading role and many Commonwealth governments are already in the process of consulting widely within their jurisdictions to develop legislative frameworks for electronic commerce.

There is little doubt that international co-operation is a key issue in the development of legal and policy frameworks to facilitate electronic commerce. In the light of the increasing importance of the subject matter,

Ministers may wish to consider what practical steps and means of communication between relevant Commonwealth agencies could be taken to co-ordinate the approaches of members countries.

Papers before the Meeting:

LMM(99)7 - Legal Aspects of Electronic Commerce: Work by the United Nations Commission on International Trade Law (UNCITRAL)

LMM(99)8 - Legal implications of developments in information technology: technological aspects of electronic commerce

LMM(99)14 - Electronic Commerce: An examination of the issues facing Commonwealth Developing Countries

LMM(99)31 - Legal Infrastructure for Electronic Commerce - The Singapore Experience

(ii) Computer and Computer-related Crime

The potential for computers to facilitate as well as to undermine the legal system and cause incalculable damage has become real and not simply apparent largely because of the globalisation of almost every aspect of human activity. Considerable progress has been made in developing strategies for combating many of the dangers that accompany the increasing convenience of transacting business through the medium of the new technology. Ministers may wish to discuss recent developments in this important area in which, until recently, the law has tended to lag behind. This matter will be considered by Senior Officials at their Meeting which will take place in Trinidad before the Minister's Meeting and from which it is expected a paper will issue for the consideration of Ministers.

Paper before the Meeting:

LMM(O)(99)4 - Computer and Computer-related Crime

LMM(99)13 - Combating Money Laundering

**AGENDA ITEM 5. COMMONWEALTH
SCHEMES OF CO-OPERATION IN
THE ADMINISTRATION OF
CRIMINAL JUSTICE**

(i) The London Scheme

(ii) The Harare Scheme

Given the developments that have taken place in the area of extradition and mutual assistance in criminal matters generally, it is appropriate that Ministers should review and where necessary modernise the Schemes which deal with these respective subject areas. Ministers are aware that Senior Officials considered these two Schemes and related issues at their meeting in London in May 1998. Some aspects of the relevant issues were also considered at the Oxford Conference in August 1998. Both meetings made some recommendations which are being placed before Ministers for their consideration. These items will also be considered by Senior Officials at their meeting in Trinidad before the Ministers' Meeting which may result in additional papers being submitted to Ministers.

Papers before the Meeting:

LMM(99)6 - Provisional Arrest for the Purposes of Extradition: the Interpol Red Notice System

LMM(O)(99)3 - London Scheme for The Rendition of Fugitive Offenders: Proposals for Modernisation

LMM(O)(99)2 - The Sharing of Confiscated Assets: Possible Amendment of Article 28 of the Harare Scheme on Mutual Assistance in Criminal Matters

LMM(99)16 - Resource Implications of Mutual Assistance in Criminal Matters

(iii) The Balance between Individual Rights and Global Interests in International Co-operation to Combat Crime

The last decade has seen a rapid growth of co-operative measures of various kinds designed to address the urgent need of societies to combat serious crime. During this period there has also been an increased concern for the protection of the rights and liberties of the individual against unwarranted assault. The parallel development of these two streams has resulted in a need for governments and the courts to resolve the perceived conflict between the two legitimate objectives and interests.

The Commonwealth has a longstanding record of achievement in areas relevant to this issue. At the Kuala Lumpur Meeting, Ministers had expressed the belief that they had an important role to play in helping the international community to address issues concerning effective co-operation to combat serious crime in the modern technologically oriented world but also that it was necessary to strike a right balance between respect for individual rights and the needs of the wider social and global interests. Ministers may wish to discuss the role the Commonwealth can play in developing a vision which establishes principles to enhance both fundamental rights and international co-operation to combat crime in the new millennium.

Paper before the Meeting:

LMM(99)9 - The Balance between Individual Rights and Global Interests in International Co-operation to Combat Crime

AGENDA ITEM 6. OTHER ACTIVITIES OF THE COMMONWEALTH SECRETARIAT IN THE LEGAL FIELD

A paper will be before the Meeting reviewing the legal activities of the Commonwealth Secretariat. The review will be a comprehensive overview of the Secretariat's range of facilitative activities in the legal field since the Meeting in Kuala Lumpur in 1996. It will report on issues on which Ministers have expressed concern or specifically mandated the Secretariat to pursue such as money laundering, the development of a model draft Bill for implementation of the Commonwealth Scheme for the Protection of the Cultural Heritage, recent trends in the area of transborder insolvency among others. Ministers will be informed of activities of the Secretariat in collaboration with, or which complement the activities of, relevant Commonwealth and other international legal NGOs some of which, for the first time, are expected to attend the Meeting as Observers.

The Review will therefore provide information as well as papers on specific topics which will give Ministers an opportunity to comment on

these activities and to provide guidance as they deem appropriate.

Papers before the Meeting:

LMM(99)4 - Other Activities of the Commonwealth Secretariat in the Legal Field

LMM(99)34 - Record of Meeting of Senior Officials of Law Ministries, London, 26-29 May 1999

LMM(O)(99)6 - Protection of Cultural Heritage: Updated Comments on Draft Model Law with Recommended Amendments
LMM(O)(99)6A - Protection of Cultural Heritage: Supplementary Note

LMM(99)13 - Combating Money Laundering

LMM(99)13 - Annex B (Addendum) and Annex B (Addendum 2)

LMM(99)17 - UNCITRAL Model Law on Cross-Border Insolvency with a Guide to Enactment

LMM(99)18 - Computerisation and the Administration of Justice

LMM(99)19 - A Commonwealth Distance Training Programme in Legislative Drafting

AGENDA ITEM 7. ANY OTHER BUSINESS

Ministers may have before them for consideration matters which do not fall under any of the agenda items listed above. In particular, there will be papers before the Meeting for information which Ministers may consider raise issues of immediate concern and therefore merit urgent discussion.

A draft Communiqué will be placed before Ministers for their consideration and will be issued immediately thereafter.

Any other outstanding matters will be considered under this item, including a possible venue for the next meeting.

Papers before the Meeting:

LMM(99)11 - Commonwealth Fundamental Values - the Legal Enabling Environment for the Not-For-Profit Sector

LMM(99)12 - Proposed United Nations Convention Against Transnational Organised Crime

**LMM(99)15 - Overcoming Barriers to
Effective Law Revision**

**LMM(99)25 - The Commonwealth Working
Group on Traditional and Complementary
Health Systems: Paper by the Intellectual
Property Sub-Group**

**LMM(99)26 - The Treatment of Refugees,
Illegal Immigrants and Asylum Seekers in
the Context of National Obligations under
International Law**

Commonwealth Secretariat
Marlborough House
London SW1Y 5HX

May 1999

Good Governance Issues

**STRATEGIES FOR CONSOLIDATING AND ENFORCING THE
FUNDAMENTAL POLITICAL VALUES OF THE COMMONWEALTH**

ACCESS TO JUSTICE – THE RULE OF LAW AND THE LEGAL SYSTEM

Paper by Professor A.W. Bradley¹

1. National constitutions and treaties concerned with human rights (such as the International Covenant on Civil and Political Rights) are based on two assumptions: (a) that all persons within the jurisdiction concerned must be able to benefit from human rights provisions; and (b) that national courts have a role to play when individuals suffer action that erodes or ignores their human rights.² Under many Commonwealth constitutions, the High Court or Supreme Court has a special responsibility for protecting human rights, including a power to provide appropriate relief for breaches of such rights even if this goes outside the usual remedies available from the court.

¹ Emeritus Professor of Constitutional Law, Edinburgh University, of the Inner Temple, barrister.

² ICCPR 1966 Article 14(1): "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ..." American Convention on Human Rights 1969, Article 8(1); and Article 25: "Everyone has the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention" . African Charter on Human and Peoples' Rights 1981, Article 7(1): "Every individual shall have the right to have his cause heard. This comprises: [a] the right to appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ..." See the Indian Constitution, Part III, especially Article 32(1): "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed." and the Constitution of Jamaica, sections 18 [provisions to secure protection of law] and 25 [enforcement of protective provisions].

2. These constitutions also provide for the independence of the national judiciary. The Latimer House Guidelines for the Commonwealth on parliamentary supremacy and judicial independence (adopted on 19 June 1998) sought to promote an effective relationship between national legislatures and the judiciary based on mutual respect for the constitutional functions of each institution. Amongst the guidelines there adopted was that

"People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed".

3. At Bangalore, between 29 June and 3 July 1998, a workshop on access to justice organised by the Commonwealth Secretariat was attended by participants from six Commonwealth countries in the Asia region and from diverse professional backgrounds. A workshop on the same theme had earlier been held in Kingston, Jamaica from 30 March to 3 April 1998 for participants from Caribbean and Pacific jurisdictions. These workshops sought to identify the reasons why, despite the crucial importance of access to justice, it is a complaint from very many jurisdictions that individuals and groups are excluded from access to the courts and the legal system. Such exclusion is in itself a breach of a fundamental right; it also deprives those excluded from seeking judicial protection for other fundamental rights that the national constitution affords to them. Indeed, the implications of exclusion go further than this, since those excluded are not merely deprived of special constitutional protection for their human rights; they are also at risk of being excluded from the benefits of living in a society that has a legal system. The effect of exclusion at the extreme is that individuals cannot by recourse to due process of law protect themselves as citizens, as consumers and as employed persons, as owners or possessors of their homes or other resources, and as family members: they cannot by legal means prevent themselves and their families from being exploited, nor their physical environment from being ravaged and polluted.

4. The Bangalore workshop in 1998 identified the causes of exclusion from access to justice as including status, poverty, gender discrimination, ignorance, language, delay, high cost of legal services, inadequate and outdated procedures, lack of adequate training for justice personnel (including the police), geographical and structural impediments. Some causes of exclusion derive from factors that exist outside the legal system, such as issues of infrastructure, geography and level of economic development, resources for education and social structures within the community. Other causes of exclusion derive directly from the legal system itself:

- the mystique about the law fostered by some lawyers;
- the complexity or obscurity of legal procedures;
- the high cost of contentious litigation;
- the failure to ensure that legal services are available to all persons;
- the frequent lack of legal aid and assistance that might to some extent redress economic inequality in society;
- a failure to reform substantive rules of law;
- procedures and rules of evidence that are inappropriate or outdated;
- judicial attitudes that emphasise legal technicality for its own sake at the expense of justice or that tend to delay justice for no good reason.

5. Some of these 'legal' obstacles to access to justice are directly related to developmental issues. Thus the effectiveness of some social legislation depends on public awareness of the law and on advice and assistance for members of the public being available to those who need it, and this may be more likely to come from non-governmental organisations (NGOs) rather than the legal profession. Those communities affected by the greatest inequality or discrimination (resulting, for example, from ethnic, cultural or

gender-related causes) are the least likely to benefit from legal measures, or to be able to take advantage of legal procedures relating to the problems. By contrast, other obstacles result from failures of a professional or personal kind: inexperienced, untrained or overworked prosecutors; judges who grant unnecessary adjournments because they do not wish to deal with the substance of the case; lawyers who invoke inappropriate procedures from ignorance or as an excuse for time-wasting and piling up costs in the hope that the other side will go away – and so on.

6. To a greater or lesser extent, problems of this kind exist in all jurisdictions. As Professor Hazel Genn has commented,

“Concern about the ‘failure’ of the civil justice system is everywhere. It is argued that the courts are too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want”.³

In the same article, the author said:

“The perception is that the legal system is costly, time-consuming, frustrating and unlikely to deliver the desired objective”.

She also drew attention to the problem that there are

*“profound dysfunctional effects of legal process. Law can create and reinforce inequalities in society. Litigation can exacerbate and prolong conflict. Litigation can simply offer an outlet for vindictiveness rather than an opportunity for vindication. Regulation can be seen as burdensome.. ... Laws can be unjust in both design and effect”.*⁴

³ See her stimulating paper “Understanding Civil Justice” in Freeman and Lewis (ed), *Law and Opinion at the End of the Twentieth Century*, OUP 1997, p 155.

⁴ Ibid., pp 172 and 164.

7. Perceptions such as these must not be ignored. Even in a country which at a national level has an adequate supply of well-trained and experienced lawyers, this can conceal great inequality in access to legal services within local communities. It is never possible to assume that there are no unmet legal needs in society. In other jurisdictions, it may be immediately evident that the judicial system is not functioning particularly well, that many people have no realistic prospects of benefiting from it (for example, if there is no scheme for legal aid), and that the legal system is inadequately resourced.

8. Given the wide variations that exist within Commonwealth jurisdictions, it is worth considering whether there are any generally applicable principles by which the problem of access to justice may be approached. And are there practical measures that should be encouraged by governments, the courts and the legal profession that would help without requiring an impossible provision of new resources?

9. The workshops on access to justice held in Kingston, Jamaica and in Bangalore in 1998 could not have been expected to solve these intractable questions. Nonetheless, based on their proceedings it is possible to draw out various conclusions.

Need for Effective Rights

10. The starting point must be that human rights treaties and national constitutions are "intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective".⁵ Access to justice is both a human right in itself and also a gateway to enforcement of other human rights. It is also a fundamental condition of life under the rule of law.

Proper Functioning of the Courts

11. The scope for effective judicial protection of human rights is likely to be small if the legal system in general (including decision making by the courts in 'private law' matters; the executive's willingness to respect judicial

decisions that affect official power; and the law reform process) is not functioning effectively. Why should we expect judicial remedies for the protection of human rights (as a matter of public law) to be working effectively if ordinary judicial remedies are not available to those who have suffered wrongs such as breach of contract, commission of a tort or invasion of property rights? Is justice being properly dispensed when the legal system is prone to long delays, even in the trial of serious offences?⁶

Responsibilities of the State

12. The essential measures to enable the courts to exist and justice to be done by an independent judiciary must be a direct responsibility of the state. The court system needs to be established at several levels (national, regional and local), but more is required than court buildings, qualified judges and a trained court staff. There must be a legal profession capable of meeting the public's various needs for legal services, advice and representation. In a market economy, the provision of some legal services may be left to the market, since over time lawyers are likely to respond to the needs of those with resources to pay for them. But there are likely to be unmet needs for legal services if some means of ensuring public provision is not found.

Legal Aid Provision in the Interests of Justice

13. Both the Kingston and Bangalore workshops heard from participants about the great diversity that exists in different jurisdictions as regards the provision of legal representation to assist those who do not have the resources to pay for it. In some jurisdictions, there is an acute need for legal aid for those accused of serious (even capital) crimes and no answer has been found to the question of how to ensure legal assistance for those whose constitutional rights have been ignored and whose vulnerability has

⁵ *Airey v Republic of Ireland* (1979) 2 EHRR 305, 314

⁶ See eg *Sookernany v DPP of Trinidad and Tobago* (1997) 1 BHRC 348 (trial for murder ten years after the killing; held, that the national constitution did not include the right of a person accused of crime to be tried within a reasonable time).

been exploited by others. International treaties set minimum standards for entitlement to legal assistance, at least in criminal cases; thus the International Covenant on Civil and Political Rights entitles someone facing criminal charges "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it": Article 14(3)(d). Even in a civil case the interests of justice may require that legal representation be provided at public expense.⁷ Because of the extent to which justice in the common law tradition depends on the adversarial system, other problems giving rise to access to justice questions arise when in jurisdictions that provide for a full legal aid scheme, it is no longer possible to maintain provision at the same level and economies have to be made.

Judicial Independence and Public Accountability

14. The constitutional importance of an independent judiciary is undoubted, but judicial independence is not an excuse for a failure by the state to make proper provision for the structure of justice. Nor is judicial independence a reason why there should not be public accountability for the legal system and the functioning of the courts. The safeguard of an appeal to a higher court and the duty of a judge to formulate reasons for judicial decisions together impose on judges a mechanism of accountability. So too does the rule against bias, in particular the rule that no-one must be judge "in his own cause".⁸

⁷ In *Airey v Republic of Ireland* (1979) 2 EHRR 305, a married woman needed an order of judicial separation from the High Court to protect herself and her children from assaults and abuse by her violent and drunken husband. Held, by the European Court of Human Rights, that legal representation was necessary to ensure that she had a fair trial of her civil rights and obligations and to ensure due respect for her private and family life.

⁸ The example of a senior UK judge, Lord Hoffmann, in taking part in the Pinochet extradition appeal (in which Amnesty International were permitted to be a party) without declaring that he was a director of Amnesty International's charitable arm is a salutary one: see *R v Bow Street*

Difficulties of accountability may arise in other circumstances, such as when justice is delayed, as in the English case involving a judge who was held by the Court of Appeal to have delayed unreasonably in delivering judgment,⁹ or with other forms of judicial misbehaviour, as in the case of a Scottish sheriff who despite many warnings acted in an eccentric and wholly unreasonable way to those in his court and was dismissed for inability to perform his judicial duties.¹⁰

Judicial Training

15. While it is fundamental to judicial independence that the judiciary should be under no duty to account to the legislature or to the government for decisions that it has made in cases coming before it, judicial independence is not incompatible with requiring judges to receive training on appointment and from time to time thereafter. Indeed, the Bangalore workshop concluded that judicial training "is an essential element of the measures for ensuring the independence of the judiciary" and recommended that adequate arrangements including the establishment of judicial academies should be made so that all judicial officers might be appropriately trained, both on appointment and thereafter. One necessary warning note to be sounded here is that the control of judicial training must remain in the hands of the judiciary and not be taken over by politicians or civil servants. As well as the need for training in court-room techniques and judicial behaviour, there should be training from time to time on major new legislation that is likely to affect the conduct and decision of cases in court.

16. Training of judges should extend to international treaties and other instruments that may not have the full effect of law within a particular jurisdiction but which are likely to

Magistrate, ex parte Pinochet (No 2) [1999] 1 All ER 577.

⁹ *Goose v Wilson Sandford & Co*, Times Law Report, 19 February 1998.

¹⁰ See *Stewart v Secretary of State for Scotland* 1998 SC (HL) 81.

influence the outcome of relevant cases, whether involving human rights or other issues. Judges in many jurisdictions are increasingly likely to have to decide cases with a human rights dimension and need to understand the problems to which such cases give rise and (so far as may be reasonable) need to be familiar with comparable case-law from other jurisdictions.

Judicial Appointments

17. The Bangalore workshop emphasised that it is the responsibility of the state to ensure that the method by which the judiciary are selected for appointment is open and transparent. Various constitutional procedures exist that seek to ensure that proper judicial appointments are made, but these do not always go far enough in achieving a sufficiently open method of appointment.

Public Interest Litigation

18. The obstacles that confront underprivileged individuals and groups in securing access to justice are such that there is a case to be made for enabling a court to investigate a particular cause of injustice, even though the matter has been brought to the court in the public interest, and not by the plaintiff or applicant acting to defend his/her own rights or interests. Public interest litigation has (under the inspiration of Justices V R Krishna Iyer and P N Bhagwati) gone to its furthest extent in the Indian scheme of constitutional protection, where disadvantaged groups (including most recently child labourers and female employees)¹¹ may by a simple letter invoking what has been called the 'epistolary jurisdiction', that can lead to remedial orders being issued by the court to improve the position for the future. An experienced practitioner in this jurisdiction has written:

"The Indian PIL [public interest litigation] revolution is a unique response to a felt necessity. It has worked to make justice accessible to the masses, cutting across procedural and technical barriers. It has made fundamental rights

a reality for the victims of undeserved deprivation".¹²

The Resolution of Disputes outside the Courts

19. There is little value in enabling the public at large to have access to the ordinary court system if this will not give them access to justice in the full sense of that word. There is abundant evidence from many jurisdictions that: (a) there is not a single model of civil procedure that is suitable for resolving all disputes; cheap and practical procedures are essential for many small claims; (b) many disputes (e.g. in the fields of housing or employment) are suitable for resolution by bodies such as employment or housing tribunals, in which lawyers do not have a special privilege of representation; (c) in many cases a just and equitable outcome to a dispute can be attained through alternative methods of dispute resolution, such as arbitration, mediation and conciliation. There is a strong case to be made for regarding the ordinary civil courts as one amongst a whole spectrum of procedures, and also for enabling traditional civil procedures to benefit from the experiences of other methods of decision-making.

Scope for Commonwealth Standards and Support

20. Many of the matters discussed here affect the public's perception of the courts and the legal system within a particular jurisdiction. Detailed decisions as to how best to promote access to justice and judicial accountability can only be made in each jurisdiction, particularly as changes in existing arrangements may have resource implications. Nonetheless, within the framework for co-operation and mutual learning that exists within the Commonwealth, there is scope for a continuing initiative intended to promote continuing awareness of the problems and of the main ways of resolving them. Each Commonwealth jurisdiction may have its own laws, but questions of access to justice and judicial accountability arise in virtually every

¹¹ See *Mehta v State of Tamilnadu* (1997) 2 BHRC 258 and *Vishaka v State of Rajasthan* (1997) 3 BHRC 261.

¹² See Indira Jaising, "Public interest litigation: the lessons from India" in R. Smith (ed), *Shaping the Future: New Directions in Legal Services* (1995), chap 12, at pp 186-7.

jurisdiction. Continuing work in this field seems justified in respect of:

- (a) access to justice generally, the main obstacles and the most likely means of seeking to overcome them;
- (b) how to ensure that when an individual secures access to the court system, he/she has access to a system that does dispense justice;
- (c) questions of law reform and the replacement of archaic procedures by simpler and more cost-effective process;
- (d) *the provision of legal services to disadvantaged groups, individuals and localities, including legal aid schemes, and the role of voluntary organisations and paralegals;*
- (e) *the appointment, training and accountability of judges;*
- (f) *the use of alternative methods of dispute resolution;*
- (g) *an assessment of the legal system from the perspective of the citizen-consumer, rather than that of the legal practitioner, the magistrate or the judge.*

THE RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY

Memorandum by the Commonwealth Secretariat

The debate on the issue of the independence of the judiciary and how it could be guaranteed is a matter that has engaged the regular attention of Law Ministers in particular and the legal profession generally. There is general acknowledgment that in order to perform their duties effectively, the judiciary must be independent. However, perceptions differ as to the limits of judicial independence and what this implies in practical terms.

2. Recent developments touching upon the promotion of the fundamental values of the Commonwealth and in particular the implementation of the Harare principles have tended to focus attention on good governance which includes issues relating to the independence of the judiciary. These developments underline the centrality of the role played by an independent judiciary in society.

3. It is not surprising therefore that Law Ministers should have established a Working Group to study the subject and to report back to it at an appropriate time. A report of that Working Group is being presented to Law Ministers at the Meeting in Port of Spain. Simultaneously, a consortium of four Commonwealth non-governmental organisations have recently sponsored a joint colloquium which examined aspects of the subject of the independence of the judiciary and how it relates to the concept of Parliamentary supremacy.

4. The colloquium, sponsored jointly by the Commonwealth Lawyers Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates and Judges Association and the Commonwealth Parliamentary Association, was held in June 1998 at the Latimer House Conference Centre in Buckinghamshire, England and was attended by judges, Ministers and Members of Parliament, legal practitioners and academic lawyers from some 23 Commonwealth jurisdictions. The

colloquium produced a set of principles and guidelines which are referred to as the Latimer House Guidelines and which the colloquium sponsors recommend for adoption and implementation by the various bodies to which the recommendations are addressed. The Guidelines* which are annexed to this memorandum are accordingly presented to Law Ministers for their information and action as they deem appropriate.

* Not reproduced in this Record

GOOD GOVERNANCE AND CORRUPTION

Note by the Commonwealth Secretariat

INTRODUCTION

1. At their 1996 Meeting Commonwealth Law Ministers issued a Statement on corruption and called for the establishment of an advisory working group to advise and assist the Commonwealth Secretariat in the performance of tasks relating, inter alia, to the provision of advice, the identification of strategies designed to promote an anti-corruption culture and the development of model legal strategies.

2. Commonwealth Finance Ministers also considered the question of corruption at their 1997 Meeting. The Communiqué of that Meeting notes the importance of good governance including increased openness in economic decision-making and the elimination of corruption through greater transparency, accountability and the application of the rule of law in economic, financial and other spheres of activity. Finance Ministers called on the Secretary-General to convene an expert group to examine further the role of good governance in economic development and ways of effectively addressing corruption issues.

3. Following these ministerial meetings, Commonwealth Heads of Government issued the Edinburgh Economic Declaration which contains the following paragraph:

"We underscore the importance of good governance including increased openness in economic decision-making and the elimination of corruption through greater transparency, accountability and the application of the rule of law in economic, financial and other spheres of activity. We endorse the request by our Finance Ministers to the Commonwealth Secretary-General to establish an expert group to work on these issues."

COMMONWEALTH ACTION ON THE MANDATES

4. The Edinburgh Economic Declaration by Heads of Government, together with the concerns expressed by Law and Finance Ministers led the Secretary-General to conclude that the issue ought to be the subject of multidisciplinary consideration which takes into account the work of three Secretariat Divisions - the Legal and Constitutional Affairs, the Economic Affairs and the Management and Training Services Divisions. The work of each of these Divisions has significant bearing on the development of a Commonwealth strategy to address the achievement of good government through the elimination of corruption. The Economic Affairs Division is particularly concerned with questions of economic policy and management and to achieve transparency and accountability in economic decision-making. The Management and Training Services Division has, for many years, worked on public and private sector reform. Its public sector reform programme includes work with public service commissions which play a crucial role in developing and administering codes of conduct. The Division also works in the area of privatisation and has a new programme in the private sector which involves the development of corporate codes of conduct.

5. In response to the calls by Commonwealth Heads of Government, the Secretary-General convened the Commonwealth Expert Group on Good Governance and the Elimination of Corruption in Economic Management. The members of the Expert Group bring together a vast range of experience in dealing with all aspects of good governance and corruption and are regionally representative of the membership of the Commonwealth.

THE ROLE OF THE EXPERT GROUP

6. The Expert Group was tasked by the Secretary-General to:

- (a) examine the relevance of governance and corruption to economic development;
- (b) analyse the causes of poor governance and corruption;
- (c) recommend measures to improve governance by addressing issues such as the effectiveness of existing laws and other rules; the introduction of transparent decision making processes and the improvement of participation in decision-making processes;
- (d) recommend measures to combat corruption;
- (e) facilitate the sharing of experience, particularly between Commonwealth countries; and
- (f) examine the inclusion of governance and corruption issues in loan conditionalities.

THE WORK OF THE EXPERT GROUP

7. The Expert Group has prepared its report which is, of course, an independent report reflecting the views of the members of the Group. The Chairperson and members of the Group are nevertheless interested in hearing the views of Law Ministers and Finance Ministers before they finally present it to the Secretary-General for transmission to Commonwealth Heads of Government at their Meeting in Durban later this year. The Chairperson of the Group, Dr K. Botchwey, will be present at the Law Ministers Meeting in Trinidad and Tobago at the invitation of the Commonwealth Secretariat. His presence will enable him to present the Report of the Group to Ministers and to hear their views on the issue of how best the Commonwealth may deal with the issue. Ministers will wish to know that the Report will also be considered by Commonwealth Finance Ministers later this year.

8. The Expert Group, in addition to its Report, has prepared a document entitled "Promoting Good Governance and Combating Corruption - Framework for Commonwealth Principles". This document, which is based on

the Expert Group Report has been developed as a means of facilitating the recommendations of the Group. Subject to the views of Law Ministers, Finance Ministers and ultimately Heads of Government a statement of Commonwealth Principles may provide the background against which member countries can establish or enhance their national anti-corruption strategies and participate in pan-Commonwealth and global efforts to combat corruption.

POSSIBLE ACTION BY LAW MINISTERS

9. Law Ministers may wish to:

- (a) take note of the Report of the Expert Group which is **Annex A** to this paper and to express any views they may have on that Report. In particular Ministers may specifically wish to express a view on the issues raised in paragraphs 57, 58 and 59 of the Report which deal with the most appropriate means of evidencing and giving effect to the commitment of Commonwealth member countries to the concept of "zero tolerance" of corruption;
- (b) consider the Draft Framework for Commonwealth Principles which is **Annex B** to this paper and provide their advice on any changes they would wish to be reflected in this document;
- (c) advise the Secretariat, and specifically the Legal and Constitutional Affairs Division of their views on programmes which should, as a matter of priority, be the subject of work by the Secretariat and by Senior Officials of Law Ministries.

**REPORT OF THE COMMONWEALTH EXPERT GROUP ON GOOD GOVERNANCE
AND THE ELIMINATION OF CORRUPTION IN ECONOMIC MANAGEMENT**

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I. INTRODUCTION

1. The main focus of this Report is on corruption in economic management. Section II provides an overview of the nature of corruption, its different dimensions and appropriate responses to deal with the problems it poses. Sections III and IV set out the actions that are necessary at the national and international level, respectively, to combat corruption. The role of the Commonwealth is examined in Section V.

II. CORRUPTION: CAUSES, COSTS AND RESPONSES

2. Corruption manifests itself in various ways and it is useful to distinguish between personal corruption (motivated by personal gain) and political corruption (motivated by political gain). A further distinction can be made between individual corruption and organisational or institutional corruption. In the context of the State, corruption most often refers to criminal or otherwise unlawful conduct by government agencies, or by officials of these organisations acting in the course of their employment.

3. The significance of institutional corruption can be understood only if it is clearly distinguished from individual corruption. There are tendencies in all cases of corruption to individualise misconduct, and at the same time to institutionalise it. These two tendencies may appear to be opposites, but the latter tendency is also perpetrated by those accused of misconduct, either by excusing misconduct or by justifying it as an institutional privilege.

4. Corruption has become global in its scope, impact, and possible solutions. It is an increasing threat to the fabric of global society. As with drug trafficking, pollution, international terrorism and other serious crimes, the fight against corruption requires international co-operation.

5. While the problem of corruption is global, many actions to combat it have to be taken at the national level. There cannot be any effective action against corruption without a clear sense of national ownership of anti-corruption strategies. A new culture must evolve which is intolerant of corruption. Greater

information, education, empowerment of people, and above all, strong political leadership committed to effective action are essential to create and sustain such a culture. Smaller and more efficient government, fewer discretionary powers in administration, greater reliance on diversity and private initiative, a free press and other media, well-paid civil servants appointed by merit, democratic processes in political parties and supremacy of the rule of law, are all important factors that serve to promote good governance and reduce corruption.

6. Forceful national action to combat corruption is possible in all countries. The objective should be to attain “**zero tolerance**” for all types of corruption. This attitude must permeate value systems, current policies and legislative frameworks. While it may be unrealistic to expect an immediate or total elimination of corruption, the principle of “zero tolerance” should be adopted from the outset, demonstrating a serious political commitment to pursue the fight against corruption. The implications of such a commitment are spelt out in this Report. National efforts should be reinforced with appropriate support at the international level. Corruption originating within national boundaries and that resulting from international transactions should be fought with equal vigour.

7. Actions taken should focus not only on corrupt activities but also address their underlying causes. Since these differ from country to country, national circumstances should be taken into account in combating corruption. It is also important to recognise that corruption is not necessarily associated with any particular type of political/social system, form of government, or level of economic development.

8. Although the political barriers to change may sometimes seem formidable, governments can often be expected to respond to public concerns and to reasoned argument. However, in extreme cases, where corruption is so pervasive and deeply entrenched, the adoption of a vigorous “zero tolerance” approach will be difficult. In such situations, the achievement of any progress may depend upon fundamental political change brought about by internal democratic forces.

transparency of economic policies and administrative reform can contribute powerfully to the fight against corruption as well as enhance governance. More generally, it is vital to achieve greater transparency and accountability in conducting all government business in order to instill public confidence in public institutions.

14. Inappropriate controls that encourage the exercise of undue political or administrative discretion create rent-seeking opportunities as do inappropriate pricing policies which encourage the development of parallel markets. Excessive levels of taxation increase the incentive for tax fraud and the bribing of tax authorities. Poor fiscal management and inadequate government personnel policies (in areas such as recruitment, promotion and remuneration) result in declining efficiency in the public sector. Improvements in economic and fiscal management as well as in personnel management policies are therefore key components of a strategy to enhance government capacity.

15. However, even when inefficient economic controls are eliminated and excessive tax rates are reduced, governments will still engage in a large number of economic activities involving transactions with the private sector. These range from taxation, government procurement of goods and services and delivery of public services, to transport, health and environmental regulations. Even if the reduction of rent-seeking opportunities reduces the scope for corruption, the normal range of government business leaves ample scope for the bribery of public servants. Furthermore, the transition to reform may itself pose difficult challenges to governments and create new incentives for corrupt behaviour. The process of privatisation, for example, creates opportunities for illicit gains, if the transfer of assets takes place in a non-transparent fashion. In designing and implementing economic policy reforms, it is also important to encourage transparency in business practices and establish level playing fields for domestic and foreign investors. Corruption in the private sector can cause as much harm to the health of the economy as corruption in the public sector. It must also be recognised that the distinction between the two sectors is becoming increasingly blurred.

16. *The diversity of corruption:* In some societies, corruption exists but is not pervasive

enough to significantly affect resource allocation decisions. In other societies, corruption has greatly distorted government programmes and undermined the effectiveness of public interventions. Corruption can occur at all levels, from pay-offs at the top of the system, to "petty corruption" by way of bribes to local officials for the delivery of services and to evade regulations. In some cases, the gains from corruption may be siphoned off to foreign bank accounts, while in other cases proceeds are "recycled" in the local economy. However, despite its diversity, corruption always involves social and economic costs, erodes the credibility of public institutions and engenders public cynicism.

17. *Corruption and political systems:* While the inter-relationship between corruption and the broader governance agenda must be recognised, any facile conclusions regarding the relationship between corruption and any particular set of political institutions should be avoided. There are many examples of corrupt practices that feed upon multi-party political processes, just as there are authoritarian regimes which have relatively "clean" records of economic management.

18. *The need for national anti-corruption measures:* The fight against corruption should go hand in hand with more general efforts to improve economic governance. However, success in more general reform efforts should be seen as neither a necessary nor sufficient condition for eliminating corruption, nor should the difficulties to be overcome in implementing broad-based reforms be used as an excuse for delay in tackling corruption. Furthermore, even in an otherwise well ordered system of governance, corruption can thrive in the absence of effective vigilance and enforcement. Sustained action is required at two levels to address the root causes of corruption and tackle all its manifestations:

- systemic reforms, which target the underlying weaknesses in policy, administration and politics, and create an environment conducive to the elimination of corruption; and
- specific, focused national anti-corruption strategies.

19. In mounting a serious national anti-corruption programme, the first step of securing a strong commitment at the highest political level to fight corruption is often the most difficult hurdle. When corruption is widespread, particularly where it involves the political establishment, this may involve serious political risks, despite popular support for cleaner government. One solution may be an amnesty for corrupt acts committed in the past, combined with an explicit code of conduct, spelling out minimum standards of universal applicability, which will be enforced vigorously from the start of the new anti-corruption programme.

20. **Popular mobilisation against corruption:** The most potent force in the fight against corruption is the widespread resentment of corrupt practices and popular support for firm action. Anti-corruption programmes need to be designed to meet the expectations of citizens and with public participation. They are likely to be more effective when they are built on the foundation of popular empowerment, nationally owned and designed to meet national circumstances.

21. **The private sector and civil society:** The concept of good governance extends beyond government. Although an anti-corruption strategy usually focuses initially on preventing the use of public office for private gain, support could be enhanced if the dangers of unethical practices in the private sector and non-governmental institutions are more widely appreciated. Corrupt behaviour (e.g. by corporate purchasing agents, or in job recruitment) can be as destructive of the performance of businesses or of non-governmental organisations (NGOs) as it is of government. Private businesses, co-operatives and NGOs all have a stake in combating a culture of corruption. Moreover, even where governments are less than enthusiastic in tackling corruption, popular support and the agencies of civil society can still be mobilised in support of an anti-corruption agenda.

22. **The need for an international response:** There is a strong case on a number of grounds for international co-operation in fighting corruption:

- countries embarking on an anti-corruption strategy can learn from the

experience of those that have already had some success in reducing corruption; furthermore, international co-operation can reinforce national efforts to combat corruption;

- in a globalised economy, transactions across borders are of increasing importance, but are often difficult to monitor by national authorities acting alone;
- international transactions may sometimes provide a conducive environment for corrupt practices, where actors are willing to engage in dubious practices abroad that would be unacceptable at home; and
- international financial transactions provide opportunities for the laundering of financial gains from corrupt practices.

23. Given the global nature of corruption, there should be no double standards. Anti-corruption measures should apply equally to rich and poor countries. They should target those who are directly guilty of corrupt behaviour as well as those who facilitate corruption (e.g. by providing money laundering opportunities). They should penalise both bribers and bribees (i.e. those who offer, as well as those who accept, bribes).

III. NATIONAL ACTIONS

24. Under the over-arching principle of “zero tolerance”, specific measures are required to *prevent* corruption, *enforce* laws against it and *mobilise public support*. These should be the sinews of coherent national programmes to achieve good governance and combat corruption. A general approach to the formulation of such programmes is set out below, but specific programmes reflecting national realities and circumstances will be required to translate such a general approach into practice. The Expert Group therefore proposes that each Commonwealth government should develop its own national good governance and anti-corruption strategy, which should identify clear objectives, effective instruments, realistic timetables and credible implementation and monitoring mechanisms.

25. The Commonwealth should render technical assistance in the development of such strategies and promote exchange of experience in close collaboration with UN programmes, the Bretton Woods Institutions, the Organisation for Economic Co-operation and Development (OECD), Transparency International and other relevant agencies. In designing national strategies, care should be taken to respect different cultural, moral, political and social environments, provided these are not inconsistent with the objective of achieving "zero tolerance". The initiative for strategy development and the choice of goals should lie with national authorities and not be externally imposed.

26. National strategies should encompass both the public and private sectors. Corruption in the private sector (e.g. in the operation of financial markets) can be as corrosive to economic performance as public sector corruption. Moreover, public sector corruption typically involves actors from the private sector. A national culture opposed to corruption requires high standards of behaviour from all sections of society, but especially from political leaders.

27. Effective national campaigns against corruption need support from the highest levels of government and implementation of the strategy requires high-level co-ordination. Hence, an important first step in developing national strategies is for the political leadership to recognise that corruption in both the public and private sectors has heavy economic and political costs and that, no matter how deeply embedded it is, it is possible to adopt effective measures against it, provided there is sufficient political will.

The Main Building Blocks

28. While the content of national strategies will vary, depending on national circumstances, there are three main building blocks for effective strategies: prevention, enforcement and the engagement of civil society.

29. *Prevention* should address underlying causes of corruption, particularly those arising from failures of public policy and weaknesses in political and administrative institutions.

Economic policy reform to reduce rent-seeking opportunities; civil service reform to improve the effectiveness and probity of the public service; reforms in tax policy and administration; tightening of controls over public expenditure; and reforms in the political system, are all important ingredients of a prevention strategy.

30. An important contribution to prevention can be made by strengthening transparency in economic management, through:

- full disclosure and examination of government finances, especially by parliamentary scrutiny;
- strengthening of parliamentary public accounts committees;
- the use of open competitive bidding for government contracts;
- publication of full information on the reports of government auditors and evaluations of development projects;
- media access to information on government finances;
- full disclosure of assets by government leaders and their families;
- setting international financial agreements before the legislature (including arms procurement) and establishing clear guidelines for fiscal discipline; and
- establishment of mechanisms for public exposure where the above do not occur.

31. Prevention should concentrate not only on the behaviour of public officials, but also aim to affect the behaviour of those who offer bribes. A code of practice for private business should spell out what is a corrupt practice, and what is legitimate business promotion. Acceptable practices in relation to business sponsorship of public activities (e.g. sports and social events) and to the employment of public officials as consultants or in other capacities, while in office and after retirement, need to be spelt out. As with all regulation, prevention is more likely if lawful behaviour is widely accepted as the norm.

32. **Enforcement** involves firm action against corrupt behaviour at all levels. Since effective enforcement is dependent upon the competence and honesty of investigators, prosecutors and the judiciary, it is important to allocate sufficient resources to ensure the probity and effectiveness of these agents. The rule of law should apply to economic transactions, with equality and impartiality in the application of the law and in access to legal remedies. Any ambiguities in laws and regulations that create incentives for corrupt behaviour should be removed. Where the integrity of legal institutions has eroded, action to restore their credibility must come early in the implementation of a national anti-corruption strategy.

33. **Mobilisation of popular support** through the engagement of civil society and popular opinion is important in changing public mores, as well as in exerting pressure on governments (at both national and local levels) to take the necessary actions to prepare and implement anti-corruption programmes. Perhaps the greatest potential force for reforms to combat corruption stems from public resentment of corruption and the burdens it places on citizens. This can provide an important basis of political support for anti-corruption actions, and challenge vested interests. Popular pressures can ensure accountability for the management of public resources, including accountability through the appropriate legislative bodies to the general public and, where external resources are concerned, to the international community.

34. Popular opinion can be activated and focused through the educational impact of the media and through the activities of NGOs; in particular:

- the freedom of the press and of other media contributes to public awareness of corruption and its consequences;
- the commitment of governments to freedom of expression and association is therefore a critical factor in creating conditions which are conducive for improving governance and eliminating corruption; and
- in situations where the media itself may be corrupt or susceptible to corruption,

adherence to high standards of integrity in journalism should be promoted, along with the development of professional well-informed media, through self-regulation and training.

35. NGOs concerned with governance and corruption (e.g. Transparency International) should be encouraged in their efforts to create a presence and raise awareness at the national level. Governments should be encouraged to recognise and respect the positive contribution of national NGOs which campaign on corruption issues.

Key Reforms in Governance and the Fight Against Corruption

36. While action against corruption should not await the implementation of other complex reforms, parallel actions to improve economic management, administration and the political process could greatly improve the prospects of success in combating corruption. Key reforms which would contribute to the fight against corruption include:

- **economic reforms**, which reduce rent-seeking opportunities, through the reduction of bureaucratic controls, simplification of economic regulations, and the removal of policy-induced scarcities (which create parallel markets and incentives to bribe to gain access to scarce goods and amenities);
- **fiscal reforms**, which increase the efficiency of the public sector, thus permitting adequate funding of public services;
- **reform of subsidised public lending programmes** which readily become a vehicle for corruption. This may be achieved by greater transparency in the operation of the programmes, by changing and strengthening the criteria for entitlement and reducing reliance on political/administrative discretion in their operation;
- **civil service reform**, which restores the morale and integrity of the public service through merit-based recruitment and promotion, and reduces the size and

tasks of public administration to levels consistent with available fiscal resources, thus making it easier to enhance emoluments and reward good performance;

- **legal reform**, which commits sufficient resources to the judiciary, investigative and prosecution services, ensures the autonomy of the judiciary from political interference, and demands high standards of honesty and commitment in recompense;
- **local government reforms**, for the purpose of empowering people to combat corruption; ownership of national action would not be complete without the empowerment of people and strengthening of civil society;
- **monitoring of privatisation** to ensure that the transfer of public assets does not create opportunities for the illicit accumulation of wealth;
- **opening up** the administrative and political systems to greater public scrutiny through parliamentary enquiries and freedom of information provisions, with the aim of bringing public pressure to bear on political and economic decision-makers to maintain high standards in public service;
- **reforms** to reduce the need for political parties to be dependent on contributions from commercial sources, special interest groups and international sources which can distort these parties' domestic concerns; and to limit the size of private contributions as well as make public the sources of party funding;
- **capacity building** to enhance the capacity of core economic management institutions (e.g. ministries of finance, revenue collection agencies and auditor-generals' departments).

37. Some aspects of economic reform, while ultimately having the potential to reduce corruption, can create additional opportunities for misappropriation of public resources during the implementation phase. Thus, privatisation

programmes, intended to reduce the scope for public sector rents, have themselves provided opportunities for corrupt public servants to illicitly transfer public assets. Fiscal stabilisation, aimed at reducing disequilibrium in the economy, has often resulted in reductions of the real income of civil servants, consequently increasing pressures on them to seek illicit incomes. The introduction of multi-party politics, intended to promote pluralism and place governments under tighter public scrutiny, also increases the need for politicians to seek funds.

38. National anti-corruption strategies should define a longer-term programme, with some decisive short-term time-bound actions to ensure that there is credibility and continuity in the process of change. There is a need to move on a number of fronts simultaneously, but at varying speeds, as some reforms are easier to implement than others. In cases where corruption has fed on poor economic policies and fiscal imbalances, progress will be easier when certain basic economic reforms have been put in place, as a prelude to administrative reforms and the launching of an anti-corruption campaign. In other cases, political reform may have to be the first step in order to increase the likelihood of the political leadership finding the political will to sustain a national strategy.

39. Although the speed with which a meaningful programme can be formulated and implemented will vary, all governments should be encouraged to commit themselves to the principle of "zero tolerance" and to institute the first steps to formulate comprehensive and realistic programmes.

Role of the Judiciary and Legal System

40. The legal system is central to the effective implementation of a national anti-corruption strategy. The rule of law implies that legally defined procedures govern public economic management, rather than political favouritism or personal connections. The independence and integrity of the judiciary is of vital importance. Most Commonwealth countries formally guarantee the independence of the judiciary from political control, but a key factor is the integrity of the members of the judiciary. Where the judiciary is corrupt, a crucial first step in a national strategy is reform which restores its efficiency and integrity. This may require

restructuring, training and committing sufficient funds to compensate members of the judiciary adequately and to provide them with the means of operating effectively. Similarly, the quality and integrity of those public agencies responsible for investigating corruption and prosecuting offenders needs to be ensured. Public prosecution should be supplemented by broadening access to the courts, with individuals and community groups being given the right to take legal action in the public interest.

41. Critical components of a strategy of legal reform should include:

- ***entrenching an independent judiciary:*** Commonwealth Law Ministers, at their 1996 meeting, recognised that the protections enjoyed by judges, including financial independence and security of tenure, were an important defence against improper interference. However, judicial independence does not imply a lack of accountability, as judges should act properly and in accordance with their office, and there should be procedures to discipline or dismiss them if they do not. Such procedures should be transparent and publicly administered by institutions which are themselves independent and impartial;
- ***court systems:*** An efficient court system is an essential component of an effective governance and anti-corruption strategy. The courts of all countries are, however, overburdened. A court system which is able to dispense unbiased and corruption-free justice requires the implementation of proper case management systems to minimise delay and ensure equal access to justice. Access to justice ought not to be for sale. Hence, it is important to ensure that court lists are not influenced by payments made to court staff, who should be rigorous in their adherence to anti-corruption codes of conduct;
- ***detecting and dealing with corrupt conduct:*** Many countries have enacted laws which permit the investigation of persons whose apparent assets exceed their known lawful sources of income. This permits relevant authorities (often

anti-corruption commissions) to require persons to explain the sources of their assets and where the assets cannot be attributed to lawful acquisition, the person can be charged with a corruption offence. In addition to laws which criminalise corrupt conduct, laws which permit the confiscation of the proceeds of corruption are an essential weapon in the fight against corruption. It is also important to have legal provisions to protect witnesses and whistle-blowers in cases involving corruption;

- ***corporate liability:*** Increasingly, Commonwealth countries are introducing the concept of corporate criminal liability, where corporations are involved in particular forms of criminal conduct or are used to facilitate or disguise criminal conduct;
- ***non-criminal legal remedies in corruption cases:*** Effective anti-corruption legal strategies cannot rely on the criminal law alone. Civil, administrative and regulatory laws all have a place in a comprehensive strategy:
 - civil law can provide effective remedies, but the civil law must be accessible and provide adequate protection to citizens' interests. Also, to permit the bringing of a civil law action there must be an identifiable victim or plaintiff.² The civil law can also be used, to supplement the criminal law, to facilitate recovery of assets from

² Citizens can suffer injury where they: (1) are unjustly excluded from public tendering procedures; (2) lose legitimate earnings; or (3) are forced to pay higher prices as a result of corruption. Among the victims of corruption are unsuccessful competitors and state agencies. Members of associations could also be victims and, hence, class actions may be available in certain cases such as consumer or environmental protection organisations. The damages which may be claimed in an action based on corruption could relate to pecuniary and non-pecuniary loss and may include punitive or exemplary damages in certain cases.

a public official who has benefited from the wrongful exercise of a public function (e.g. in cases where public officials purchase land in the knowledge of prospective rezoning proposals which would increase the value of land);

- in the sphere of regulatory law reform, laws relating to unfair competition and to the control of monopoly trading could be useful to fight corruption. Provisions which incorporate proper processes including the application of the rules of natural justice could permit: the exclusion of persons (natural and legal) from public tenders (blacklisting); withdrawal of licences to conduct business; prohibition of anti-competitive acts; and disqualification of company directors;
- the Commonwealth principles (adopted by Law Ministers) on Co-operation between Business Regulatory Agencies have the potential to assist in the resolution of cases involving corruption which are dealt with under the laws relating to business regulation (rather than under the criminal laws);
- in cases involving petty corrupt practices, an appropriate remedy (certainly in "first offence" cases) could lie with disciplinary bodies such as public service commissions, rather than action through the courts. The rights of employees could be protected by appropriate appeals procedures. Administrative tribunals with jurisdiction to review decisions made by public officials and to order rectification in appropriate cases could also offer redress in cases involving abuse of office. Their mere existence places moral and professional pressure

on public officials to act transparently and in good faith.

IV. INTERNATIONAL ACTIONS

42. In many instances, especially where corruption transcends national boundaries, national anti-corruption measures need to be reinforced with support at an international level, including co-operative law-enforcement initiatives against corruption (e.g. in the area of money laundering). There is a need for greater consultation on the international aspects of corruption on a genuinely multilateral basis, involving developed and developing countries, and a careful assessment of the degree to which international anti-corruption conventions designed to meet the needs of developed economies, also correspond to the requirements of developing economies. Most developing countries, with the exceptions of those who are members of the Organisation of American States (OAS), are not parties to the existing conventions. All developing countries should be able to participate effectively in the international campaign against corruption. This is particularly important in view of the increasing proportion of procurement under multilateral assistance which is sourced in developing countries, and the growing volumes of South-South trade and investment.

43. A number of international agencies have launched initiatives to address corruption and governance issues. In 1996, the United Nations (UN) General Assembly adopted a resolution on corruption, together with a Code of Conduct for Public Officials, which was intended to guide member states in their efforts against corruption. The following year, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention) was signed. It has since entered into force in 12 of the 34 countries that have signed it. Other important initiatives include the Inter-American Convention against Corruption³, the Council of Europe's recent Criminal Law Convention on Corruption⁴, and

³ Adopted by the Organisation of American States in March 1996

⁴ The Council of Europe had earlier developed 20 guiding principles which were adopted by the Council of Ministers in November

the programmes for combating corruption adopted by the Bretton Woods institutions.

44. The World Bank has heightened its defences against corruption in its operations through new anti-fraud and corruption provisions in its procurement guidelines, improved disbursement provisions and strengthened financial auditing arrangements. The International Monetary Fund (IMF) is taking a more proactive approach to eliminate the opportunity for fraudulent activity and in 1997 adopted new guidelines for promoting good governance.⁵ In addition, both the World Bank and the IMF are providing assistance to national authorities in designing measures to strengthen the financial integrity of government institutions. Initiatives have also been taken in the private sector. For example, in 1996, the International Chamber of Commerce adopted a report that proposed strict rules of conduct for corporate self-regulation.

45. One of the major goals of existing international instruments on corruption has been to ensure a "level playing field" for international businesses competing for business in developing countries (e.g. through the OECD Convention). There are gaps in the coverage of these initiatives and some continuing weaknesses in the practices of international and national financial institutions which fund aid and trade. Areas in which further effort is required include:

- **funding of political parties** - the OECD Convention does not cover acts of bribery in relation to foreign political parties and it is not clear to what extent it might cover bribery of political party officials.⁶

1997; in addition to the Criminal Law Convention on Corruption, a monitoring agreement is in place. It has also examined the role of the civil law (as opposed to criminal or administrative law) in combating corruption, and drafted a model code of conduct for public officials

⁵ "The Role of the IMF in Governance Issues: Guidance Note", was approved by the IMF Executive Board in July 1997

⁶ The OECD Working Group on Bribery in International Business Transactions has under consideration five areas in which there may be gaps in relation to the criminalisation of the

- **laundering of the proceeds of corruption** - provisions relating to the laundering of the proceeds of corruption could be strengthened;
- **offshore financial centres** - safeguards are needed to prevent them from being used to harbour the proceeds of corruption;
- **balance in accountability** - aid and international lending agencies need to strengthen their procedures and rules in order to increase the internal scrutiny and accountability of their staff;
- **shared responsibility for outcomes** - there should be a more open acknowledgement by donors and international financial institutions for their share in the responsibility for programmes which they help design and for the policy advice they provide;
- **lack of balance in exposure** - at present, the main efforts (e.g. Transparency International's corruption index) to rank performance in relation to corruption seek to rank countries. There is no comparable effort to rank international corporations. In general, there is a need to direct the spotlight on the behaviour of these corporations.⁷

46. It should be noted that developments currently underway may fill some of these gaps. The OECD's work on money laundering is at an advanced stage. The IMF and the World Bank are moving towards greater openness in their negotiations with their members. Both institutions and other donors have strengthened their financial and technical assistance in

bribery of foreign public officials: bribery of foreign political parties, payments in anticipation of a person becoming an official, the money laundering of bribes, the role of foreign subsidiaries in bribery and the role of off-shore centres.

⁷ Transparency International is currently developing the methodology for an Active Bribery Index, which would evaluate countries on the basis of their companies' propensity to bribe.

support of national efforts to improve governance and combat corruption.

47. Further movement in the direction of publishing the details of key international financial negotiations and mission reports by the international financial institutions would be welcome, as part of a process of increasing transparency that generates greater public information about policy issues and programme formulation. Governments should take advantage of the new openness to make maximum public disclosure of the contents of international financial negotiations and agreements. To increase public participation and national ownership of reform programmes, key documents such as Policy Framework Papers, Letters of Intent, and Letters of Development Policy should be published by the borrowing countries and widely disseminated, unless there are valid reasons for non-disclosure.

48. The results of monitoring and of operational evaluation by aid agencies and national governments should get maximum public exposure. The wider public dissemination of national and international reports on corruption should be encouraged, to increase public knowledge of the extent of corrupt practices and possible avenues for reform.

49. In line with its 1997 guidelines, the IMF should be even-handed by raising governance and corruption issues in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes. Measures to improve governance and reduce corruption should be domestically owned and rarely imposed externally as conditions for financial support. When such conditionality is introduced by international financial institutions in exceptional cases, this should be consistent with their mandates. In designing conditionality on governance and corruption issues, the IMF and the World Bank should take full account of a country's capability to implement reforms and define realistic time schedules. "Floating tranches", which have been recently adopted in several World Bank structural adjustment loans, could be used more widely to achieve more effective timing and sequencing of reform measures without holding up entire programmes. To promote national ownership of reforms, donors should agree with governments on the objectives to be achieved,

identify alternative paths to those ends, but leave the route to be selected to the government⁸

50. The work of Transparency International in monitoring global corruption is to be welcomed. Working with national governments, Transparency International is promoting "integrity workshops" which will help raise consciousness about corruption issues. Its proposals to collect data on public procurement costs of selected generic items also warrant support. However, the Expert Group does not believe that Transparency International's Corruption Perception Index presently provides a reliable and comprehensive guide to relative country performance. The Index should be improved by increasing its comprehensiveness, extending the data sources on which it is based, and providing some indication of trends over time. Monitoring should also be extended to include multinational corporations. Other credible international NGOs which are involved in monitoring corruption and campaigning against it also deserve international support.

51. The international arms trade is a potent source of corruption, surrounded by secrecy and fuelled by illicit payments to middlemen. In addition to the need to control the arms trade in furtherance of international peace and security, much greater efforts are required to reduce corruption in this sphere.

52. Two actions would help to achieve this:

- a new code of conduct covering the international trade in arms, requiring full disclosure by the parties involved (the recipient government, the arms suppliers and their governments)⁹; and

⁸ As recommended in the Report of the Independent Evaluation Group on the IMF's Enhanced Structural Adjustment Facility, January 1998.

⁹ This should take account of recent initiatives which include the Code of Conduct on Arms Exports adopted by the European Union's Council in May 1998 (the Code is to be reviewed annually and may be progressively strengthened); and the draft International Code of Conduct for the arms trade which has been drafted by a group of former Nobel Peace Prize Laureates headed by Dr Arias, former President of Costa Rica.

- strengthening support for the UN arms register.

53. There is also a need to reform aid policies by reducing tied-aid, and by monitoring suppliers' credits. The tying of aid to procurement from the donor country not only increases costs but also reduces the scope for competitive bidding. This increases the incentive for corrupt practices on the part of the suppliers, both in relation to the recipient and the donor agency. Likewise, supplier credits can be used to fund projects with little equity involvement on the part of the promoter, thus generating quick returns which increases the scope for pay-offs. There is also a need for transparency to expose conflicts of interest among those involved in project formulation, appraisal and implementation (e.g. where firms involved in project formulation and appraisal are also contracted to undertake project implementation).

54. Stronger conditions attached to aid projects which ensure that procurement and disbursement related to the project are shielded from corruption, and blacklisting contractors who engage in corrupt practices, are desirable. Regional financial institutions and bilateral donors who have not already done so should adopt anti-fraud and corruption provisions in their procurement guidelines similar to those adopted by the World Bank in 1996.

55. International support for basic harmonisation of national laws on corruption will facilitate international co-operation in the investigation and prosecution of these offences, particularly in the areas of extradition and mutual assistance in criminal matters. In this regard, the European Criminal Law Convention on Corruption is a good model.

V. A ROLE FOR THE COMMONWEALTH

56. Commonwealth governments should lend support to the international initiatives outlined in the previous section of this Report. In parallel with formal international conventions of the kind being promoted by the OECD, there is an equally important role for less formal co-operation between countries. Given its voluntary and informal nature, its democratic ethos and the common legal traditions shared by its diverse membership (which includes both

developed and developing countries), the Commonwealth is particularly well adapted to provide channels of communication and mutual aid in tackling the delicate and controversial political issues which must be confronted in combating corruption.

57. The Commonwealth can reinforce efforts in some areas which are not susceptible to formal legal compacts or are not the primary concern of the other multilateral organisations which have taken initiatives in this area. In particular, the Commonwealth is in a good position to promote dialogue on the political aspects of reform, and to sponsor initiatives for the strengthening of legal institutions required for effective enforcement of anti-corruption measures. There is a rich and varied experience among Commonwealth countries in efforts to improve governance and combat corruption. This has included notable successes in uprooting deeply entrenched corrupt practices. Although the diversity among Commonwealth countries (e.g. in relation to income levels) may mean that some approaches will need to be carefully adapted to be transferable, the legal and political traditions shared by many Commonwealth countries suggest that there are many useful lessons to be learnt by sharing experiences.

58. The Expert Group considered the advantages and disadvantages of different instruments through which the Commonwealth's commitment to promote good governance and combat corruption might be best expressed in tangible terms. One approach would be for the association to have its own legally binding instrument or convention on governance and corruption. Such an instrument would reflect the Commonwealth's specific concerns, values and aspirations and its effectiveness would be subject to Commonwealth control. Because of its legally binding nature, a convention would give 'teeth' to the Commonwealth's commitment and greatly strengthen the enforcement of anti-corruption measures at national levels. It would also help to improve foreign investors' perceptions of the investment environment in many Commonwealth countries.

59. On the other hand, many Commonwealth members might have strong reservations about the negotiation of a legally binding instrument, as this would be historically unprecedented and constitute a radical departure

from the Commonwealth's tradition of articulating collective commitments of the association through morally, but not legally, binding declarations adopted by consensus. Furthermore, the process of negotiating, signing and ratifying a Commonwealth convention could prove to be a protracted as well as a costly enterprise. In addition, in some regions of the Commonwealth, a legal instrument confined exclusively to the Commonwealth might not be effective when the co-operation of neighbouring non-Commonwealth countries is needed to tackle trans-border problems of corruption.

60. An alternative approach, more consistent with Commonwealth practice, would be for Heads of Government to adopt a morally binding declaration of principles which would provide the foundation for concerted action by the association to promote good governance and combat corruption. Drawing on the analysis and discussion of issues in this Report, the Expert Group has proposed a possible draft framework for such principles in the accompanying document entitled 'Promoting Good Governance and Combating Corruption: Framework for Commonwealth Principles'. This could be supplemented by a Commonwealth scheme for the implementation of national and international measures to combat corruption.

61. Recognising the need for a broader, global campaign against corruption - in which it should play an active role - the Commonwealth could also agree to promote, in consultation with other interested parties, an initiative to launch, under the auspices of the United Nations, negotiations on a global, legally binding intergovernmental compact against corruption. Details of such a possible initiative are elaborated in Annex 2.

62. Another option for consideration is whether Commonwealth governments might become parties to existing international, but not universal, conventions against corruption such as the OECD and OAS Conventions and the Council of Europe's Criminal Law Convention on Corruption. This would appear to be a relatively simpler way of improving the enforcement of anti-corruption measures in Commonwealth countries. It is likely that Commonwealth countries which wish to join these Conventions would be able to do so, provided they are able to meet membership

criteria and related obligations. However, the scope of some of these conventions (e.g. the OECD Convention) might be considered to be too narrow by some Commonwealth governments¹⁰.

63. The Group believes the Commonwealth's commitment to fight corruption and promote good governance should be credible, tangible and visible. It needs to be articulated at the highest level, which is by Heads of Government. Their meeting in South Africa towards the end of 1999 provides a unique opportunity for the Commonwealth to act sooner rather than later. Commonwealth governments should therefore consider carefully the most appropriate means of evidencing and advancing the Commonwealth's commitment to effective action to combat corruption. The Group hopes that, in the first instance, Commonwealth Law Ministers will be able to offer guidance on this subject at their meeting in May 1999.

64. There are a number of important practical ways a specific Commonwealth contribution can also be made to improve governance and combat corruption. The Group agreed on the following specific proposals for action:

- the Commonwealth Secretariat should assist member countries that request help in designing and implementing their own national strategies to promote good governance and eliminate corruption. Such assistance could take the form of technical assistance and training for capacity building in countries that face serious human resource and institutional constraints. The Secretariat should also compile and disseminate information on emerging good practice in combating corruption and improving governance, and gather information on a regular basis from members on their progress in implementing national strategies;

¹⁰ A Note by the Commonwealth Secretariat on existing multilateral conventions on corruption and their membership criteria is at Annex 3.

- the Commonwealth should finalise and adopt its draft Code of Conduct on Integrity in Public Office; and the Commonwealth Code for Good Corporate Governance should be finalised, taking account of the work on similar codes undertaken by the World Bank and the OECD, and disseminated widely;
- the Commonwealth and the international financial institutions should support the implementation of standards that have been agreed to ensure that off-shore financial centres (many of which fall within jurisdictions of developed and developing Commonwealth countries) are not used to launder bribes.

65. The Commonwealth should also offer encouragement and support for the further development of the international initiatives described in Section IV. Areas where further developments should be encouraged include:

- further work by the OECD to tackle the issues of contributions to political parties and to strengthen measures against the laundering of bribes;
- the extension of the scope of the work of Transparency International to report on the behaviour of international business, along with improved reporting on perceptions of national corruption;
- further work by the IMF related to its Code of Good Practices on Fiscal Transparency¹¹; in developing, together with other institutions including the Bank for International Settlements and the World Bank, a Code of Good Practices on Transparency in Monetary and Financial Policies; and on the proposed Transparency Reports which would indicate country performance in these areas;
- support for the work of the Council of Europe on corruption;

- encouragement of other international agencies, including Transparency International, to focus attention on corruption associated with the international arms trade; and
- sponsoring more work on the specific needs of developing economies in relation to international agreements to combat corruption.

66. As resources at the disposal of the Commonwealth are limited, the Commonwealth Secretariat should seek to help members states in accessing other sources of funding to support national anti-corruption strategies and should identify actions which are additional and complementary to existing national and international initiatives.

67. The Expert Group believes that, if the Commonwealth is to make a serious contribution to the promotion of good governance and the fight against corruption, there will be a need to commit additional resources to enable the Secretariat to undertake the tasks outlined above. Given the potential economic, social and political gains, there is justification for the commitment of sufficient resources to support this venture.

¹¹ "The Code of Good Practices on Fiscal Transparency - Declaration of Principles" was adopted by the Interim Committee of the IMF's Board of Governors in April 1998.

**EXPERT GROUP ON GOOD GOVERNANCE AND THE ELIMINATION OF
CORRUPTION IN ECONOMIC MANAGEMENT**

Members

Dr Kwesi Botchwey (Ghana) (Chairperson)¹²

Dr Mahbub ul Haq (Pakistan)

Mr Lim Siong Guan (Singapore)

Ms Ruth Hubbard (Canada)

Dr Lal Jayawardena (Sri Lanka)

The Hon Barry O'Keefe (Australia)

Dr Kenneth Rattray (Jamaica)

Mr Bertrand de Speville (Britain)

Mr Brian H Tyler (New Zealand)

Mr Joseph Warioba (Tanzania)

Observers

Mr Shailendra Anjaria (International Monetary Fund)

Mr Laurence Cockcroft (Transparency International)

Mr Ibrahim Shihata, Mr Nick Manning (World Bank)

Mr William Witherell, Ms Enery Quiñones (Organisation for Economic Co-operation and Development)

¹² Following the tragic death of Dr Mahbub ul Haq in July 1998, the Commonwealth Secretary-General appointed Dr Kwesi Botchwey as Chairperson, and Mr Shahid Husain (Pakistan) as a member of the Group.

A GLOBAL COMPACT AGAINST CORRUPTION

Why a global compact?

Existing international legally binding conventions against corruption (e.g. the OECD's Convention on Combating Bribery of Foreign Public Officials, the Council of Europe's Criminal Law Convention on Corruption and the Inter-American Convention Against Corruption) are all significant instruments attesting to the growing international commitment to fight corruption with legally enforceable measures. However, these conventions are not universal and vary widely in terms of their scope (e.g. the OECD Convention does not cover acts of bribery in relation to foreign political parties). In terms of geographical coverage, many countries - most of them developing countries in the African, Asian and Pacific regions - are presently not participating in any international arrangements or mechanisms to combat corruption. There is therefore a need to develop, particularly with the active participation of developing countries, a truly global compact against corruption. This would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries and eliminating any double standards in the campaign against corruption.

What form should it take and what will be its scope?

2. It is proposed that the global compact should take the form of a universal, legally binding inter-governmental instrument against corruption. It would specify obligations for governments, which would include measures affecting the roles of other key players in international society: multilateral development and finance institutions; the private sector (especially multinational corporations), and the independent sectors (e.g. NGOs). The draft framework of Commonwealth principles to fight corruption, which the Expert Group has proposed for adoption by Commonwealth Heads of Government, would provide a basis for shaping the specific content and provisions of the global compact, in addition to drawing upon existing international conventions and examples

of good practice. Based on the fundamental principle of zero-tolerance for corruption, the broad objectives of the global compact will be to:

- require all the key players to abide with minimum standards and rules (in the case of non-state actors, these would apply through legislative and other measures adopted by governments) which will promote good governance and reduce corruption; these standards and rules should be general enough to accommodate political, social, economic and legal diversity but without compromising the basic principle of zero-tolerance for corruption;
- reduce opportunities in international financial transactions for the laundering of financial gains from corruption and strengthen international co-operation for the swift confiscation and repatriation of the proceeds of corruption;
- reduce the scope for corruption in the international trade in armaments;
- establish an independent and impartial mechanism to monitor compliance with the global compact as well as monitor and report regularly on corruption and governance issues;
- establish an impartial mechanism to arbitrate international disputes on corruption issues;
- facilitate technical assistance and capacity building to assist countries in need of such help to adopt and enforce effective national anti-corruption strategies.

How would it be promoted and negotiated?

3. Bold international initiatives require a champion to promote them. If the

Commonwealth sees merit in the idea of a global compact, provided it is willing to demonstrate its own collective commitment to combat corruption in credible and visible terms, it could be the champion to promote this enterprise. If the 1999 CHOGM in South Africa were to adopt the proposed framework of Commonwealth principles - in the form of an instrument appropriate for the Commonwealth - as an earnest of the association's commitment to eradicate corruption, Heads of Government could also declare their intention to promote a global compact against corruption. They could request the Commonwealth Secretary-General to constitute a small Ministerial-level group to promote this initiative by holding consultations with key governments, international organisations and non-governmental organisations.

4. If the Ministerial group determines there is sufficient international support for a global compact, as a next step, the Commonwealth could work with other interested parties to promote an initiative at the UN which would lead to the establishment of an intergovernmental negotiating committee. This body, under the auspices of the UN, would begin time-bound negotiations on a legally binding global instrument to combat corruption. Although the negotiations will be conducted by governments, adequate provisions should be made to enable representatives of multilateral finance and development institutions, the private sector and the independent sectors (i.e. NGOs) to contribute to the development of the global compact.

NOTE BY THE COMMONWEALTH SECRETARIAT ON EXISTING MULTILATERAL CONVENTIONS ON CORRUPTION AND THEIR MEMBERSHIP CRITERIA

Introduction

1. This Note reviews the various existing conventions on corruption to which Commonwealth countries may become party. It also discusses the possible ways in which the Commonwealth could adopt its own instrument on the subject.

2. The existing or proposed instruments considered are:

- (i) the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- (ii) the Council of Europe's Criminal Law Convention on Corruption; and
- (iii) the Inter-American Convention against Corruption;

each of which is open for ratification and/or accession by countries which are not members of the sponsoring international organisation.

3. In considering whether or not it would be desirable to recommend that Commonwealth countries seek to become parties to instruments concluded in other fora, there is a need to consider issues such as:

- (i) the rationale for the development of these instruments;
- (ii) the relevance of non-Commonwealth conventions to the broad range of Commonwealth concerns;
- (iii) the ability of Commonwealth countries to influence future developments in these instruments;
- (iv) the incidental costs involved in participating in monitoring mechanisms; and
- (v) the availability of technical and/or financial assistance to Commonwealth countries to meet the implementation and monitoring costs.

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (The OECD Convention)

4. The substantive provisions of the OECD Convention require states parties to criminalise the direct or indirect intentional offering, promising or giving of any undue pecuniary or other advantage to a foreign public official to secure either the undertaking of an official act or a refraining from acting in order to obtain or retain business or gain other improper advantage in the conduct of international business. Related inchoate offences (such as attempt or aiding and abetting) must also be criminalised and corporate criminal or similar liability must be established. Extraterritorial jurisdiction should also be established.

5. Foreign public officials are those holding legislative, administrative or judicial office, or performing public functions and include officials or agents of public international organisations.

6. The offences created must be punishable by penalties which are capable of triggering the operation of extradition, mutual assistance in criminal matters, proceeds of crime and anti-money laundering statutes. Mutual assistance and extradition obligations are created by the Convention.

7. Accounting practices which prohibit the making or keeping of books and accounts which facilitate the concealment of the true nature of transactions must be established by law.

8. Parties are required to participate in a monitoring process designed to follow up systematically national implementation of the Convention. The monitoring process consists of both self-evaluation and mutual evaluation.

9. Current signatories have accepted a 1997 Recommendation of the Council on Combating Bribery in International Business

Transactions which elaborates on certain provisions of the Convention.

Countries entitled to become states parties

10. Australia, Canada, New Zealand and the United Kingdom are entitled, as OECD members to become parties to the Convention. All have signed and are in the process of enacting legislation which will permit them to ratify the Convention.

11. Prior to its entry into force, the Convention may be acceded to by non-members of the OECD who have been invited to become full participants in the OECD Working Group on Bribery in International Business. The Secretariat understands that the OECD will welcome any country which wishes to join the group. After entry into force, the Convention is open to accession, inter alia, by any state which has become a full participant in the OECD Working Group on Bribery in International Business.

Costs of membership of the Convention

12. Other than the costs involved in passing the necessary laws to implement the Convention, states parties will incur the costs involved in the monitoring and follow-up procedure established by Article 12. For non-OECD members a system of cost sharing applies which accords with OECD rules concerning fees for non-member full participants and observer countries.

13. Additional implementation costs which may be incurred by states parties include:

- (i) participation in the OECD Working Group on Bribery in International Business; and
- (ii) provision of facilities for extradition and mutual assistance in criminal matters which, under most international treaties and arrangements, including the Commonwealth Schemes, contemplate payment by the requested country of in-country expenses of complying with requests.

Legislative initiatives required by the Convention

14. The majority of Commonwealth countries will require substantial amendment of national laws to enable participation in the OECD Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws:

- (a) the laws of most, if not all, Commonwealth countries have always criminalised the offence of bribing one of the country's own public servants. However, few, if any, deal with bribing *foreign* public officials. Equally few deal with the position of agents;
- (b) although the Convention does not absolutely require that jurisdiction be established when the bribery offence is committed wholly outside the enacting country it does require criminalisation when the offence is committed in part in that country. It also requires that *no* extensive physical connection with the enacting country be required. States parties are exhorted to extend current bases of jurisdiction where this is necessary to effectively combat corruption. It would not, for example, be within the spirit of the Convention to fail to deal with a company incorporated in the enacting state which paid bribes to foreign public officials out of funds maintained in off-shore accounts;
- (c) exceptions to the privileges and immunities of international organisations are required;
- (d) corporate criminal liability will, in most countries, need to be extended (or, in some countries, created);
- (e) although not mandatory, civil and administrative sanctions for bribery must be considered;
- (f) amendments to companies laws dealing with account keeping, financial statements, audit requirements and empowering the legal "black-listing" of companies; and
- (g) pursuant to the 1997 Resolution, amendment of taxation laws to disallow

the deductibility of bribes to foreign public officials.

Limitations of the OECD Convention

15. The benefits of advocating Commonwealth country participation in the OECD Convention can, notwithstanding its limitations, be recognised. The Convention is in existence and the OECD has indicated its willingness to welcome membership by any country. It represents an important first step in global efforts to combat a global problem. The objective of eliminating corruption in international business transactions is one which is worthy of support and which can assist in the processes of development desired, in particular by developing countries and those in transition. By assisting to ensure that development capital is actually used for development, the Convention has the potential to be of economic benefit to all countries.

16. While dealing with the important issue of bribery and corruption in international commercial transactions the Convention is very limited in scope. Its implementation in any country will address only one of the plethora of examples of corruption which are of concern to Commonwealth countries.

17. Membership of the Convention is not automatically open to every country wishing to sign. Non-members of the OECD must first solicit an invitation to join the OECD Working Group and only if that invitation is forthcoming does the opportunity of becoming a party arise. Any state party may propose amendment of the Convention and amendments are considered by all states parties.

18. Membership of the OECD Convention alone will not achieve the Commonwealth objective of ensuring that there is national political commitment to the eradication of corruption. that comprehensive and effective anti-corruption legislation is put in place, that the issue of ensuring adequate remuneration of public officials is addressed or that the public is empowered to reject corruption and develop a culture opposed to corruption.

The Council of Europe Criminal Law Convention on Corruption

19. This Convention was adopted by the Council of Ministers in 1998 and was opened for signature in January 1999. By the end of 1999, a complementary Draft Agreement Establishing the Group of States Against Corruption (GRECO) is expected to be in force. Together the two instruments deal with the aspects of corruption to be dealt with under the criminal law. The Group of States against Corruption (GRECO) is established "to improve the capacity of its members to fight corruption by following up, through a dynamic process of mutual evaluation and peer pressure, compliance with their undertakings" to combat corruption. It is important to note that the Council of Europe (CoE) intends to conclude other instruments on the subject, including an important convention on the civil law aspects of corruption.

20. The CoE Convention deals with:

- (i) active bribery which involves promising, offering or giving, indirectly, any undue advantage to any person, for themselves or for anyone else, for the person to act, or refrain from acting in breach of their duty; and
- (ii) passive bribery which involves requesting or receiving, directly or indirectly, any undue advantage, for himself, herself or anyone else, to act or refrain from acting in the exercise of functions.

21. It requires states parties to criminalise both active and passive bribery of:

- (i) public officials;
- (ii) members of "domestic public assemblies" exercising legislative or administrative powers;
- (iii) foreign public officials;
- (iv) members of foreign public assemblies;
- (v) those involved in business activity in the private sector;
- (vi) employees, those under contract to and persons seconded to public international or supranational organisations or bodies of which the state party is a member;
- (vii) members of international parliamentary assemblies; and
- (viii) judges and officials of international courts.

22. The Convention deals with trading in influence by requiring states parties to criminalise the intentional promising, offering or giving, directly or indirectly, any undue advantage to anyone who asserts or confirms that he or she is able to exert improper influence over the decision-making of any person listed in the sub-paragraphs (i), (ii), (iii), (vi), (vii) and (viii) above.

23. Related inchoate offences must also be established as must the offence of laundering the proceeds of any offence required to be criminalised. The creation of use of invoices or other accounting documents and the unlawful omission of making a payment record are also to be the subject of criminal provisions and corporate criminal liability must be established.

24. The subject of the laws required to be enacted are those who commit relevant offences within the territory of the state party, nationals, public officials and members of domestic public assemblies of the party and nationals who work with or for or are officials of international organisations, courts or parliamentary assemblies.

25. Laws facilitating the confiscation or forfeiture of the proceeds of bribery must be enacted. Parties are required to adopt such measures as may be necessary to ensure that specialist independent persons or entities are available and adequately resourced to combat corruption.

26. Countries must facilitate co-operation by public officials and authorities in detecting and reporting corruption and must provide adequate protection for those who report corruption and for witnesses in proceedings.

27. To the extent that bank secrecy may inhibit the investigation of corruption offences it must be overridden and any other required special investigative techniques should be introduced or, if in existence, applied to the investigation of corruption.

28. National laws must facilitate international co-operation and parties are required to assist other parties in the investigation and prosecution of offences. Mutual assistance and extradition obligations are

imposed by the Convention and the international exchange of information is encouraged.

Countries entitled to become states parties

29. Britain, Cyprus and Malta are entitled, as Council of Europe Members, to become parties to the Convention. Canada is entitled to become a party as a non-member state which participated in its elaboration. Any party may specify territories to which the Convention shall apply.

30. After entry into force of the Convention, states other than those entitled to become parties, may be invited to accede to the Convention. Invitations are issued by the Committee of Ministers of the Council of Europe, after consulting with the contracting states. Invitation must have the unanimous agreement of contracting states entitled to sit on the Committee of Ministers and be supported by the majority provided in Article 20.d of the Statute of the Council of Europe.

Costs of membership of the Convention

31. States parties to the Convention which are not already members of GRECO automatically become members of GRECO at the time the Convention enters into force for them. The Enlarged Partial Agreement (EPA) establishing GRECO provides that the Budget of GRECO comprises, inter alia, the annual compulsory contributions of each member of the Group. The travel and subsistence costs of one representative of each party in meetings of the Group and the costs of mutual evaluation are met out of the budget of the Group.

32. In addition to the cost of participation in GRECO, states parties will incur the domestic cost of passing the laws necessary to implement the Convention. Like the OECD Convention, provision of facilities for extradition and mutual assistance in criminal matters are likely to involve some cost to participating countries.

Legislative initiatives required by the Convention

33. The majority of Commonwealth countries will need to amend existing laws or enact new laws and to establish administrative mechanisms in order to meet obligations imposed by the Convention. The following are the principal areas not covered, or inadequately covered, by existing national laws of many member countries:

- (i) the criminalisation of the offence of bribing foreign public officials; members of foreign public assemblies; those involved in business activity in the private sector; employees, those under contract to and persons seconded to public international or supranational organisations or bodies of which the state party is a member; members of international parliamentary assemblies; and judges and officials of international courts.
- (ii) the criminalisation of trading in influence;
- (iii) the scope of predicate offences for money laundering;
- (iv) the existence or scope of corporate criminal liability;
- (v) the existence or scope of accounting offences;
- (vi) the extent of jurisdiction of courts to deal with offences by nationals including those who work with or for or are officials of international organisations, courts or parliamentary assemblies;
- (vii) the extension of laws relating to the confiscation or forfeiture of the proceeds of bribery;
- (viii) the existence of specialist independent persons or entities to combat corruption;
- (ix) passage of "whistle-blowing legislation and witness protection provisions; and
- (x) the scope of limitations to bank secrecy laws.

Proposed extension of the Council of Europe Convention regime

34. The Council of Europe Criminal Law Convention on Corruption is to be supplemented by other conventions including an important instrument on civil law. Ultimately it is reasonable to assume that the CoE programme of action against corruption will be supported by a comprehensive regime of international

instruments designed to address all aspects of corruption as it relates to governance and to commercial activity. It is also expected that the GRECO will exercise functions in respect of subsequent conventions.

Limitations of the Council of Europe Convention

35. Commonwealth country participation in any of the Council of Europe's proposed conventions on corruption is dependent upon agreement by all states parties to any relevant convention and upon agreement by the Council of Ministers of the Council of Europe. Whilst it is probable that some Commonwealth country participation will be welcomed it is not by any means sure that all Commonwealth countries will find themselves able to become states parties to any of the proposed Conventions.

36. While participation in the CoE corruption convention regime will undoubtedly ensure that any Commonwealth country has a comprehensive and internationally monitored programme of action against corruption covering criminal, civil and administrative issues and other issues of concern to the Commonwealth such as the establishment of codes of official conduct, the question whether the greater Commonwealth interest in fostering good governance, eliminating corruption and improving economic management will be furthered by the participation of some member countries is a question which remains to be answered.

37. Without knowing the cost of participating in GRECO (which is mandatory for participation in the criminal law convention and may be mandatory in respect of future conventions) it is difficult to say whether many Commonwealth countries would find it possible, within resource constraints, to participate in the European regime.

38. Amendments to the Convention may be proposed by any state party and the Committee of Ministers of the Council of Europe must consult with non-member states parties before adopting amendments.

The Inter-American Convention Against Corruption 1996

39. The Inter-American Convention was concluded in March 1996 and its expressed purposes are to promote and strengthen the development by states parties of mechanisms needed to prevent, detect, punish and eradicate corruption and to promote co-operation among states to ensure the effectiveness of anti-corruption measures. It covers the performance of "public functions" which are widely defined so as to include any temporary or permanent, paid or honorary activity performed in the name of the State or in the service of the State.

40. The substantive provisions of the Inter-American Convention require states parties to consider measures to maintain and strengthen:

- (i) the introduction and enforcement of standards of conduct designed to prevent conflict of interest and to properly conserve and use the resources entrusted to government officials in the performance of their functions so as to preserve public confidence in the integrity of public servants and government processes;
- (ii) public sector ethics;
- (iii) the registration of pecuniary interest of persons performing public functions;
- (iv) public procurement systems;
- (v) government revenue collection and control systems which deter corruption;
- (vi) laws which deny favourable tax treatment to those who violate anti-corruption laws;
- (vii) reporting of corruption by public servants and citizens;
- (viii) oversight bodies to implement modern anti-corruption strategies;
- (ix) deterrents to bribery, including accurate financial records;
- (x) mechanisms to encourage the participation of civil society in anti-corruption efforts; and
- (xi) the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

41. Substantively the Convention requires states parties to establish as criminal offences the direct or indirect solicitation or acceptance or offering of any article of monetary value or other benefit by any government official or person (on his or her own behalf or for any other

person) who performs a public function in exchange for any act or omission in the performance of a public function.

42. The fraudulent use or concealment of property derived from corrupt activity is to be criminalised as are inchoate offences related to corruption and trading in influence.

43. Jurisdiction must be asserted over offences committed within the territory of a state part and may be asserted where the offence is committed elsewhere by a national or habitual resident. If extradition of an alleged offender is refused jurisdiction must be assumed.

44. Bribery of foreign government officials by a national, resident business or habitual resident is to be criminalised in accordance with the Constitutional and fundamental legal principles of states parties.

45. States parties are also to criminalise certain types of conduct not dealt with by other multi-lateral conventions including:

- (i) illicit enrichment which cannot be reasonably explained;
- (ii) improper use of classified or confidential information and state property; and
- (iii) diversion of state property.

46. Extradition, mutual assistance and proceeds of crime laws must support corruption laws and bank secrecy laws must not inhibit the investigation or prosecution of corruption offences.

Countries entitled to become states parties

47. All members of the Organization of American States may become parties to the Convention and the Convention is open for accession by *any* other state.

48. The Commonwealth countries eligible as members of the OAS are Canada, Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Lucia, St Kitts and Nevis, St Vincent and the Grenadines and Trinidad and Tobago.

Costs of membership of the OAS Convention

49. Unlike the OECD and Council of Europe Conventions, the OAS Convention does not have a body which monitors its implementation and accordingly there are no costs involved other than those incurred in the development, passage and implementation of legislation to give effect to the Convention.

Legislative initiatives required by the OAS Convention

50. The following are the principal areas in which Commonwealth countries would need to enact additional or amending legislation to implement the mandatory provisions of the Convention:

- (i) criminalisation of the fraudulent use or concealment of property derived from corrupt activity;
- (ii) criminalisation of trading in influence;
- (iii) power to prosecute in lieu of extraditing;
- (iv) criminalisation of bribery of foreign government officials;
- (v) criminalisation of improper use of classified or confidential information and state property and diversion of state property;
- (vi) criminalisation of illicit enrichment which cannot be reasonably explained; and
- (vii) amendment or enactment of extradition, mutual assistance and proceeds of crime and bank secrecy laws.

51. Non-mandatory provisions of the Convention which should be the subject of action by states parties if the full spirit of the Convention is to be achieved relate, inter alia, to:

- (i) standards of conduct designed to prevent conflict of interest and to properly conserve and use the resources entrusted to government officials and the introduction of registers of pecuniary interests by relevant officials;
- (ii) public procurement and government revenue collection and control systems which deter corruption;
- (iii) the creation or enhancement of oversight bodies to implement modern anti-corruption strategies;

- (iv) mechanisms to encourage the participation of civil society in anti-corruption efforts; and
- (v) the study of further preventive measures such as the relationship between equitable compensation and probity in public service.

Limitations of the OAS Convention

52. The OAS Convention addresses many, if not most, of the issues of concern to Commonwealth countries and if it has any limitations these may be that in certain areas it imposes no obligations but rather exhorts states parties to consider action in areas such as public procurement which are of particular concern to the Commonwealth in its work on economic management. Certainly its reference to public education and participation in anti-corruption strategies and its consideration of the relationship between remuneration and probity reflect issues discussed in Commonwealth fora.

53. Although any state party may propose draft additional protocols to the Convention these are only considered at meetings of the General Assembly of the OAS.

Possible Development of a Commonwealth Instrument on Corruption

Legal foundations of the Commonwealth

54. The Commonwealth, unlike the other organisations whose instruments have been considered, is not formed by treaty and no Commonwealth concern has yet been the subject of any agreement enforceable at international law. The Commonwealth's reliance on consensus to achieve agreement on issues of common concern is a fundamental precept of the organisation. Its reliance on the Secretary-General's Good Offices Role to resolve problems is one of the organisation's strengths. One of the issues which arises for consideration, therefore, is whether the development of a formal Commonwealth mechanism or instrument to combat corruption is consistent with the fundamental nature of the Commonwealth as an organisation.

Commonwealth co-operation

55. Notwithstanding that the Commonwealth has no agreements enforceable at international law - that is no treaties or conventions, Commonwealth Law Ministers have, for thirty-two years, relied on "schemes" to facilitate co-operation between member countries. The first scheme developed in 1966 related to extradition. Subsequent schemes agreed in 1986 and 1993 deal with mutual assistance in criminal matters, the transfer of convicted offenders and the protection of material cultural heritage. These schemes contemplate the enactment of laws in all member countries which permit the granting of assistance to other members in the subject areas. In the area of extradition, the Scheme has enjoyed significant success with the vast majority of member countries governing their extradition relations under the London Scheme on the Rendition of Fugitive Offenders. The other Schemes are being progressively implemented by member countries.

56. While having no enforceable effect at international law, the Schemes evidence the willingness and ability of the vast majority of Commonwealth members to assume, between themselves, moral obligations which they are prepared to treat as binding and as an essential concomitant of their membership of the Commonwealth.

57. The Commonwealth is a fully fledged intergovernmental organisation. It enjoys recognition by all other intergovernmental organisations and has, or may exercise, observer rights at many of them. Its standing in the international community is such that the Commonwealth Schemes are recognised as effective contributions to, and often as leading global practice in the areas they cover. The Commonwealth Schemes on extradition and mutual assistance in criminal matters have strongly influenced instruments developed by the United Nations in these areas. There is, therefore, every reason to believe that a Commonwealth instrument evidencing the organisation's commitment to good governance and the elimination of corruption would be accorded status no less than any other developed under the auspices of an intergovernmental organisation.

58. One particular feature of the Schemes is that they have been devised primarily to address

issues relating to international co-operation and have not, other than in this context, addressed issues of internal governance of member countries. The question therefore arises whether a Scheme, in the sense that that word is understood in the Commonwealth family, would or could be an appropriate means of evidencing agreed Commonwealth principles relating to the elimination of corruption.

A possible Commonwealth convention or treaty

59. If the Commonwealth wishes to evidence "zero tolerance" towards corruption and corrupt regimes, the existence of an internationally binding legal instrument between its members is one very clear way of entrenching zero tolerance of corruption as a Commonwealth fundamental value. Such a convention could cover those areas of particular concern to the Commonwealth and, if thought desirable, combine mandatory and discretionary action in the one instrument. In determining the appropriate range of subjects to be covered it could draw on existing international instruments where these cover the subject in a way relevant and acceptable to Commonwealth conditions and could cover other areas where Commonwealth consensus exists or is likely to be able to be achieved.

60. A Commonwealth instrument could govern the way any disputes between parties are resolved. It could, for example and if considered desirable, ensure that no two Commonwealth countries could resort to a non-Commonwealth forum to resolve internal Commonwealth disputes.

61. Commonwealth control of an international instrument ensures that it is the Commonwealth which decides if, and when, such an instrument should be revised and therefore it is the Commonwealth which would determine whether or not to impose additional obligations on states parties.

A possible non-binding Commonwealth instrument

62. Given the status accorded to Commonwealth Schemes among the international community, member countries could choose to evidence their individual and

collective commitment to combating corruption by an instrument of less than treaty status. They could do so in one of two ways:

- (a) by concluding an instrument of less than treaty status which covers all the issues and which contemplates the enactment of national laws to give effect to the commitments outlined in the instrument; or
- (b) by issuing a declaration or adopting a statement of principles, as was done in Singapore in 1971 and in Harare in 1991.

63. An instrument of less than treaty status (bearing some small resemblance to the existing Commonwealth Schemes but of far wider application and impacting on domestic governance) may only be possible to conclude in the same way as would a treaty, or indeed the Schemes themselves, by being the subject of negotiation at senior official level before adoption by Ministers. An instrument of this nature would be in accord with Commonwealth practice. It would reflect those issues upon which consensus was reached and would contain no provisions relating to signature, ratification or denunciation.

64. A Commonwealth Declaration could assume whatever importance was considered appropriate by Heads of Government. Its provisions could be made on a par with declarations of other Commonwealth fundamental principles and observance of the terms of the Declaration could, conceivably, be

the subject of pan-Commonwealth concern. Obviously, equally, a statement of principles or declaration could be accorded a status less than that accorded to the Harare Principles. A decision on such an issue is one solely for the sovereign states which are members of the Commonwealth.

DRAFT

Promoting Good Governance and Combating Corruption: Framework for Commonwealth Principles

Preamble

1. Good governance is not a luxury; it is a basic requirement for development. Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.

2. Corruption is always a two-way transaction with a supply/briber/active side and a demand/bribee/passive side. It occurs in poor, emerging, and developed nations, regardless of the level of social and economic development and in countries with varying forms of government ranging from dictatorships to established democracies.

3. Corruption, which is multi-dimensional, generally occurs at the nexus between the public and private sectors, with actors in the private sector interacting with politicians and with other elected officials or with civil servants and other non-elected officials in the public sector. Some aspects of corruption such as fraud and the misappropriation of assets or funds can occur entirely within the private or public sectors. In addition, with increasing privatisation of public utilities and services, the distinction between the public and private sectors is becoming less relevant in some areas.

4. Corruption is generally defined as the abuse of public office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain. There are many types and levels of corruption including "grand corruption", which involves huge sums paid by major businesses to high-level politicians and/or government officials; widespread systemic

corruption which may take the form of substantial bribes to public officials to obtain, for example, licences/permits or to by-pass regulations; and petty corruption which involves modest but recurring payments to avoid delays, jump queues or to obtain goods in controlled markets. All forms of corruption entail high economic and social costs: transaction costs are increased; public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened.

5. The Commonwealth is firmly committed to combating all forms of corruption. Its overarching objective is to promote, both among its members and globally, "**zero tolerance**" of all types of corruption. This principle must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, its eradication may require a sustained effort over a protracted period of time. However, the principle of "zero tolerance" should be adopted from the outset, demonstrating a serious political commitment to pursue the fight against corruption. The Commonwealth remains firm in its determination that its high standards and goals should not be lowered. Creating an environment which is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself.

NATIONAL ACTIONS

6. National programmes and strategies to improve governance and combat corruption require strong political will at the highest levels of government if they are to

succeed. Anti-corruption programmes cannot be externally imposed: they must be internally driven. Domestic ownership is critical. National programmes should be based on the specific issues and circumstances in each country; they need to be comprehensive in engendering transparency and accountability in all sectors, and in covering all the active and passive actors involved in corruption. To be effective, such programmes should be implemented in a timely manner and generally include principles from the four inter-related platforms described below. Many countries may already have in place strategies which include some of the elements listed below.

A. *Economic and Fiscal Policies*

7. Opportunities for seeking economic rents are a major cause of corruption. Policy reforms that can help to reduce such rents as well as other incentives which generate corrupt practices, include:

- liberalising trade regimes. Quantitative restrictions and import/export licences are important sources of corruption. So are high tariffs which, by protecting domestic industries from international competition, create artificial monopolies which become a source of illicit payments to maintain their positions. Eliminating such trade restrictions can significantly reduce corruption;
- reducing foreign exchange controls and increasing transparency in foreign exchange allocation processes;
- eliminating price controls which, by lowering the price of goods below their market values, create artificial scarcities and parallel markets. Poorly targeted subsidies have similar effects;
- simplifying regulations in order to reduce the scope for bureaucratic discretion;
- increasing transparency in the allocation of land-use permits and in the zoning of land;

- reducing excessive levels of taxation where they provide incentives for tax fraud and for bribing tax authorities, and preventing the misuse of tax incentives and other special tax privileges in tax enforcement;
- ensuring that fiscal and tax rules do not permit bribes or other illicit payments to be treated as deductible expenses for tax purposes.

B. *Public Sector Management*

8. Improving the management of the public sector should be an essential element of any national programme to enhance governance and reduce corruption. The main areas to be covered are:

The Civil Service

9. A merit-based, professional and non-partisan civil service which is appropriately sized and well-motivated is of critical importance. Over-sized public administration systems, with bloated and poorly paid bureaucracies, engender corruption. There should be a clear demarcation of functions between the public and private sectors, separating core government activities from those that might be privatised or out-sourced on the grounds of efficiency or resource availability. Down-sizing alone is not enough but should be complemented with merit-based recruitment and promotion, and career growth policies. Civil servants need to be adequately paid if they are to maintain the probity, professionalism and integrity that should be required of the public service; they should also be free from political interference. The rule of law should apply to the civil service. Codes of acceptable conduct for those holding public office and for civil servants, covering, *inter alia*, standards of integrity, potential conflicts of interest, acceptance of gifts, misuse of information for personal gain, and disclosure of assets and financial interests, with appropriate sanctions for breaches, should be well publicised and enforced vigorously. There should also be incentives to retain the better performers within the civil service.

Financial Management

10. Sound public sector financial management systems are essential tools of good governance, which enable governments to set macroeconomic targets, to allocate resources and to implement programmes and projects efficiently. Processes for budget preparation, execution and monitoring need to be open and transparent. Clear procedures and criteria should be used for developing public investment programmes and projects, including those by public enterprises, and for allocating recurrent expenditure budgets. There should be satisfactory accounting, financial reporting and auditing systems covering all public programmes and investments. Public accounts should be subject to scrutiny by appropriate bodies such as parliamentary committees and Auditors-General. Timely compliance with auditing requirements is important to ensure the legitimacy of public expenditures. Where audits indicate deficiencies or are themselves unsatisfactory, prompt remedial action should be taken. Auditors-General, or other supreme auditing authorities, should be sufficiently independent to allow open criticism of government. Countries should be encouraged to adopt Codes of Fiscal Transparency based on the 1998 IMF model.¹³

Public Procurement

11. Transparency in government procurement practices is not an established norm in many countries. Corruption is widespread, both in the award of contracts and during their implementation. Governments should be encouraged to review their procurement practices and to develop comprehensive guidelines of their own, with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to

national and international competitive bidding. Countries should adopt standard bidding documents, establish processes for public bid opening, set objective criteria for bid evaluation, and provide a system for review of awards, to increase efficiency and economy in public procurement. Collecting and disseminating data on public procurement prices of goods and services of similar specifications, which are procured by different agencies regularly in large quantities, can have substantial and prompt effects in reducing corruption.

C. *The Judiciary and the Legal System*

12. Economies need institutional arrangements to resolve disputes between citizens, firms and governments; to clarify ambiguities in laws and regulations; and to enforce compliance. The rule of law in a country is of vital importance for economic, social and political development. Inherent in the concept of the rule of law are the notions of impartiality, fairness and equality. Strengthening the rule of law will generally require:

- **entrenching an independent judiciary** - A competent, impartial, efficient and reliable judiciary is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government. The judiciary should be empowered to manage its operational budget provided by the state;
- **compliance** - Vigorous application and enforcement of existing laws and prosecution of offenders is essential if the rule of law is to be respected. Investigative, policing, and prosecutorial services, which remain weak in many countries need to be enhanced to ensure compliance with the law. Independent anti-corruption agencies such as ombudsman offices, inspectors-general, and anti-

¹³ The Code of Good practices on Fiscal Transparency - Declaration of Principles", was adopted by the Interim Committee of the IMF's Board of Governors in April 1998.

corruption commissions can be effective if they are genuinely free from being influenced by the executive branch of government and where there is a strong judiciary in place;

criminal law - As the nature and prevalence of corruption has grown, laws against corruption may need to be strengthened to provide a meaningful deterrent, and complemented in several ways:

- (i) both active and passive corruption should be made criminal offences, comprehensively covering government officials, civil servants, political parties and their officials, firms and individuals in the private sector, and members of the judicial system;
- (ii) criminal law should provide for the seizure and forfeiture of the proceeds of corruption;
- (iii) there should be legal provisions to protect witnesses and whistle-blowers in cases involving corruption;
- (iv) illicit enrichment: significant increases in the assets of a government official or civil servant which cannot be reasonably explained in relation to lawful sources of income should be made a criminal offence;
- (v) trading in influence should be a criminal offence.

civil, administrative and regulatory laws - These can contribute to the battle against corruption and ease over-burdened court systems, by dispensing appropriate sanctions for less serious forms of corruption.

Relatively minor offences can be dealt with effectively through disciplinary bodies such as public service commissions. Regulations requiring declarations of assets and financial interests by elected officials and senior civil servants, which might give rise to potential conflicts of interest, can enhance the integrity of public service and reduce the opportunities for corruption. Strict regulations on the funding of political parties and their officials are required to tackle a major source of corruption: there should be clear limits on contributions from individuals, and private firms and corporations. Foreign contributions should be banned. Lists of larger contributors and political party accounts should be published regularly.

D. The Role of Civil Society

13. Civil society, with an adequate institutional framework, can make a major contribution to improving governance and combating corruption. Beyond periodic electoral processes, states that can regularly consult, collaborate with, and listen to their citizens are better able to develop national ownership of policies and the political will required to pursue government programmes effectively. Important elements which enable civil society to play its role include:

- freedom of association: Citizens should enjoy the right to establish organisations around particular interests (e.g. professional and business associations, labour unions) to pursue broad or narrow social, economic or political objectives. Such associations, in following their interests, often act also as critical watchdogs of the integrity of public service and government. At the local level, grassroots community organisations, co-operatives and local NGOs help the poor and marginalised

to get their voices heard in the corridors of power;

- freedom of the press and media: Transparency in any society requires information to be available freely in the public domain. A free press is essential in this process, and is critical to the success of anti-corruption strategies. Freedom of the press and media calls for unrestricted access to information, the absence of government controls, harassment, or censorship (except where national security issues are involved), the liberty to express views, and sufficient financial independence to resist control of editorial policy and news coverage. Civil society should promote genuine competition in the media market-place to ensure diversity of ownership, so that alternative outlets can provide a broad range of views on public policy issues. Whereas the media must respect libel laws, the courts should take heed in deciding on the magnitude of libel penalties so that they do not threaten the viability of the free press and media organs;
- civil society can help ensure that access to foreign publications and broadcasts is unrestricted. Advances in information technology also provide civil society with new sources of information and channels of communications, which should remain open;
- the development by civil society of independent public policy research institutes and think-tanks can provide increased domestic capacity to analyse deficiencies in the system of governance. Such bodies can help to study the particular types of corruption in a country, and identify country-specific remedial options.

INTERNATIONAL ACTIONS

14. With the increasing globalisation of corruption, several international agencies including the UN General Assembly, the OECD, the IMF, the World Bank, the OAS, the European Union, the Council of Europe and the International Chamber of Commerce, have mounted initiatives to improve governance and combat corruption. These include conventions to limit corruption in transnational business, and stronger anti-corruption programmes by international financial institutions and aid agencies. These efforts are important and have the potential to lead to significant results. There are however gaps in their coverage, and continuing weaknesses in policies and practices, which need to be addressed. In addition there are some special areas that require further international action.

A. *Conventions on Corruption*

15. There are three such conventions. The Inter-American Convention Against Corruption, a regional OAS initiative, covers active and passive corruption as well as illicit enrichment. It was prepared and adopted jointly by the developing and developed countries in the OAS. The second, the OECD Convention on Combating Bribery of Foreign Public Officials, is limited to active bribery of foreign public officials. As OECD nations are a major source of corrupt payments in international business transactions, this Convention, when fully effective, could reduce transnational corruption significantly. It is in force in 12 of 34 countries that have signed it. The OECD is undertaking further work in areas not covered adequately by the Convention such as acts of bribery in relation to foreign political parties, the laundering of bribes, and the roles of subsidiaries and off-shore centres in banking. The third, the Council of Europe's Criminal Law Convention on Corruption, was opened for signature on 27 January 1999. It is very comprehensive, covering active and passive bribery of domestic and foreign public and private sector officials, as well as judges and members of public assemblies.

- Except for the OAS effort, these initiatives have largely been promoted by the major developed countries and do not correspond fully to the needs of developing countries.
- It remains unclear as to what instruments will be used to adopt the results of the further work underway in the OECD.
- The battle against cross-border corruption should be joined genuinely by all nations, both developed and developing, from all parts of the world. This calls for a global compact against corruption.
- International financial institutions need to be more transparent in their operations, objectives and decision-making processes. There has been greater openness in the past few years and the recent discussions on a new international financial architecture may lead to further progress. To increase national ownership and public participation in reform programmes, key documents such as Policy Framework Papers, Letters of Development Policy and Letters of Intent should be more systematically released by borrowing countries and widely disseminated via the Bretton Woods institutions, unless there are valid reasons for non-disclosure.

B. Programmes of International Financial Institutions and Aid Agencies

16. The IMF, the World Bank, the regional development banks and bilateral aid agencies have for many years been aiding countries in improving governance through policy advice, technical assistance, institutional reform and capacity building. As corruption has become increasingly a part of the debate on aid effectiveness, aid agencies have taken on stronger anti-corruption programmes. The World Bank has adopted new fraud and corruption procurement guidelines, and improved disbursement and financial auditing procedures. The IMF is taking a more pro-active stance and has adopted guidelines for promoting good governance¹⁴. Both the Bretton Woods institutions are beginning to take corruption explicitly into account in defining their country financial assistance programmes. Several bilateral donors are designing programmes to assist nations in their anti-corruption efforts. Areas in development assistance that need added scrutiny and further action include greater transparency and accountability, conditionality, procurement, and bilateral aid practices.

(i) Transparency and accountability

¹⁴ "The Role of the IMF in Governance Issues: Guidance Note", was approved by the IMF Executive Board in July 1998.

- There should be a more open acknowledgment by donors and international financial institutions of their share in the responsibility for the outcomes of the programmes they help design and for the policy advice they give. Flawed designs and poor policy advice should be remedied through the provision of additional assistance.
- The staff of lending agencies should be subjected to greater scrutiny and internal accountability.

(ii) Conditionality

- Measures to improve governance and reduce corruption should be domestically owned and rarely be imposed externally as conditions of financial assistance. In exceptional cases where such conditionality is introduced by international financial institutions, this should be consistent with their mandates.
- In designing such conditionality the IMF and the World Bank should define realistic time-schedules, taking into account a country's capacity to implement reforms.

- "Floating Tranches", which have been adopted recently in several World Bank structural adjustment loans, should be used more widely to enable governments to sequence reform measures in the light of local circumstances without holding up entire programmes.
- To promote local ownership of reforms, foreign donors should agree with governments on the objectives to be achieved, identify alternative paths for meeting these ends, but leave the route to be selected to the government concerned.
- The IMF should be even-handed by raising governance and corruption issues in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes.

(iii) **Procurement**

- The anti-fraud and corruption provisions of the World Bank's 1996 guidelines on procurement provide strong sanctions against borrowing countries and firms that engage in corrupt practices. These include rejection of contract awards or cancellation of loan funds, and making firms judged to have engaged in fraudulent or corrupt practices ineligible for future Bank-financed projects. It also requires bidders to disclose commissions made to agents.
- Several multilateral development banks (MDBs) have adopted the World Bank's new guidelines, as recommended by the ministers of finance of the Group of Seven, and others are in the process of doing so. The MDBs have also recently agreed to share information on disbarred firms, but are not likely to agree on a common list, as regional subsidiaries of multinational

corporations often have very different codes and business practices.

(iv) **Practices of Bilateral Aid Agencies**

- Bilateral aid agencies should be encouraged to adopt the World Bank provisions on fraud and corruption in their procurement guidelines and to utilise similar standard bidding documents.
- Since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices, tied aid should be reduced.
- Supplier credits should be carefully monitored as they often involve projects with little equity by the promoters, which increases the scope for corrupt payments.
- As part of the negotiations on the OECD Convention, a separate resolution was passed in 1996 calling on member countries which do not disallow the tax deductibility of bribes to foreign public officials to re-examine their tax laws with a view to denying this deductibility. All donor countries that have not already done so should amend their tax laws accordingly.

C. Special Areas requiring Further Action

(i) **Monitoring of Corruption**

- Transparency International, a relatively small Berlin-based NGO established in 1993, has over a short period of time done remarkably well in helping to raise awareness of corruption globally. It has since 1995 produced a widely publicised index of corruption, based on surveys of perceptions of international businessmen, which ranks countries

on their level of governmental corruption.

- Transparency International's work in monitoring corruption is to be welcomed. Its Index, however, does not provide a reliable and comprehensive guide to relative country performance. The most recent index has significantly increased the country coverage to 85 countries, but its analytical and statistical methodology needs to be improved.
- Transparency International is planning to produce an Active Bribery Index, which would assess countries on the basis of the propensity of their firms to pay bribes. This may be a useful additional indicator, but the issue is more one of the practices of individual firms rather than their nationality. There remains a need to provide exposure of multinational corporations and their subsidiaries that have been known to engage in corrupt practices.

(ii) **The Arms Trade**

17. It is difficult to determine how the arms trade is financed, e.g. through military aid, debt creation, compensatory trade offsets, or cash transactions. Surrounded by secrecy, the international arms trade is a major source of corruption. There should be much more transparency in the trade. This could be achieved through:

- stronger support for the UN arms register; and
- a new international code of conduct for the arms trade, requiring full disclosure by all the parties involved.

(iii) **Money Laundering**

18. There should be global acceptance of the principle that national laws must punish

the laundering of the proceeds of corruption. The main international body engaged in ongoing efforts to deal with this problem is the Financial Action Task Force set up in 1989 by the OECD and other rich nations, which has proposed detailed measures of control. However, as emerging economies and small off-shore havens have become increasingly involved, the problem has become more widespread and goes beyond the financial institutions in the developed world. The formation of regional groups, such as the Caribbean Financial Action Task Force, should be encouraged in order to strengthen anti-money laundering measures.

- Additional international efforts are required to pursue illicit funds to numerous off-shore financial centres, which make corruption less risky since the proceeds can be hidden overseas. Stronger mechanisms are required to enable the expeditious repatriation of the proceeds of corruption.

COMMONWEALTH ACTIONS

19. All Commonwealth countries should develop their own national strategies to promote good governance and eliminate corruption. These strategies should identify clear objectives with realistic time-tables for their attainment and should be supported by effective and credible implementation and monitoring mechanisms. The Commonwealth should render technical assistance to countries that request help in developing their national strategies. There are also a number of other specific actions that the Commonwealth can take to improve governance and combat corruption.

- The Commonwealth, which includes developing and developed countries from all parts of the world, is well placed to promote a genuinely global compact on corruption, which should be universal and fully cover all aspects of this growing and complex cancer.

- The Commonwealth should also develop an appropriate instrument, to be adopted unanimously by its membership, to fight corruption vigorously with the objective of ensuring that zero tolerance of corruption becomes a fundamental value of the association.
- The Commonwealth should encourage the international community to continue with the initiatives underway to combat all aspects of corruption, including urging countries to become parties to all anti-corruption conventions that are appropriate to their needs and circumstances.
- International agencies should be pressed by the Commonwealth to focus attention on reducing corruption in the international arms trade.
- The Commonwealth should actively work with other international agencies to develop effective standards to ensure that all off-shore financial centres in all parts of the world are not used to launder the proceeds of corrupt practices.
- The Commonwealth should finalise and adopt its draft Code of Conduct on Integrity in Public Office.
- The Commonwealth Code for Good Corporate Governance should be finalised and disseminated widely.
- Given the economic, social, and political benefits involved, the Commonwealth should provide its Secretariat with additional resources to enable it to:
 - compile and disseminate information on emerging good practice in combating corruption and improving governance; and
 - establish, in consultation with other international agencies, an impartial and independent mechanism to prepare independent periodic reports on trends and performance in relation to governance and corruption.
- help member countries, when requested, to design their own governance and anti-corruption strategies;

GOOD GOVERNANCE AND CORRUPTION

Memorandum by the Commonwealth Secretariat

1. The Meeting already has before it, in respect of Agenda item 1(b), paper number LMM(99)21 in the form of the Report of the Expert Group on Corruption set up by the Commonwealth Secretary-General to undertake a study of the impact of corruption on economic management.
2. The attached extract publication issued jointly by the Commonwealth Secretariat and Transparency International and entitled *Conflict of Interest: Legislators, Ministers and Public Officials* is circulated during the meeting, for information and to facilitate the discussions on agenda item 1(b). If you require the full text of the publication please contact the address below.

Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

Tel: 00 44 020 7747 6409
Fax: 00 44 020 7747 6406
Email: N.McIntyre@Commonwealth.int

CONFLICT OF INTEREST: LEGISLATORS, MINISTERS AND PUBLIC OFFICIALS

A study prepared by Gerard Carney

Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX, United Kingdom

Published with assistance from the Ford Foundation

PREFACE

This publication is the result of a joint collaboration between the Legal and Constitutional Affairs Division of the Commonwealth Secretariat and Transparency International (TI), a non-governmental organisation active in the field of integrity building and countering corruption. It builds on a long history of the Commonwealth Secretariat's work with like-minded and appropriate non-governmental organisations in the pursuit of common goals.

The area of Conflict of Interest is now clearly identified as one of the most crucial areas for reform in the building of democratic and accountable institutions and structures. Without clear and well-understood rules, decisions will be made by senior officials that are motivated by private gain rather than by the public interest - decisions which can have the potential to deepen poverty when they should carry with them the prospect of enhancing sustainable development for all.

In this study, prepared with financial assistance from the Ford Foundation, Gerard Carney of Bond University, Queensland, Australia returns to the ground which has made him an international authority on conflict of interest involving legislators, Minister and public officials. Of particular interest, by way of illustration, is the Ethics in Public Office Act 1995, of Ireland, an enactment rendered necessary by political scandals that demonstrate vividly (if demonstration were needed) that developed countries can suffer as badly as developing countries where their arrangements and control mechanisms are inadequate.

It is our belief that this study will be a useful tool for policy makers, researchers and to those campaigning for necessary reforms.

We join in expressing gratitude to Gerard Carney for this signal contribution to our understanding of an area which presents a number of challenges to our various systems of government

R C Nzerem
Director
Legal and Constitutional Affairs Division

J D Pope
Executive Director
Transparency International

ABOUT THE COMMONWEALTH SECRETARIAT

The Commonwealth Secretariat (established 1965) is the main intergovernmental agency of the Commonwealth, facilitating consultation and co-operation among member governments and countries. It is responsible to member governments collectively.

The Secretariat organises Commonwealth summits, meetings of ministers, consultative meetings, and technical discussions; it assists policy development and provides policy advice, and facilitates multilateral communication among the member governments. It also provides technical assistance to help governments in their social and economic development and in support of the Commonwealth's fundamental political values.

The Secretariat is headed by a Commonwealth Secretary-General who is elected by Heads of Government.

The Legal and Constitutional Affairs Division of the Secretariat facilitates Commonwealth legal co-operation over constitutional issues, commercial crime, human rights and other aspects of law. This legal co-operation is a unique feature of the Commonwealth, made possible because members have similar legal systems, most based on, or greatly influenced by, the common Law. The division:

- facilitates dialogue among governments on legislation and other legal matters. It organises three-yearly Meetings of Law Ministers, Law Officers of Small Commonwealth Jurisdictions, and Meetings of Senior Law Officers of Ministries of Law;
- informs governments of international legal developments;
- keeps governments apprised of developments in law in other Commonwealth countries through responses to requests from officials and judges, and regular publications including the Commonwealth Law Bulletin;
- promotes co-operation between governments on legal matters including combating corruption in public life.

Legal co-operation schemes: The division initiated and helped to prepare, and promotes implementation of Commonwealth schemes for co-operation in law - for mutual assistance in criminal matters, the transfer of convicted offenders, extradition, and the protection of the material cultural heritage. Commonwealth legal co-operation also covers business regulatory bodies.

Incorporating international conventions: The division also assists governments to bring their national laws in line with international conventions such as the UN Declaration on the Elimination of Violence against Women, the Recommendations of the Financial Action Task Force on Money Laundering, and relevant World Trade Organisation (WTO) Agreements.

Secretariat Headquarters

The Secretariat has its headquarters at Marlborough House, Pall Mall, London SW1Y 5HX, UK. Tel: (44) 171-839 3411. Fax: (44) 171-930 6128.

Website: <http://www.thecommonwealth.org>

TRANSPARENCY INTERNATIONAL'S MISSION STATEMENT

Rationale

- Corruption is one of the greatest challenges of the contemporary world.
- It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor.
Controlling it is only possible with the co-operation of a wide range of stakeholders in the integrity system, including most importantly the state, civil society, and the private sector.
- There is also a crucial role to be played by international institutions.

TI's Purpose

- To curb corruption by mobilising a global coalition to promote and strengthen international and national Integrity Systems.

Guiding principles

TI is based on the following guiding principles:

- TI recognises the shared responsibility of actors in all regions for corruption, and its emphasis is on prevention and on reforming systems, not on exposing individual cases;
- TI considers that the movement against corruption is global and transcends social, political, economic and cultural systems;

Internally, TI observes the principles of participation, diversity, accountability and transparency;

- TI is politically non-partisan; and

TI recognises that there are strong practical as well as ethical reasons for containing corruption.

How TI achieves its purpose

- TI builds national, regional and global coalitions, embracing the state, civil society and the private sector, in order to fight domestic and international corruption;
 - TI co-ordinates and supports National Chapters to implement our mission;
 - TI assists in the design and the implementation of effective integrity systems; and
- TI collects, analyses and disseminates information and raises public awareness on the damaging impact of corruption (especially in low-income countries) on human and economic development.

What makes TI different?

- TI is the only international movement exclusively devoted to curbing corruption.
- TI is an international centre of expertise on combating corruption, pooling a large number of highly professional volunteers for an integrated approach.
- TI seeks to empower civil society to play a meaningful role in countering corruption.

April 1998

The Rationale:

“Throughout the world people are increasingly angry with the ways in which public power has been manipulated for private profit. The message we get from our national chapters in every corner of the globe is that they want to see clear and clearly-understood conflict of interest rules established, and for conflicts of interest involving public officials to be contained through the open monitoring of their assets and liabilities.” Peter Eigen, Chairman, Transparency International (TI).

The Author:

Gerard Carney is Associate Professor of Law at Bond University in Queensland, Australia. He has written extensively on the subject of controlling conflicts of interest and has served as expert consultant to several commissions of inquiry, both in Australia and abroad.

The Publishers:

Transparency International (TI) is a not-for-profit non-governmental organisation with its headquarters in Berlin, Germany. Founded in 1993, it presently has over seventy national chapters formed or in formation, in all parts of the world. TI's Mission Statement appears on page 2. Full details of the organisation and its finances are on the TI web site, together with the *TI Source Book on National Integrity Systems* to which this publication is an adjunct.

TI is a non-political global movement against corruption. It brings together into a coalition with civil society groups and NGOs interested in promoting just and honest government, a wide range of stakeholders, including development agencies, private sector interests, and international financial institutions.

TI may be contacted at:

97-99 Otto-Suhr-Allee,
D-10585 Berlin, Germany

Tel. + 49 30 343 8200
Fax + 49 30 347 03912

Web site: <http://www.transparency.de> Email: ti@transparency.de

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Transparency International's acknowledgements

Transparency International (TI) acknowledges with gratitude the financial assistance from the Ford Foundation which made this study possible.

An extended version of appears on TI's web site: see <http://www.transparency.de>, which also includes much of the primary material referred to in this study.

This study is one of a series being prepared to empower civil society to engage in meaningful and effective debates about the development of their countries' National Integrity Systems. An up-to-date list of the studies published, and the publications themselves, may also be seen on the TI web site.

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INTRODUCTION

This study has two main purposes. The first is to assist legislators, ministers and public officials to identify a conflict of interest when it poses an ethical dilemma in the performance of their official duties and responsibilities. The second purpose is to suggest various mechanisms either to prevent such a conflict of interest arising, or to resolve the conflict when it does arise. It does not purport to be a comprehensive manual of public sector ethics although it deals with probably the most important aspect of an ethical public life. Nor does it provide a clear blue-print of rules as if a legal text, since it has been observed :

Questions of law are ultimately able to be resolved by the courts. Matters of ethics are, almost by definition, unable to be resolved by resort to rules or laws. Ethics questions are matters for judgement about competing values, and therefore matters about which there may be continuing disagreement, ambiguity, or uncertainty.

Put in its simplest terms, a conflict of interest arises when the private interests of a politician or official clash or even coincide with the public interest. Such a conflict of interest raises an ethical dilemma when the private interest is sufficient to influence or appear to influence the exercise of official duties. Classic examples of conflict of interest include:

- A legislator approaches a minister on behalf of a company in which the legislator is a shareholder.
- A minister accepts an offer of future employment from a company which is currently seeking a government trading licence.
- A public official must decide from a number of options on the route of a new highway - one option would reduce the value of his family's farm.

At best, guidance is given to assist in the identification and resolution of conflicts of interest. Other issues thrown up by the above simplistic definition include: what is an interest, what is a private interest, what is the public interest, what constitutes a clash of those interests, and when does a coincidence of interests raise an ethical dilemma?

The relationship between conflict of interest and corruption helps to elucidate the nature of both. Of the two phenomena, corruption is the better known. Most people are able to give an example of corrupt conduct but less readily explain the notion of a conflict of interest. As for their relationship, one can say that all cases of corruption involve a conflict of interest but the reverse cannot be maintained.

More specifically, corruption involves a clash between the official's private and public interests where usually a financial benefit is knowingly obtained at the expense of the public interest. In other words, as defined by the TI Source Book in Ch 1, corruption is the "misuse of public power for private profit". A further basis of contrast is that corruption constitutes a serious crime whereas a conflict of interest merely describes a broad spectrum of conduct. Whether particular conduct constitutes unethical behaviour or worse depends on the circumstances and the reaction to the conflict. Corruption lies at one extreme of that spectrum of conflict of interest.

This connection between corruption and conflict of interest is the subject of increasing international recognition and discussion. For instance, the Justice Ministers of the member States of the Council of Europe recommended recently the adoption of international instruments on corruption including a code of good conduct for public servants. Similarly, the Inter-American Convention Against Corruption requires the parties to consider standards of conduct to prevent conflicts of interest arising including the public declaration of income, assets and liabilities by specified public officials.

The recognition of the need to avoid conflicts of interest by legislators, ministers and public officials promotes the adoption of similar standards of ethical conduct in the community as a whole.

There remains a note of caution.

It is essential if legislators, ministers and public officials are to act ethically to provide them with the support, both technical and emotional, needed to perform their arduous public duties. In addition, they must be provided whether in a full-time or part-time position with adequate salaries to enable them to have a lifestyle appropriate to their position. This is not a lavish lifestyle but one which enables them to provide for their families and which compensates them somewhat for the stresses put on family life.

At least, the remuneration must be sufficient to ensure that financial worries do not distract them from their public duties. In such an environment of financial security, the risk of unethical conduct is reduced, the lure of monetary gain is less tempting and the avoidance and resolution of conflicts of interest more likely.

CHAPTER 1

RATIONALE AND BENEFITS OF PUBLIC INTEGRITY

Before considering the nature of a conflict of interest, it is important to examine the underlying basis for the ethical concern which is raised by a conflict of interest.

The fundamental premise of all government is that the power of government derives from the people for whom it serves. In other words, there is a trusteeship created between the people and those who serve in the three branches of government: the legislature, the executive and the judiciary. Members and officers of each of those branches exercise an ever increasing power over the rights and liberties of individuals, the economy and the commercial system. That trusteeship requires the exercise of power for the people's welfare, that is, in the public interest. Hence the description of "public servant" appears more apposite than "civil servant".

The duty to exercise power in the public interest has been recognised for centuries by political philosophers: Plato, Cicero, Rousseau, Wang An Shih and the Islamic scholar, Abdul Rahman Ibn Khaldun (AD 1332-1406) who regarded the luxurious living of the ruling group as one of the causes of corruption. Moreover, this fundamental premise is reflected in many constitutions throughout the world.

Nowhere is it so comprehensively stated than in the United States Senate Code of Official Conduct which contains the following declaration of Senate policy :

The ideal concept of public office, expressed by the words, 'A public office is a public trust', signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public trust. All official conduct of Members of the Senate should be guided by this paramount concept of public office.

Public interest

The "public interest" in this context is in effect the purpose which those who exercise power conscientiously believe to be most appropriate for the general welfare of that society. Since minds differ on whether a policy will enhance society's welfare, the public interest is a flexible concept to accommodate such a range of views. Cultural differences may also explain diverging views on what is in the public interest. But there are limits to the breadth of this concept of public interest. While this study does not attempt to define the "public interest", it should be remembered that decisions made not in the public interest result in adverse consequences for the welfare of society, economically and socially, and ultimately for the political system itself. The focus of this study is on how the duty to serve that public interest is safe-guarded by the avoidance of conflict of interest.

An absolute obligation

For legislators, ministers or officials to decide a matter even partly on the basis that it will benefit his or her private interests is to betray the trust of the people. The decision must be made solely on the basis that it is in the best interests of society. For to allow any other consideration, may result in a decision other than that most appropriate in the public interest. The primary test is subjective, that is, one which the politician or official must apply personally according to his or her own conscience.

But even if this test is satisfied, there is also an objective assessment to be made. Might the decision be viewed by the people as one made other than solely on the basis of their welfare? This must also

be considered by the legislator, minister or official but unlike the subjective test, the ultimate judgement on this issue rests with the people. Why must this be so? The reason is public confidence. The people are entitled to feel confident that their power or sovereignty is being exercised for their benefit. For, as the famous American counsel, Archibald Cox, has noted, the stability of government rests on the maintenance of public confidence:

Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern.

This confidence can be easily eroded by the appearance of a conflict of interest. For this reason, the ethical requirement for legislators, ministers and officials is to avoid both actual, potential and apparent conflicts of interest.

At times the requirement to avoid apparent conflicts of interest appears unfair and harsh, especially when abused by political opponents. Yet a politician or official who creates the appearance of a conflict of interest is simply inviting the closer inspection of his or her motives. It is a self-imposed vulnerability. Unless the appearance can be dispelled by the politician or official, they risk the political consequences of assumed unethical behaviour. The appearance of a conflict of interest is, in other words, one of the hazards of the game of politics. Its avoidance becomes one of the rules of the game when the objective of the game is the pursuit solely of the public interest.

Accountability of government

The trend in many political systems to adopt mechanisms to support the integrity of its public officials is part of a wider phenomenon of government accountability. The ability to challenge government decisions for breaches of human rights, for lack of constitutional power or for failure to proceed in accordance with the rules of natural justice, also derives from the fundamental premise referred to earlier that the exercise of power is to be in the public interest. The concern with the integrity of those who exercise that power is simply the torch of public accountability being shone on another level of the decision-making process. It is another example of the checks and balances so eloquently explained by Thomas Madison in *The Federalist* No 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Guidelines to support, not undermine, public confidence

It is essential that any discussion of safeguarding the integrity of legislators, ministers and officials occur in a positive atmosphere which recognises the privilege and honour which attaches to those vested with the public trust. No assumption is made that all who occupy public office lack integrity. Rather, the desire is to assist those in public office vested with that awesome responsibility to act always in the public interest. Accordingly, the mechanisms recommended in this study on the whole emphasise the values which underlie ethical conduct rather than the rules which implement those values.

One of the reasons often given for adopting the various mechanisms outlined in this study is to improve the low level of public confidence in the integrity of politicians and public officials. This view reflects the fact that mechanisms are generally adopted only in response to significant public scandals, such as Watergate in the United States. Public confidence depends ultimately, however, on the performance of those entrusted to govern. These mechanisms only support and assist politicians and public officials in the performance of their onerous duties and responsibilities. Their efficacy cannot be assessed simply in terms of any change in the level of public confidence. Nor is it possible to determine whether public confidence is enhanced by these measures. Their primary achievement must be the extent to which they have assisted politicians and public officials to serve the public interest better.

It should be noted, however, that increased levels of public scrutiny of government especially by an active media renders public confidence in government more vulnerable now than in the past. Yet at the same time, there is unlikely to have been any change in the nature of a conflict of interest and its prevalence. So what has rendered public confidence more vulnerable is not necessarily a further decline in ethical standards but the increased likelihood that infringements of those standards will be detected.

Along with mechanisms to help preserve integrity in government, there has been recognition of what has been called the “affirmative side” of government ethics, that is, to be “intellectually honest and politically courageous”. The issue becomes not what I can get away with, but can I justify my conduct? Essentially, it is another aspect of accountability and responsibility but one which goes beyond the scope of this study.

Foreign And International Law Issues

**THE REFORM OF THE RULES GOVERNING JURISDICTION
AND THE ENFORCEMENT OF FOREIGN JUDGMENTS**

**Memorandum by the Commonwealth Secretariat and paper by
Professor David McClean, CBE, QC, DCL, Dean of the Faculty of Law
University of Sheffield, England**

1. In the Commonwealth context, the question of the recognition and reciprocal enforcement of judgments and orders and the Service of Process within the Commonwealth has received the consideration of Law Ministers over the years.

2. In 1975 a preliminary Report on the subject commissioned by the Secretariat and prepared by Professor David McClean and Professor Keith Patchett, then Professor of Law at the University of Wales, was presented to Law Ministers at their Meeting in Lagos, Nigeria in 1975. A further Report on the subject also commissioned by the Secretariat and prepared by the same authors was presented to Law Ministers at their Meeting in Winnipeg, Canada in 1977.

3. Between 1978 and 1980, the Secretariat organised a series of regional Working Meetings in Basseterre, St. Kitts (1978); Apia, Samoa (1979) and Nairobi, Kenya (1980) to examine existing arrangements and to consider ways in which improvements might be made in certain areas of the Recognition and Enforcement of Judgments and Orders, the Resealing of Grants of Administration and the Service of Process within the Commonwealth.

4. Prior to the advent of the World Trade Organisation (WTO) and the liberalisation of trade practices, difficulties were experienced in enforcing foreign judgments in civil cases which often depended on the existence or absence of reciprocal arrangements for the enforcement of such judgments. With the increase in the globalisation of trade, the issues relating to jurisdiction and the enforcement of foreign judgments are bound to assume greater significance.

5. The attached paper by Professor McClean, who has over the years represented the Secretariat at Sessions of The Hague Conference on Private International Law with which the Secretariat has reciprocal Observer status, is a continuation of the general watching brief the Secretariat maintains on behalf of member countries on general international legal developments and matters of contemporary interest and concern.

February 1999

THE REFORM OF THE RULES GOVERNING JURISDICTION AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

Paper by
Professor David McClean, CBE, QC, DCL, Dean of the Faculty of Law
University of Sheffield, England

Introduction

1. This paper examines some highly significant developments which could have important effects on international civil litigation generally, and on Commonwealth practice in particular.

2. The background is that legal disputes cross national frontiers with increasing frequency. Raw materials exported from one country and used to manufacture a product in a second may give rise to a product liability claim from a plaintiff resident in a third. The dispute may involve injury to an individual, perhaps a tourist, or may have much wider ramifications, involving a development grant to a local enterprise paid through a foreign bank. Issues frequently arise as to: (a) the jurisdiction of the courts; and (b) the recognition and enforcement of any resulting judgment.

3. Many Commonwealth countries share a common set of principles on the issue of jurisdiction and have legislation on the recognition and enforcement of judgments based ultimately on English models. On both aspects, the existing rules are increasingly seen as unsatisfactory. They even lack coherence, for the recognition rules do not cover all judgments issued under the common jurisdictional principles! It is now possible that a new model will become available in the year 2000 which could provide the Commonwealth with the opportunity to revise and greatly improve its current practices, to the benefit of litigants and the courts.

4. The Hague Conference on Private International Law, an intergovernmental body with which the Commonwealth Secretariat has Observer status, is the primary means through which States co-operate in considering the

harmonisation and simplification of the relevant rules of law. It has been working since 1994 on a draft international convention on Jurisdiction and the Recognition and Enforcement of Judgments. A preliminary and incomplete draft was produced after the last meeting of the relevant Special Commission of the Conference in November 1998 and it is hoped that a Convention can be agreed at the Nineteenth Session of the Conference in the year 2000.

Existing Commonwealth practice

(a) *Jurisdiction*

5. Most Commonwealth countries have rules derived from traditional English practice, under which jurisdiction can be taken in three main sets of circumstances:

- (i) where the writ or other originating document is served on the defendant within the territorial jurisdiction of the forum State

As a basis for jurisdiction this is wholly unsatisfactory. Given ever-increasing mobility, the presence of the defendant (or an officer of the defendant company) in a particular country at one moment in time is no guarantee that the case has any real connection with the forum country. The Brussels and Lugano Conventions (to which the United Kingdom and most European countries, whether in the European Union (EU) or not, are parties) expressly prohibit its use as against

- (ii) defendants domiciled in other Contracting States;
where the defendant submits to the jurisdiction; and
- (iii) where the court grants leave under what in England is Order 11 of the Rules of the Supreme Court for service outside the jurisdiction in prescribed circumstances

Some of the grounds upon which leave can be given, e.g., that the contract was made within the jurisdiction, are also viewed with disfavour as outmoded and so 'exorbitant'; especially as we move into the realms of electronic commerce, notions of the 'place of contracting' become very artificial. Most if not all Commonwealth countries which have this 'Order 11' jurisdiction nonetheless refuse to recognise judgments of other Commonwealth courts which have taken jurisdiction under identically worded Rules.

6. The rigidity of these rules is tempered by the use of the plea of *forum non conveniens* and the discretionary element in the use of Order 11; but in the practice of civil law countries neither is known and that degree of judicial discretion is regarded as an infringement on the doctrine of the separation of powers.

(b) Recognition and enforcement of judgments

7. The subject of the recognition and enforcement of money-judgments within the Commonwealth was examined in a detailed report considered by Commonwealth Law Ministers at their Winnipeg Meeting in 1977, *The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth* by David McClean and Keith Patchett. (Professor Patchett subsequently published a detailed study on those aspects of that subject which are

relevant to civil and commercial disputes: *Recognition of Commercial Judgments and Awards within the Commonwealth* (Butterworths, 1984)). As the report observed:

"In a world where international trading relations increasingly give rise to the possibility of transnational debts, the security of commercial transactions calls for a speedy, cheap and uncomplicated process for ensuring that judgments properly obtained against a debtor can be satisfied, even though his assets may be situated in another law area."

8. The great majority of Commonwealth countries have legislation modelled on one or both of two United Kingdom statutes, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. In his 1984 book, Professor Patchett identified 45 Commonwealth jurisdictions with legislation based on the 1920 model (plus the Canadian provinces which had a distinct model still recognisably derived from that of 1920) and 56 jurisdictions with legislation on the 1933 model. Many had both. Some also had legislation reflecting earlier regional arrangements (in the Caribbean, and in Central and East Africa). Since the date of Professor Patchett's study, some countries have revised their legislation, in some cases using a model prepared for the Commonwealth Secretariat (so, Kenya in 1984 and Solomon Islands in 1988).

9. **Appendix A** to this paper sets out a partial text, in parallel columns, of a recent model (the Foreign Judgments Act 1991 of Australia) and of the corresponding material from the United Kingdom 1933 Act. It will be seen that:

- (a) in both models (Australia s.5; UK s.1) the legislation depends for its operation on the designation of reciprocating countries, by Regulation, Order-in-Council or equivalent instrument. The geographical scope of many Commonwealth Acts in this field is remarkably small despite the widespread use of similar legislative texts;

(b) that recognition depends largely on whether the country of origin of the judgment is regarded as having had jurisdiction to grant it, though this material is awkwardly placed under a heading relating to the 'setting aside of registered judgments' (Australia, s.7(3); UK, s.4(2)). The main grounds for taking jurisdiction which are regarded as acceptable can be stated as follows:

(i) that the judgment debtor was plaintiff in, or counter-claimed in, the court of origin (Australia, s.7(3)(a)(ii); UK, s.4(2)(a)(ii));

(ii) that the judgment debtor, a defendant in that court:

(a) was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the relevant country (Australia, s.7(3)(a)(iv); UK, s.4(2)(a)(iv)); or

(b) had an office or place of business in that country and the proceedings were in respect of a transaction effected through or at that office or place (Australia, s.7(3)(a)(v); UK, s.4(2)(a)(v)); or

(c) submitted to the jurisdiction of that court by prior agreement (e.g. in a jurisdiction clause in a contract) or by voluntarily appearing in the proceedings (Australia, s.7(3)(a)(iii); UK, s.4(2)(a)(iii)).

There are additional grounds in the case of disputes concerning immovables.

10. Much of the Commonwealth legislation in this area is "showing its age". It suffers from a number of defects, notably the fact that many countries have very limited lists of other Commonwealth members designated as reciprocating for the purpose of the relevant Act, but the processes of enforcement can be made to work. It falls into that category, well known to law reform agencies, of legislation which really should be overhauled but seldom reaches a priority list in any one country. All that suggests that were an acceptable and up-to-date model available, based on principles acceptable to neighbouring States and trading partners in the civil law as well as the common law tradition, including such states as the United States (where common law developments have proceeded on different lines from those followed in most Commonwealth countries, and Japan) it might well be taken up by Commonwealth countries. It is this that gives recent work at the Hague considerable significance.

Developments in the field

11. Earlier work in the Hague Conference led to a Convention of 1 February 1971 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters. It has not enjoyed success: only three States, Cyprus, the Netherlands and Portugal, have ratified the Convention, and as between the two last-mentioned, its provisions have been replaced by those of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968, a convention negotiated under the auspices of the European Community.

12. There has been work done on this topic in a number of regional fora. So under the auspices of the Organization of American States there are two, interrelated, Inter-American Conventions negotiated in 1979, that on Extraterritorial Validity of Foreign Judgments and Arbitral Awards and that on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments. These are not in a particularly fully-developed form.

13. The signature of the Brussels Convention was one of the most significant events in this field in recent decades. It is a “double convention”, which means that it prescribes the bases on which the courts of Contracting States may take jurisdiction as well as requiring the recognition and enforcement of judgments of those courts in all other such States. Even more significant was the signature in 1988 of the Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, also known as “the Parallel Convention”, by which a number of other European States not within the Community adopted provisions based upon those in the Brussels text both as between themselves and with the EC Member States. The Lugano text contains some improvements of the original Brussels text and more recently that has in turn been amended to incorporate similar improvements.

Principles of the Brussels-Lugano texts

14. As has been noted above, these Conventions are ‘double’ Conventions; that is, they address issues both of jurisdiction and the enforcement of judgments. The latter aspect, the creation of a common market in enforceable judgments, was the initial starting-point. So a main feature of the Conventions is that a judgment obtained in any one Contracting State can be enforced, by what is virtually an automatic process involving minimal delay, in any other Contracting State. Although accompanied by inevitable qualifications, the provisions of Title III (Recognition and Enforcement) of the Conventions spell this out with stark simplicity. Article 26(1) provides: “A judgment given in a Contracting State shall be recognised in the other Contracting State without any special procedure being required” and Article 31 adds: “A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there”.

15. Before the Convention provisions allowing such easy enforcement could be made acceptable to potential Contracting States, there had to be agreement as to the bases upon which the relevant States would exercise jurisdiction. A State is not going to commit itself to enforce a judgment based on a claim to jurisdiction

which it regards as exorbitant. So the Convention spells out rules for the exercise of jurisdiction, the primary basis being the “domicile” of the defendant within the forum State (Article 2 of each Convention).

16. The notion of “domicile” is differently understood in different countries, or even in different contexts within the same country. The Conventions essentially allow each Member State to use its own definition so far as individual defendants are concerned (which means that two or more States may claim jurisdiction on the domicile basis) and make use of the civil law notion of the “seat” of a corporation for corporate defendants. Neither approach is satisfactory in a global context.

17. The Conventions also contain rules giving ‘exclusive jurisdiction’ to a court: Article 16 of the Conventions represents an agreement between the Contracting States that on certain matters there should be one court, and one court only, which could hear the case. The principal categories comprise disputes as to title to immovable property and proceedings concerned with the registration or validity of patents, trade marks, designs, or similar rights.

18. Finally, the Conventions establish, principally in Article 5, additional grounds of ‘special jurisdiction’, which require courts to entertain cases where the subject matter is linked to their State in specified ways. These rules can be compared with the ‘Order 11’ practice; but there is no element of discretion under the Conventions.

19. The principal types of special jurisdiction (without entering into the niceties) are:

1. in matters relating to a contract, the place of performance of the obligation in question;
2. in matters relating to individual contracts of employment, this place where the employee habitually carries out his work;
3. in matters relating to maintenance, in the courts for the place where the

maintenance creditor is domiciled or habitually resident;

4. in matters relating to tort, the place where the harmful event occurred;
5. as regards a dispute arising out of the operations of a branch, agency or other establishment, the place in which the branch, agency or other establishment is situated.

20. There are also provisions dealing with jurisdiction over co-defendants, counter-claims and recourse actions (Article 6), submission to the jurisdiction (Article 18) and 'prorogation of jurisdiction' (i.e. jurisdiction clauses) (Article 17).

21. As between themselves, the Contracting States expressly excluded the exercise of jurisdiction on a number of grounds deemed exorbitant. These are set out in Article 3 of the Conventions and include rules which enable jurisdiction to be founded on the mere fact that the document instituting the proceedings was served on the defendant during his temporary presence in the forum State.

Current work at The Hague

22. The aim of the current work in the Hague Conference is to develop a global convention which will draw on the best modern texts, particularly those of Brussels-Lugano, but with every provision designed to take fully into account the different approaches found across the world. There is little doubt that a modern text would be of enormous value not least for Commonwealth countries with their somewhat dated legislation. If the text can become a successful Convention transcending the boundaries created by regional arrangements, and by different legal and constitutional histories, it will be a major achievement.

23. The greatest added-value of a new Hague Convention over the existing instruments would be the participation of the United States (a matter important to the

European countries but equally to countries such as Australia, Canada, China, Japan and those in the Caribbean). This is not just because of the importance of the United States in international commerce: the existence of 50 different States with their own rules as to jurisdiction and recognition creates considerable difficulty, which would be removed were a federal treaty to be in place, pre-empting State law. There remain, however, obstacles to an agreement on terms which would be acceptable to the United States and to the other potential parties.

24. Part of the problem lies in the fact that the bases of jurisdiction available to courts in the United States are identified largely by interpretation of the Due Process Clause of the United States Constitution, which is taken to require an appropriate degree of connection between the defendant and the chosen forum. This has given rise to caselaw developing bases of jurisdiction such as the defendant's 'doing business' in the forum, whereas bases of jurisdiction defined by reference to the plaintiff (e.g. the habitual residence of a consumer wishing to sue for breach of a consumer contract, a basis available under the Brussels and Lugano texts) could run into constitutional challenges.

25. Another, and not wholly unrelated, difficulty concerns forum non conveniens which operates in common law jurisdictions and especially in the United States to qualify what might otherwise be exorbitant assertions of jurisdiction. The United Kingdom and Ireland, in accepting the Brussels Convention, in effect abandoned the use of forum non conveniens in their dealings with other Contracting States (though there remain doubts as to the exact effect); but what may be acceptable in a regional context may not be appropriate in a global convention. The difficulty remains that civil law countries are unfamiliar with the idea of forum non conveniens and have genuine concerns as to the degree of judicial discretion it involves.

26. Another issue, one much pressed by the Australian delegation at The Hague, is that of the level of damage awards. As is well known, the level of damages awarded (often by juries) in United States courts, whether as compensatory or as punitive damages, is often

far higher than would be contemplated elsewhere. Could a means be found of enabling judgments to be enforced but only to the extent, in terms of the quantum of damages, which reflected the practice of the State of enforcement? This was addressed 20 years ago in the negotiations between the United Kingdom and the United States for a bilateral convention. A text was produced in 1978, but has never been signed. The last version of that text excluded judgments to the extent that they were for punitive or multiple damages but also dealt with the issue of excessive compensatory damages as follows:

“Where the respondent establishes that the amount awarded by the court of origin is greatly in excess of the amount, including costs, that would have been awarded on the basis of the findings of law and fact established in the court of origin, had the assessment of that amount been a matter for the court addressed, that court may, to the extent then permitted by the law generally applicable in that court to the recognition and enforcement of foreign judgments, recognise and enforce the judgment in a lesser amount.”

27. In early rounds of the discussions at The Hague, the United States delegation expressed a willingness to negotiate on a similar basis in the context of a possible Hague Convention, but its position has hardened. The United States position seems to be that the special position worked out in a bilateral negotiation between two States with close ties and mutual confidence in their respective legal systems is not readily adaptable for use on a global basis.

The nature of a possible Hague Convention

28. The Special Commission of the Hague Conference which is charged with preparing a draft Convention for presentation to a full Session of the Conference in 2000 is setting itself the task of negotiating a fully “double convention” in the style of Brussels-Lugano. The difficulties in accommodating some United States approaches in a double convention may yet see a retreat to what is called a “mixed” Convention. Under such a Convention

- (a) certain bases for taking jurisdiction would be prescribed by the Convention and all judgments pronounced by courts taking jurisdiction on one of those bases would be guaranteed recognition and enforcement in all other Contracting States (subject to the exceptions usually found in this context, e.g. where no notice had been properly given to the defendant of the action against him);
- (b) certain bases for taking jurisdiction would be declared exorbitant and their use prohibited, and any judgment granted on such a basis would be denied recognition and enforcement;
- (c) a Contracting State would remain free to take jurisdiction on other bases, neither prescribed nor exorbitant, in accordance with its national law, but the recognition and enforcement of any judgments pronounced on such bases would fall outside the convention, and would depend on the national law of the State in which recognition and enforcement was sought.

The partial draft of November 1998

29. After a number of meetings exploring and clarifying issues, the Special Commission moved in November 1998 towards the establishment of a draft Convention, still pursuing the aim of a ‘double’ convention. At the end of the November 1998 meeting, the Drafting Committee presented the text reproduced as **Appendix B** of this paper. It will be seen that the text is far from being a complete draft, and that it contains a number of variants (sometimes based on opposed principles). It is also the case that the Drafting Committee was not able in the time available to revise some parts of the text which had been seen and criticised by the Special Commission during the meeting. Nonetheless, the text serves to indicate the current state of the work, and the following paragraphs offer some commentary upon it.

Article 1: Scope

30. The policy of confining the draft to 'civil and commercial matters' is uncontroversial, and many of the exclusions in Article 1(2) follow naturally from its adoption. Unfortunately, however, the approaches of the civil law and common law countries divide on the meaning of 'civil and commercial'. The difficulty is well-known, but it remains difficult to draft wording which catches the differing understanding of the relationship between administrative law (and of special administrative tribunals) and civil matters in general. The words in square brackets in Article 1(2) are all related to this set of issues.

31. It will be noted that the Convention does not apply to arbitration (where the New York Convention holds sway) or to 'proceedings related thereto'; so a court judgment related to an arbitral award would not be within the scope of the Convention.

Article 2: Geographical scope

32. There is no draft text, but this is an important issue for Commonwealth countries. The question is to what extent the Convention will affect (parties from) non-Contracting States. This can arise in a number of forms, but, for example, the Brussels and Lugano Conventions have jurisdictional rules which generally apply only where the defendant is from another Contracting State; in other case the Contracting States are free to apply their traditional jurisdictional rules (as the United Kingdom does). But it is not clear whether the Hague Convention will adopt that same approach.

Article 3: Defendant's forum

33. The Special Commission agreed, with little difficulty, that the principal basis of 'general' jurisdiction (that is, jurisdiction existing regardless of the subject-matter of the dispute, like service within the jurisdiction in the familiar common law practice) should be, where the defendant was a natural person, the defendant's habitual residence. Habitual residence is a factual notion, free of the technicalities surrounding domicile.

34. More difficulty was met in agreeing an approach for corporations and other legal persons. The November 1998 text gives jurisdiction to the courts both for the place of incorporation or formation and also for the place where central management was exercised. This was preferred to an approach based on the notion of 'principal place of business' on the ground (which not all delegations found convincing) that a potential plaintiff would find it harder to be sure he had correctly identified the principal place of business.

Article 4: Choice of court

35. There is agreement that the Convention must deal with choice of court or jurisdiction clauses. The proposed text gives them binding force, and allows for the possibly different approach of non-Contracting States. The areas yet to be addressed principally concern the priority to be given to choice of court clauses as against other Convention rules: as against rules giving exclusive jurisdiction to a specified court (e.g. in cases concerning land) or creating what is coming to be called 'protected jurisdiction' (e.g. the special rules allowing a consumer to sue in his 'home' court).

Article 5: Appearance by the defendant

36. The principle, of jurisdiction created by submission, is relatively uncontroversial. The practical difficulties derive from the very great variety of procedures, so that there is a real problem in finding a form of words which identifies the point beyond which a challenge to the jurisdiction can no longer be raised without amounting to submission. For example, some States have procedures which enable a defendant to enter a limited appearance solely to challenge the court's jurisdiction, but others insist that any such challenge must be part of a defence which also addresses the merits.

Article 6: Contracts

37. This is proving one of the more controversial areas. Variant 2 is not dissimilar to the Brussels and Lugano text which has the language (in Article 5(1)) "in matters relating to a contract, in the courts for the place of performance of the obligation in question", but the proposed Hague text requires more: a

significant part of the obligation must in fact be performed. The argument is that a mere obligation to perform in State X does not create a significant link with that State, a matter of particular concern to the United States delegation.

38. Variant 1 is even closer to United States ideas allowing the plaintiff (and not only a consumer plaintiff) to sue in the courts of his own habitual residence where the defendant has engaged in certain closely defined types of related activity in that same State. European civil lawyers are deeply suspicious of the forum actoris, jurisdiction at the plaintiff's home court, so there are cross-currents of argument which will take some time to resolve.

Article 9: Branches

39. Both the familiar common law rules and the Brussels-Lugano texts recognise jurisdiction, where a dispute has arisen from the operation of a 'branch' of a company, in the country where the branch was situated. The scope to be given to the notion of a 'branch' attracts less international agreement, and the mere involvement of an agent or employee of the defendant is not seen as the equivalent of a branch.

40. The text in the November 1998 proposals reflects the continuing disagreement, and also tries to incorporate the United States notion of defendants 'doing business' in the forum State. As those ideas are also to be found in one Variant of Article 6 (see above), it is unclear how the various aspects of the present draft will be incorporated in the eventual text.

Article 10: Torts

41. This is also proving difficult. Paragraph 1 of the 1998 text is derived in part from the experience of operating the Brussels-Lugano text. The 'place of injury' test in 1(b) can produce fortuitous jurisdiction if unqualified (notably in the case a product taken to some country far removed from both the country in which it was manufactured and the markets in which it was intended to be sold).

42. Paragraph 3 is again influenced by European experience. In a number of cases, the courts have held that there is jurisdiction in the

State of injury but that damages can be awarded in the courts there only in respect of loss suffered in that State. A very similar idea is presented here.

43. Paragraph 2 appears to be concerned with jurisdiction to grant injunctive relief, to restrain threatened conduct.

44. There will almost certainly be special rules (in the Articles yet to be drafted) as to protective jurisdiction in respect of consumers and employees. Consumers may be allowed to sue in the courts of their own habitual residence in disputes arising out of consumer contracts, a concept which would include some insurance policy cases. Workers, similarly, might be allowed, in disputes arising out of a contract of employment, to sue in the courts for the place which constituted the centre of their employment activities under the contract.

45. It seems likely that where a dispute concerns questions of title to land, only the courts at the place where the land is situated will have exclusive jurisdiction. It remains to be settled how such a principle would be expressed, whether it would extend even to questions concerning tenancies, and how it would relate to issues arising under trusts. Jurisdiction in disputes between the trustees and beneficiaries under a trust would be separately dealt with, perhaps by giving jurisdiction to the courts designated in the trust deed or for the place where the trust had its principal place of administration, and failing both the place with which the trust had the closest connection. It seems likely that certain types of issue as to the establishment and internal 'constitution' of companies will be reserved to the State in which the company was formed and is registered.

Article 14: Provisional and protective measures

46. To the common lawyer, the measures dealt with here are best illustrated by the Mareva injunction (to which the new Civil Procedure Rules in England give the more mundane name 'freezing injunction'). The increasing importance of such measures in practice needs no underlining, but some countries view the development of 'world-wide Marevas' with deep suspicion. For this reason

the draft of Article 14 looks more like an examination paper than a set of recommendations.

Article 20: Prohibited grounds of jurisdiction

47. Article 20 draws the important distinction between general and special jurisdiction. All the grounds listed would be unacceptable as bases for the assertion of general jurisdiction, unrelated to the subject-matter of the dispute. Grounds (a) (the presence of property, especially land) and (e) (doing business) might well be acceptable as bases of jurisdiction where the dispute concerns the property or arises out of the 'doing business'. Ground (f) is of particular interest to Commonwealth countries. It will be seen that the Drafting Committee is considering an exception in respect of civil actions based on violation of human rights protected by international conventions.

Article 23: Lis pendens and Article 24: Declining jurisdiction

48. The state of the text indicates the level of disagreement. In Article 23, Proposal I in its two variants is derived from the approach in the Brussels and Lugano Conventions, which essentially give jurisdiction to whichever court in a Contracting State is first seised of the case (assuming, of course, that it is entitled to take jurisdiction under the Convention rules). Experience has shown that the notion of the court being 'seised' is far from unproblematic, and the Variants are attempts to address that problem. Proposal II introduces an element of discretion akin to that familiar under the plea of forum non conveniens.

49. This idea is developed further in the 'optional' Article 24; it is not wholly clear in what sense it is optional. It will be clear that the Drafting Committee felt obliged to include, if only in square brackets, rather detailed provisions which spell out matters which in common law courts are understood as matters of practice in the exercise of the court's wide discretion. It is the very width of that discretion which makes the whole notion difficult for some civil law countries to accept, but it is far from clear that an optional Article, which some Parties could accept and others reject, would be workable.

Articles 25 and 26: Recognition and enforcement

50. The principle of easy recognition and enforcement is basic to the whole project, and these two articles state the general rule. The text indicates the few points on which no clear decision had been taken in the discussions thus far.

Article 27: Grounds for refusal of recognition and enforcement

51. Potentially more controversial, the discussions revealed broad agreement, and Article 27 draws heavily on well-established precedents in other Conventions. Paragraph 2 requires a court to accept findings of jurisdictional facts (for example that the State of origin was the place of central management of a corporation or business association) found as fact by the court in contested proceedings in the State of origin.

Articles 28 to 31

52. These seem not to require detailed comment, as the principles are familiar. The prohibition of any requirement of legalisation and of security for costs based on the nationality or habitual residence of the applicant (the judgment-creditor) should give rise to no difficulty.

Article 31bis: Legal aid

53. This provision may give rise to more discussion. Variant 1 has the effect of extending to the State requested to enforce a judgment the effect of a decision in the State of origin that a party should have legal aid. Variant 2 has a more limited effect in international terms, keying the grant of any legal aid to the terms on which legal aid might be granted to a party habitually resident in the State addressed. The latter seems the more acceptable.

Article 32bis: Damages

54. This is an attempt to address the highly controversial issues, already mentioned, as to the level of damages. Paragraph 1 would enable some States to decline to enforce awards of

exemplary, punitive or otherwise non-compensatory damages (though it is drafted in a positive rather than a negative way). Paragraph 2 tackles the even more sensitive issue of 'excessive' compensatory damages. It is here that the 'politics' of the negotiations are at their least predictable, and the issue will undoubtedly be used as a bargaining counter in future stages of the negotiations, right up to the final Session in 2000.

General conclusions

55. Although much work remains to be done, the prospect of a new Convention is an exciting one, which would have enormous advantages for Contracting States. It may be necessary for existing rules to be retained for use in dealings with non-Contracting States, but it is very likely that the terms of the new Convention will set the norm for jurisdictional rules and for the recognition and enforcement of judgments in the 21st Century. Despite the growth of arbitration, many disputes can only be handled by the courts and a reformed system will both assist litigants and, by greater simplicity, reduce the overall cost of operating the courts.

ENFORCEMENT OF FOREIGN JUDGMENTS LEGISLATION

Australia

FOREIGN JUDGMENTS ACT 1991

Application of this Part on the basis of reciprocity of treatment

5.- (1) If the Governor-General is satisfied that, in the event of the benefits conferred by this Part being applied to money judgments given in the superior courts of a country, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all Australian superior courts, the regulations may provide that this Part extends in relation to that country.

(2) ...

(3) If the Governor-General is satisfied that, in the event of the benefits conferred by this Part being applied to money judgments given in all or some inferior courts of such a country, substantial reciprocity of treatment will be assured in relation to the enforcement in that country of money judgments given in all or some Australian inferior courts, the regulations may provide that this Part extends in relation to specified inferior courts of that country.

(5) ... a judgment is taken to be final and conclusive even though:

- (a) an appeal may be pending against it; or
 - (b) it may still be subject to appeal;
- courts of the country of the original court.

(6) [Possible application to some non-money-judgments]

Setting aside a registered judgment

7. -(1) ...

(2) Where a judgment debtor duly applies to have the registration of the judgment set aside, the court:

(a) must set the registration of that judgment aside if it is satisfied--

(i) that the judgment is not, or has ceased to be, a judgment to which this Part applies; or

(ii) that the judgment was registered for an

United Kingdom

FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT 1933

Power to extend Part I of Act to foreign countries giving reciprocal treatment

1. - (1) If, in the case of any foreign country, Her Majesty is satisfied that, in the event of the benefits conferred by this Part of this Act being extended to, or to any particular class of, judgments given in the courts of that country or in any particular class of those courts, substantial reciprocity of treatment will be assured as regards the enforcement in that country of similar judgments given in similar courts of the United Kingdom, She may by Order in Council direct--

(a) that this Part of this Act shall extend to that country;

that such courts of that country as are specified in the Order shall be recognised courts of that country for the purposes of this Part of this Act: and

that judgments of any such recognised court, or such judgments of any class so specified, shall, if within subsection (2) of this section, be judgments to which this Part of this Act applies.

(3) ... a judgment shall be deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

Cases in which registered judgments must, or may, be set aside

4. -(1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment--

(a) shall be set aside if the registering court is satisfied--

(i) that the judgment is not a judgment to which this Part of this Act applies or was registered in contravention of the foregoing provisions of this Act: or

- amount greater than the amount payable under it at the date of registration; or
- (iii) that the judgment was registered in contravention of this Act; or
 - (iv) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - (v) that the judgment debtor, being the defendant in the proceedings in the original court, did not (whether or not process had been duly served on the judgment debtor in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable the judgment debtor to defend the proceedings and did not appear; or
 - (vi) that the judgment was obtained by fraud; or
 - (vii) that the judgment has been reversed on appeal or otherwise set aside in the courts of the country of the original court; or
 - (ix) that the judgment has been discharged; or
 - (x) that the judgment has been wholly satisfied; or
 - (viii) that the rights under the judgment are not vested in the person by whom the application for registration was made; or
 - (xi) that the enforcement of the judgment, not being a judgment under which an amount of money is payable in respect of New Zealand tax, would be contrary to public policy; or
- (b) may set the registration of the judgment aside if it is satisfied that the matter in dispute in the proceedings in the original court had before the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter
- (3) For the purposes of subparagraph (2)(a)(iv) and subject to subsection (4), the courts of the country of the original court are taken to have had jurisdiction:
- (a) in the case of a judgment given in an action in personam :
 - (i) if the judgment debtor voluntarily submitted to the jurisdiction of the original court; or
 - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in the
 - (ii) that the courts of the country of the original court had no jurisdiction in the circumstances of the case; or
 - (iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that process may have been duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear; or
 - (iv) that the judgment was obtained by fraud; or
 - (vi) that the rights under the judgment are not vested in the person by whom the application for registration was made;
 - (v) that the enforcement of the judgment would be contrary to public policy in the country of the registering court;
- (b) may be set aside if the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter
- (2) For the purposes of this section the courts of the country of the original court shall, subject to the provisions of subsection (3) of this section, be deemed to have had jurisdiction--
- (a) in the case of a judgment given in an action in personam--
 - (i) if the judgment debtor, being a defendant in the original court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings . . . ; or
 - (ii) if the judgment debtor was plaintiff in, or counter-claimed in, the proceedings in

- original court; or
- (iii) if the judgment debtor was a defendant in the original court and had agreed, in respect of the subject matter of the proceedings, before the proceedings commenced, to submit to the jurisdiction of that court or of the courts of the country of that court; or
 - (iv) if the judgment debtor was a defendant in the original court and, at the time when the proceedings were instituted, resided in, or (being a body corporate) had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor was a defendant in the original court and the proceedings in that court were in respect of a transaction effected through or at an office or place of business that the judgment debtor had in the country of that court; or
 - (vi) if there is an amount of money payable in respect of New Zealand tax under the judgment; or
 - (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property--if the property in question was, at the time of the proceedings in the original court, situated in the country of that court; or

- the original court; or
- (iii) if the judgment debtor, being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of the country of that court; or
 - (iv) if the judgment debtor, being a defendant in the original court, was at the time when the proceedings were instituted resident in, or being a body corporate had its principal place of business in, the country of that court; or
 - (v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place;
 - (b) in the case of a judgment given in an action of which the subject matter was immovable property or in an action in rem of which the subject matter was movable property. if the property in question was at the time of the proceedings in the original court situate in the country of that court;

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters (10 - 20 November 1998)

Proposal by the Drafting Committee (Working Document No 144 dated 20 November 1998)

CHAPTER I SCOPE OF THE CONVENTION

Preamble not yet discussed

Article 1 Substantive scope

1 This Convention applies to civil and commercial matters.

2 The Convention does not apply to the following matters -

- a civil status and legal capacity of natural persons;
- b maintenance obligations;
- c matrimonial property regimes [and other rights and obligations arising out of marriage]¹;
- d wills and succession;
- e insolvency, composition or analogous proceedings;
- f social security;
- g arbitration and proceedings related thereto;
- [h questions of administrative law;]
- i taxation and customs;
- j ²

[3 A dispute is not excluded from the scope of the Convention by the mere fact that a governmental agency or other governmental instrumentality is a party to the proceedings.]

¹ This may need to be extended to relationships having consequences analogous to those of marriage.

² The questions of liability for nuclear activity will be dealt with in Article 37 (relations with other conventions).

[4 The Convention applies to disputes within its scope of application regardless of the nature of the body exercising judicial authority on behalf of the State.]³

Article 2 Geographical scope not yet discussed

CHAPTER II GROUNDS OF JURISDICTION

Article 3 Defendant's forum

Subject to the provisions of this Convention -

a a natural person may be sued for any claim in the courts [of the Contracting state] [of the place] where that person is habitually resident [or, if the habitual residence cannot be determined, where that person is domiciled];

b a legal entity may be sued for any claim before the courts [of the Contracting State] [of the place] where it has been incorporated or formed, or where it has its central management, or, if that place cannot be determined, the place of its principal activity.

Article 4 Choice of court

1 If the parties have agreed that a court or courts of a State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction unless the parties have agreed otherwise.

2 Such agreement shall be valid as to form, if it was entered into

a in writing or by any other means of communication which can be evidenced by a text; or

³ The Commission may wish to consider whether this paragraph, if acceptable, should apply only to recognition and enforcement.

- b orally and confirmed in writing or by any other means of communication which can be evidenced by a text; or
- c in accordance with a usage which is regularly observed by the parties; or
- d in accordance with a usage of which the parties were or ought to have been aware and which is regularly observed by parties to contracts of the same nature in the particular trade or commerce concerned; or

[e in accordance with any other form accepted by the court seised].

3 Reservation of protective forum - text to be decided

4 Reservation of exclusive jurisdiction - text to be decided

[5 Where such an agreement designates a court or courts of a non-Contracting State, courts in Contracting States shall [decline jurisdiction] [or suspend proceedings⁴] [unless the court or courts chosen have themselves declined jurisdiction].]

Nota bene: With regard to choice of court clauses, the following topics are still to be considered:

- 1 Sufficient links between the forum and the litigation
- 2 Provisional and protective measures
- 3 Warrantly
- 4 Intervention
- 5 Appearance of the defendant

Article 5 Appearance by the defendant

1 Subject to the provisions of this Convention, a court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction.

2 Variant 1

The defendant has the right to contest jurisdiction. Without prejudice to provisions of the law of the forum allowing more time, this right shall be exercisable

[Option 1 - within a reasonable time after the commencement of the proceedings]

[Option 2 - at least up to the time of the first defense on the merits].

Variant 2

The defendant has the right to contest jurisdiction not later than the time of the first defense on the merits.

Article 6 Contracts

Variant 1

A plaintiff may bring a claim, in matters relating to contracts, in the courts of a Contracting State if

1 the plaintiff's habitual residence or seat is located in that State; and

2 the defendant engaged in activity in that State that constituted a significant step

- a in the creation of the contract obligation on which the claim is based, such as solicitation of business, or
- b in the defendant's preparation to perform the obligation on which the claim is based, or
- c in the performance of the obligation on which the claim is based.

Variant 2

1 A plaintiff may bring a claim, in matters relating to contracts, in the Contracting State in which the obligation in question was to be performed under the terms of the contract, provided that a significant part thereof was in fact performed. If the claim is based on several obligations, the principal obligation shall be determinative.

2 The preceding paragraph shall not apply where the obligation in question is to pay for goods or services.

Article 7 Contracts with consumers not yet discussed

Article 8 Contracts with employees not yet discussed

Article 9 Branches

⁴ If this solution is accepted by the Special Commission, additional rules may have to be considered.

The plaintiff may bring a claim in the courts of a Contracting State in which a branch, agency or other establishment [, or an employee or other representative] of the defendant is situated or has acted for or on behalf of the defendant in conducting regular commercial activity, including promotional activity directed at that State or the sale of goods or provision of services in that State, provided that the action is based on a claim that relates to such activity.

Article 10 Torts or delicts

1 The plaintiff may commence an action based on a claim in tort or delict in the courts of the Contracting State -

a in which the act or omission of the defendant that caused the injury occurred, or

b in which the injury arose, provided that the defendant could reasonably foresee that the activity giving rise to the claim could result in such injury in that State, including activity through commercial channels known by the defendant to extend to that State.

2 The plaintiff may also commence an action in accordance with the preceding paragraph when either the act or omission, or the injury is threatened.

[3 If an action is commenced in a jurisdiction other than that where the act or omission that caused the injury occurred or where the defendant is habitually resident or has its seat, the court shall have jurisdiction only in respect of the injury that occurred in that State.]

Articles 11-13 Reserved

Article 14 Provisional and protective measures

1 A court that is seised or is about to be seised of proceedings on the merits and which has jurisdiction under the Convention has jurisdiction to take provisional or protective measures [in connection with those proceedings].

2 A court of the place where property is located has jurisdiction to take provisional or protective measures in respect of that property.

Nota bene: With regard to provisional and protective measures, the following topics are still to be considered:

1 Should the rule in the first paragraph be extended to any court having jurisdiction under the Convention?

2 Should a choice of court clause prevent other courts from taking provisional or protective measures, unless the parties have agreed otherwise?

3 Should there be a third paragraph as follows: "A court of a Contracting State has jurisdiction to take provisional or protective measures if their effect is limited to the territory of that State."?

4 Definition of provisional or protective measures?

5 Extraterritorial effects of orders in personam

6 Recognition and enforcement

Articles 15-19 reserved

[Article 20 Examples of prohibited grounds of jurisdiction]

1 General jurisdiction of a State over the defendant may not be based exclusively on one or more of the following [in particular]

a the presence in the territory of the State of property belonging to the defendant, [or the seizure by the plaintiff of property situated there];

b the nationality of the plaintiff;

c the nationality of the defendant;

d the domicile, habitual or temporary residence of the plaintiff within the territory of the State;

e the carrying on of commercial or other activities by the defendant within the territory of the State;

f the service of a writ upon the defendant within the territory of the State [with the exception of actions based on a violation of human rights protected by international conventions];

g [a unilateral specification of the forum by the plaintiff];

h [the declaration of enforceability or registration of a judgment].

2 Unless otherwise provided in the present Convention, the grounds under paragraph 1, subparagraphs b, c, d, f and g may not also serve as grounds to establish special jurisdiction.]

Articles 21-22 reserved

Article 23 Lis pendens

PROPOSAL I

1 When an action having the same subject matter is already pending between the same parties in the court of another Contracting State, the court second seised shall stay the case if it is to be expected that the court first seised will, within a reasonable time, render a decision capable of being recognised under this Convention in the State of the court second seised.

2 The court second seised shall decline jurisdiction as soon as it is presented with a decision rendered by the court first seised which complies with the requirements for its recognition or enforcement under this Convention.

[3 Variant 1

For the purposes of the preceding paragraphs, a court is seised when an application has been made before it and the document instituting the proceedings or an equivalent document has been duly served on the defendant.

Variant 2

For the purposes of this Article, a court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is filed with the court, provided that the document is received within fifteen days (from the date of filing) by the authority or person responsible for service. Failing this, the court is deemed to be seised when service is effected.

However, if the document must be served before being filed with the court, the court is deemed to be seised at the date on which the document instituting the proceedings or an equivalent document is received by the authority or person responsible for service, provided that the document is filed with the

court within fifteen days of receipt by the plaintiff of proof of service. Failing this, the court is deemed to be seised when the document is filed.]]⁵

[PROPOSAL II

1 If the court first seised determines that the court second seised in another Contracting State has jurisdiction and is [manifestly] more appropriate to resolve the dispute, it may suspend proceedings and direct the party concerned to request the court second seised to exercise its jurisdiction in place of the court first seised.

2 In determining the appropriateness of a forum the courts concerned will consider all relevant factors and in particular

a the distance between the habitual residence, or the seat of each of the parties and the court seised,

b the nature and location of the evidence capable of contributing to the resolution of the dispute and the procedure necessary to obtain such evidence.

3 The courts seised may proceed to an exchange of views.

4 If the court second seised determines that it has jurisdiction and accepts jurisdiction in place of the court first seised, the latter shall decline jurisdiction.

If the court second seised refuses to exercise jurisdiction, the court first seised shall revoke the suspension of the proceedings.

[5 Such procedure shall not have the effect of allowing a party to invoke a limitation period [time bar] with respect to a claim which was not subject to such limitation when it was pending before the court first seised.]]⁶

Article 24 Declining jurisdiction (optional provision)

Variant 1

⁵ Variant 2 was not fully discussed.

⁶ The problem of the effect of a declaratory action on lis pendens remains to be examined.

I In the absence of an express choice of court by the parties [or an exclusive jurisdiction], a court of a [Contracting] State having jurisdiction under the provisions of the Convention may, by way of exception and] at the request of any party at an early stage of the proceedings, suspend consideration of the case [or decline jurisdiction] if it considers that another [Contracting State] court has jurisdiction and would [clearly] [manifestly] be better placed in the particular case to try the dispute and to promote the ends of justice.

II In deciding whether to suspend consideration [or decline jurisdiction], the requested court shall consider [the following factors] [all the relevant factors, including in particular the following]

a the balance of convenience for the parties to the proceedings [and their witnesses] having regard in particular to:

- the availability and situation of the evidence and the location of the parties and the witnesses,
- [the language of the witnesses and the documents in the proceedings,]
- the likely relative speed and cost of proceedings in the two courts;

b whether one court and not the other will be applying its own law;

c the desirability of avoiding a multiplicity of legal proceedings and the risk of conflicting decisions;

d how far the litigation has progressed in the other court; e the enforceability of any decision which may result; and

f the relative strengths of the connections with the two courts of the parties and the dispute.

[III The requested court may consult with the other court, while fully respecting the rights of the parties, before deciding whether to suspend [or decline jurisdiction] in favour of that court.]

[IV The requested court [shall] [may] require the defendant to give such undertakings as meet the ends of justice, including an undertaking that he will not rely on a period of limitation or prescription having expired.]

[V If the requested court decides to suspend [or decline jurisdiction] in favour of the courts of a non-Contracting State it may order the defendant to lodge security in the requested court in an amount to satisfy any judgment of the other court in favour of the plaintiff and to cover the costs.]

[VI The requested court shall decide on the question whether to suspend [or decline jurisdiction] without [undue] delay.]

VII In the event that the other court does not assume jurisdiction, the requested court shall [revoke the suspension of the case and] proceed to consider the case.

VIII In the event that the other court assumes jurisdiction, the requested court may decline jurisdiction.

(The following paragraph could be included in the Chapter on Recognition and Enforcement)

IX A decision may not be refused recognition or enforcement on the ground that the court addressed takes the view that the court of origin should have declined jurisdiction.

Variant 2

No provision permitting the judge to decline jurisdiction.]

CHAPTER III RECOGNITION AND ENFORCEMENT

Article 25 The notion of decision

1 The rules of this Chapter shall apply to all decisions given by [the courts] of⁷ a Contracting State, irrespective of the name given by that State to the decision.

They apply also to

[a decisions which order provisional or protective measures and]

7 See Article 1.

b an award of judicial costs or expenses [even if such award does not proceed from a court], provided that it relates to a decision which may be recognised or enforced under this Convention.

Article 26 General rule

1 A decision rendered in a Contracting State shall be recognised in another Contracting State if it is final in the State of origin.

2 To be enforceable in the State addressed, a decision must be enforceable in the State of origin.

Article 27 Grounds for refusal of recognition and enforcement

1 Recognition or enforcement of a decision may however be refused

a if the decision was rendered by a court not having jurisdiction under this Convention,

[b if proceedings [between the same parties and] having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted,]

c if the decision is irreconcilable with a decision rendered [between the same parties], either in the State addressed, or in another [Contracting] State, provided that in the latter case the decision is [capable of being] recognised or enforced in the State addressed,

d if recognition or enforcement of the decision would be manifestly incompatible with the public policy of the State addressed.

2 In questions relating to the jurisdiction of the court of origin, the authority of the State addressed shall be bound by the findings of fact on which that court based its jurisdiction [unless the decision was given by default].

3 Without prejudice to such review as is necessary for the purpose of application of the preceding provisions, there shall be no review of the merits of the decision rendered by the court of origin.

Article 28 Decisions rendered by default

A decision rendered by default shall not be recognised or enforced unless the defaulting party has had, in the circumstances, sufficient time and opportunity to present his defense.

Article 29 Documents to be filed

1 The party seeking recognition or applying for enforcement shall furnish -

a a complete and certified copy of the decision;

b if the decision was rendered by default, the original or a certified copy of a document establishing that the document which instituted the proceeding or an equivalent document was brought to the knowledge of the defaulting party;

c all documents required to establish that the decision is final in the State of origin and, as the case may be, that the decision is enforceable in that State;

d if the authority addressed so requires, a translation of the documents referred to above, made by a person so qualified to do so.

2 No legalisation or other like formality may be required.

3 If the terms of the decision do not permit the authority addressed to verify whether the conditions of this Convention have been complied with, that authority may require the production of any other necessary documents.

Article 30 Procedure

1 The procedure for the recognition, declaration of enforceability or registration for enforcement of the decision is governed by the law of the State addressed. The authority addressed shall act expeditiously.

2 If the decision contains provisions which are severable, one or more of them may be separately recognised, declared enforceable or registered for enforcement⁸.

Article 31 Costs of proceedings

⁸ The Drafting Committee is of the view that this provision should be placed in the Article dealing with the effects of the decision (Article 32).

No security, bond or deposit, however described, shall be required by reason only of the nationality or habitual residence of the applicant [in a Contracting State] to guarantee the payment of judicial costs or expenses.

Article 31 bis Legal aid

Variant 1

A party granted legal aid in the State of origin shall be extended such aid under equivalent conditions [to the most favourable extent] provided by the law of the State addressed in any proceedings for the recognition or enforcement of a decision.

Variant 2

damages have been awarded, recognition may be limited to a lesser amount.

b In no event shall the authority addressed recognise the decision in an amount less than the amount of damages which that authority could have awarded in the circumstances, including those existing in the state of origin.

3. References in this Article to damages include, where appropriate, judicial costs and expenses.]

Persons habitually resident in a Contracting State shall be entitled, in proceedings for the recognition or enforcement of decisions in another Contracting State, to legal aid under the same conditions as apply to persons habitually resident in the requested State.

Article 32 Effects of the decision not yet discussed. *Article 32 bis Damages*

1 In so far as a decision awards non-compensatory damages, it shall be recognised at least to the extent that similar or comparable damages could have been awarded in the State addressed.

2 a [In exceptional cases] when the debtor, after proceedings at which the creditor has the opportunity to be heard, satisfies the authority addressed that in the circumstances, including those existing in the state of origin, [grossly] excessive

THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

Note by the Commonwealth Secretariat

1. A paper for Law Ministers (LMM(99)3) examines current steps to reform the rules governing jurisdiction and the enforcement of foreign judgments. This Note alerts Senior Officials to possible action in a closely related area, that of the reciprocal enforcement of maintenance orders.

2. Within the Commonwealth, the situation has many similarities to that outlined in respect of money-judgments in paper LMM(99)3. Almost all Commonwealth countries have legislation dealing with the reciprocal enforcement of maintenance orders, and most of the legislation is derived from one or other of two United Kingdom statutes, the Maintenance Orders (Facilities for Enforcement) Act 1920 and the Maintenance Orders (Reciprocal Enforcement) Act 1972. The legislation provides not only for the enforcement of final orders made in other Commonwealth countries designated for the purpose, but also (as its most characteristic feature) for the making of provisional orders by a court in the claimant's country of residence and their confirmation after a further hearing in the respondent's country. The resulting position was examined in the report by Professor David McClean and Professor Keith Patchett referred to in LMM(99)3, and the discussion at the ensuing regional meetings led to the development of a Model Bill, the final version of which was published by the Commonwealth Secretariat in 1981. A number of countries have more recent legislation, and Canada has a modern Uniform Act using the same basic techniques in its legislation for the inter-Provincial enforcement of maintenance orders.

3. The growing mobility of workers has led to an increase in the number of

cases in which maintenance claims are made across national boundaries, but a Special Commission of the Hague Conference on Private International Law held in April 1999 noted that existing international arrangements seemed not to address the problem adequately. There is a New York Convention on the Recovery Abroad of Maintenance negotiated under the auspices of the United Nations in 1956, which provides for the enforcement of final orders and for the transmission of maintenance claims for trial in the respondent's country, and no less than four Hague Conventions of which the two agreed in 1973, one dealing with the enforcement of final orders and the other with the applicable law, are the most important.

4. From the point of view of most Commonwealth countries, the Hague Applicable Law Convention is of no interest, as the common law tradition is that the law of the forum country is always applied to maintenance issues. Of Commonwealth countries, only the United Kingdom is a party to the Hague Enforcement Convention, which has little "added value" as compared with the Commonwealth's own legislative arrangements. Some Commonwealth countries are party to the New York Convention, but the text of that Convention has not proved very satisfactory as the nature of the assistance to be provided by states is unclear; the United Nations seems to lack the capacity to do further work in this area, and the Hague Conference is *de facto* responsible for monitoring the United Nations Convention.

5. The April Special Commission of the Hague Conference (at which Professor McClean acted as Observer for the Commonwealth Secretariat) identified a

number of issues which the present international texts fail to address, adequately or at all. Many of the issues arise from modern developments in national practice and are as relevant to the Commonwealth legislation as they are to the international conventions.

6. These issues include:

- the increasing use in some countries of administrative rather than judicial processes to deal with child and spousal support (e.g. the Child Support Agency of the United Kingdom and similar agencies elsewhere); most texts do not enable administrative decisions to be enforced across national boundaries;
- many texts do not allow public bodies which may have made payments for the maintenance of a wife or child to recover internationally such payments from the absent husband;
- although many countries now provide for the automatic "indexation" of maintenance payments by reference to annual movements in a cost of living index, the international arrangements accommodate this practice only with difficulty if at all;
- there is a lack of clarity on the extent to which a country can and should provide assistance in locating the maintenance-debtor or respondent to a maintenance claim;
- there are issues surrounding the provision of legal aid in a maintenance context;
- outside the Conventions, enforcement may depend upon reciprocity: the Commonwealth practice has revealed difficulties caused by the need (in all but the most modern versions of the

legislation) for the Commonwealth countries whose orders will be recognised to be specifically designated;

- the international texts are deficient in failing to accommodate the orders made under the Commonwealth procedure of provisional orders confirmed elsewhere, a serious matter as the Commonwealth jurisdictions are the largest group of any in terms of parties to particular arrangements;
- and there is the major issue of the disparity in economic standards, and so the level of awards, between different countries, a problem which the Commonwealth legislation partially solves by allowing a provisional order to be modified on confirmation whereas other texts are defective in dealing inadequately with modification or subsequent variation.

7. For all these reasons, the Special Commission decided to recommend that the development of a new and improved international instrument for the enforcement of maintenance orders be undertaken by the Hague Conference. This recommendation will be considered by the Commission on Policy and General Affairs of the Conference early next year.

8. Senior Officials will wish the Commonwealth Secretariat to monitor the consideration of this recommendation, and if a new instrument is developed to assist the Hague Conference in ensuring that there is sufficient flexibility in the new text for the needs and practice of Commonwealth countries to be accommodated. Senior Officials may wish to consider whether the issues identified in the recent discussions and listed in part at paragraph 6 above do not need to be addressed in the context of Commonwealth legislation, either independently of other international developments or as a contribution to the

international effort. This might eventually require decisions by Law Ministers, for example on a new version of the Model Bill referred to in paragraph 2 above, or the possible development of a Commonwealth Scheme incorporating best modern practice in a way which recognises the varying needs and legal resources of Commonwealth countries.

April 1999

THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT MECHANISM

Paper by the Commonwealth Secretariat

Introduction

1. Conscious of the shortcomings and weaknesses of the General Agreement on Tariffs and Trade (GATT) dispute settlement mechanism, the trade negotiators set out during the Uruguay Round to design and implement a new dispute settlement system which would command the respect and confidence of members. The new World Trade Organisation (WTO) dispute settlement mechanism is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and has been referred to as the "central pillar of the multilateral trading system and the WTO's most individual contribution to the stability of the global economy"¹

2. Article 3:2 of the DSU itself describes the new mechanism as the central element in providing security and predictability of the multilateral trading system. Article 3:1 is reassuring as it commits members to "adhere to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947", just like the WTO is to be "guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES"². But the DSU also aims to overcome the legal and procedural difficulties associated with the old GATT. As the DSU forms an integral part of the WTO Agreement, adherence to it is mandatory i.e. the DSU is binding on all WTO members.³

3. Since the entry into force of the DSU in 1995 as part of the WTO Agreement, the WTO has received more than 100 trade disputes, 37 of these proceeding to a dispute settlement panel.⁴ The function of the panels is to make an objective determination on the facts and of the applicability and conformity with the agreements indicated in Appendix 1 to the DSU, basically the entire WTO Agreement.⁵

4. The DSU establishes a separate Dispute Settlement Body (DSB) which is charged with the responsibility of settling all trade disputes arising from the operation of the WTO Agreement.⁶ The DSB has the sole authority to establish panels, adopt panel and appellate reports, maintain surveillance of implementation of rulings and recommendations, and authorise retaliatory measures in cases of non-implementation of recommendations.⁷ It should be noted that it is the WTO General Council which convenes as the DSB when it meets to settle disputes between members.⁸

Features of the New Dispute Settlement Mechanism

5. The DSU is very comprehensive, and as such reduces the scope for differing positions among members, who have undertaken not to resort to unilateral

¹ Renato Ruggerio, WTO Director General, 17 April 1997, quoted in WTO, Settling Disputes, 19 December 1997 <<http://www.wto.org/wto/about/dispute1.htm>>

² Article XVI:1 of the WTO Agreement

³ Article II:2 of the WTO Agreement

⁴ Overview of the State-of-play of WTO disputes, 9 November 1998, <<http://www.wto.org/wto/about/dispute1.htm>>

⁵ Article 11.1 of DSU.

⁶ Article 2.1.

⁷ Idem

⁸ Article IV: 3 of WTO Agreement.

measures, but to seek the redress of a violation of obligations or other nullification or impairment of benefits in accordance with the procedures of the DSU.⁹ It makes provision for alternative dispute settlement mechanisms such as conciliation, mediation and arbitration, and reinforces the panel process.¹⁰ It emphasises the importance of consultations in securing dispute resolution, requiring a member to enter into consultations within 30 days of a request from another member. If after 60 days from the request for consultations there is no settlement, the complaining party may request the establishment of a panel. The DSU requires that the panel be established unless the DSB decides by consensus against establishment.¹¹

6. The DSU also has specific rules and deadlines for deciding the terms of reference¹² and composition of panels¹³. Standard terms of reference will apply unless the parties agree to special terms within 20 days of the panel's establishment. If the parties do not agree on the composition of the panel within the same 20 days, the composition can be decided by the Director-General in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee. Panels normally consist of three persons of appropriate background and experience from countries not party to the dispute. The Secretariat maintains a list of experts suggested by delegations, nominated by the DSB.

7. In addition to rules relating to panel procedures, the DSU also sets out procedures for multiple complaints, involvement of third parties to the dispute, confidentiality of the information furnished during the panel proceedings, interim and final reports of the

panel and their adoption by the DSB, appellate review procedures, report of the Appellate Body, its circulation and adoption by the DSU, time frame for the DSU decisions and surveillance and implementation of the DSB rulings/recommendations.¹⁴

8. One major improvement introduced by the DSU was the abolition of the right of members to block the panel process. Under the new rules, the establishment of a panel is almost automatic, as the DSB is obliged to establish a panel after the request appears for the second time on its agenda unless the DSB by consensus decides against.¹⁵

9. The concept of appellate review is an important feature of the DSU. An Appellate Body was established which is composed of 7 members, three of whom serve on any one case.¹⁶ The new Appellate Body could be said to bring in more professionalism to the system.¹⁷ The Appellate Body members are required to be individuals with proven legal expertise and possessing adequate knowledge of the covered Agreements.¹⁸ They are required to act independently of the countries to which they belong.¹⁹ An appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel.²⁰

10. The stricter time-frame imposed under the DSU for various stages with a view of reducing unnecessary delays is an enormous improvement to the GATT dispute settlement system. As pointed out, there are now time limits for responding to a request for consultations, entering into actual

⁹ See Article 23.1 of the DSU.

¹⁰ Article 4 *idem*.

¹¹ Article 6 *idem*.

¹² Article 7 *idem*.

¹³ Article 8 *idem*.

¹⁴ Articles 9-22 *idem*.

¹⁵ Article 6.1.

¹⁶ Article 17.1.

¹⁷ Briggs, Inye N, et al, *Paper prepared for Seminar on Dispute settlement, Trade Policy Course, World Trade Organisation, 14 November 1997.*

¹⁸ Article 17.3.

¹⁹ Article 8.9.

²⁰ Article 17.6.

consultations, the DSB action on the request for establishment of panels, composition of panels, panel procedures, provision for appeal against panel reports, appellate review procedures, consideration and adoption of the panel and appellate reports by the DSB and their implementation by the parties concerned.

How successful has the DSU been?

11. Measuring the success of the DSU is very difficult, as it has only been in operation since 1995. As indicated in the table below, there have been 150 requests for consultation since 1995. Of that number some have gone to panel hearings, while others have been either withdrawn or settled between the parties. This means that an average of 50 cases were initiated each year, with an average of 5-6 cases actually heard and completed annually.

	Consultation Requests	Distinct Matters	Active Cases	Completed Cases	Settled or Inactive Cases
Number	150	114	19	17	28

12. It is interesting to note that between 1947 and 1995, only 300 cases were initiated under the old GATT system. In other words, on average six cases were initiated each year. The colossal number of cases initiated in the first three years of the establishment of the WTO could be interpreted as confidence in the new dispute settlement system. Developing countries have also been active in the process accounting for 40 per cent of all cases under the DSU.²¹ If the frequency of its invocation by members and the involvement of developing countries is anything to go by, then a persuasive argument could be made that it has been a success.

The DSU Special Provisions for Developing Countries

13. Throughout the DSU, developing countries have special rights.²² They may request a shorter duration for panel proceedings or an extension of the period for consultations. Special consideration is

requested during the consultations stage²³, during the panel proceedings,²⁴ and the implementation stage,²⁵ and should a panel be established between a developed and a developing country, the latter may request a panellist from a developing country to examine the case.²⁶ Importantly, Article 27 of the DSU envisages that developing countries may now request the service of a legal assistant to help them with their legal dispute.²⁷

Participation of Developing Countries in the WTO Dispute Settlement

²³ Article 4.10

²⁴ Article 12.10,11

²⁵ Article 21.7,8

²⁶ Article 8.10

²⁷ Article 27.2 provides that the Secretariat shall make available a qualified legal expert from the WTO Technical co-operation services to any developing country Member which so requests. This expert shall assist the developing country member in a manner ensuring the continued impartiality of the Secretariat.

²¹ "Disputes Reach Century Mark" in *WTO Focus*. No.21, August 1997,p.1

²² Articles 3.12 and 24

14. Out of the 150 requests for consultations since entry into force of the WTO, about 40 of those requests were initiated by developing country members and more than 20 involved developing country members as respondents.²⁸ In the African region there is no record of any developing countries which have utilised the WTO dispute settlement in a substantive manner. However, Cote d'Ivoire did intervene in the *Bananas* case as a third party. Nigeria also intervened as a third party in the recently adopted Appellate Body decision regarding the *Import Prohibition of Certain Shrimp and Shrimp Products (Shrimp case)*. Apart from these two countries no other African country has utilised the WTO dispute settlement mechanism in a substantive way.

15. In contrast, Asian developing countries have tended to use the WTO dispute settlement more frequently. India is an example of a key Asian developing country that uses the WTO dispute settlement mechanism quite regularly. Other Asian developing countries have also been active in utilising the WTO dispute settlement mechanism. For instance, in the *Shrimp case* India was joined by Malaysia, Pakistan and Thailand in a complaint against a ban imposed by the United States under its law on the importation of shrimp and shrimp products from these countries.

16. In the Caribbean region, the continuing saga of the *Bananas case* between the European Union (EU) and the United States, highlighted not only the reliance of small developing economies on the preferential trade arrangements under Lomé, but more importantly it provided small island developing countries such as St Lucia with the opportunity under the WTO Dispute Settlement mechanism to challenge the economic might of the United States. In the South Pacific region, there is no evidence of any developing or least developed countries having invoked or used the dispute settlement system.

²⁸ Overview of the State-of-play of WTO disputes, 9 November 1998, <<http://www.wto.org/wto/about/disputel.htm>>

17. But why do few developing countries in the African, Caribbean and Pacific regions use the WTO dispute settlement mechanism infrequently compared to other developing countries in Asia? This paper does not propose to provide a definitive answer to that question. However, it is submitted that one of the main reasons for this seems to lie in the fact that trade from these three regions only accounts for a small percentage of world trade. On the other hand, the percentage for Asian trade accounting for global trade is relatively higher.

18. The nature of the multilateral trading system also seems to suggest that those countries which have more at stake in terms of their trade interests will tend to utilise the WTO dispute settlement mechanism a lot more than those countries which have less.

Problems of Developing Countries under the WTO Dispute Settlement System

19. Notwithstanding the greater involvement of developing countries in the dispute settlement system of the WTO, there still remain some acute problems that have to be addressed. As previously noted, out of a total 150 requests for consultations since the establishment of the WTO, developing countries account for about 40 of these cases. However, some critics argue that these figures should not be interpreted as a sign of the confidence of developing countries in the system as there are real problems developing countries face in utilising the dispute settlement process. These problems could be grouped under two headings - systemic and practical problems.

Systemic problems

20. These problems arise mainly because of the inherent weaknesses in the dispute settlement mechanism and the structural difficulties faced by developing countries. Among them are unlevelled bargaining power and the inability of developing countries to respond forcefully should a developed country fail to implement the rulings of the DSB.

21. Developing countries, especially the least developed, often view the invocation of

dispute settlement as a kind of confrontational act²⁹ against the developed country trading partners. The possibility of losing the preferential treatment accorded them may explain why developing countries have in the past been hesitant in invoking the dispute settlement mechanism. However, it must be noted that a number of key developing countries have been asserting their rights under the dispute settlement system.

22. This is especially true for high-income developing countries such as Korea and the bigger developing countries including Argentina, Thailand, India and Brazil. In some of the cases that have been initiated by developing countries such as the *Gasoline case*, the *Bananas case* and the *Shrimp case*, they have pooled their resources together in terms of exchanging information and supporting each other's claims.

23. The other aspect is the state of administration in many developing countries. Invoking the dispute settlement system commences, in the usual course of things, with a complaint from the private, sometimes from the public, sectors to the government of the member country. Where the general functioning of government is unsatisfactory, for instance because the bureaucracy puts off potential complainants or because the relevant authorities to receive the complaints are only remotely keen in protecting the national interest due perhaps to the pervasive antipathy associated with low pay and inadequate training, the likelihood of complaints filtering through to the WTO is quite small.

Practical problems

24. Developing countries still face a severe shortage of personnel in the public service who are properly qualified in international economic law. The reasons include a lopsided preference of the private sector by the few qualified, the brain drain that draws some overseas, unattractive terms of

service, relatively ineffective or inefficient recruitment procedures, excessive use of very short-term consultancy and retainerships in WTO matters which does not generate a continuity or institutional memory within the government, and in some cases a prioritisation that does not give adequate prominence to WTO matters. The training needs of developing countries still remain critical.

25. Thus one of the key problems facing some of the developing countries, especially the smaller developing countries, is the lack of legal expertise or limited capacity in terms of legally qualified lawyers dealing with WTO related matters. The implication of this problem is that those developing countries, which do not have the necessary expertise will often have to pay hefty legal fees for lawyers from Washington or Brussels to represent their interests if they are to utilise the dispute settlement mechanism.

26. The use of private lawyers in panel hearings was considered in the *Bananas case* where the panel upheld an objection by the United States and other complainants in the case that private lawyers were not allowed to appear in the panel hearings. When the matter was appealed, the Appellate Body overturned the decision of the panel on this point and accepted that the member governments could use private lawyers to represent their interests.

Conclusions

27. The new DSU is clearly a substantial improvement to the multilateral trading system and if it works even reasonably efficiently it should considerably enhance the predictability and rule-based nature of the trading system. Undoubtedly problems will be encountered, and practice will reveal that more evolution in the procedures will be required.³⁰ As the system evolves, it should be noted that it ought to encourage settlement by disputants, giving them assistance in the process of settlement, but it should encourage

²⁹ Article 3.10 urges that the dispute settlement system be invoked in good faith in an effort to resolve disputes, rather than requests being regarded as contentious acts.

³⁰ Jackson, John H. *The World Trading System*, law and policy of international economics relations, 1997 second edition, p.133

that settlement primarily with reference to existing rules rather than simply with reference to the relative economic or other power that the disputants possess.

28. If the new dispute settlement mechanism is to function properly and effectively, it should be designed so that as time goes by, greater and greater confidence will be placed in it, so it is more utilised and gradually greater responsibilities may be given to it. In that context members should refrain from imposing unilateral trade measures, as the effect of such an act is to undermine the principles that have been enshrined in the DSU.

29. The current stalemate between the United States and the EU on the question of EU compliance with the Appellate Body's decision in the *Bananas case*, where the United States recently threatened unilateral action is an example of where a developed country has responded forcefully and in doing so may undermine the DSB. This is the first case since the creation of the WTO where compliance with a WTO ruling has been disputed.

30. Given the importance of the DSU in the legal framework of the WTO, special efforts should be made to encourage more developing countries, especially Least Developed countries to make use of the system. While the WTO Secretariat provides some legal assistance to developing countries in preparation for their cases, this assistance is only limited to pre-panel work and does not extend to the provision of qualified legal representatives to developing country members for the entire duration of the case.

31. The question of whether the WTO should do more than providing pre-panel work to developing countries in preparing for their cases has prompted an increasing number of developing countries to seek other alternative ways of funding their participation in the dispute settlement system.

32. Several WTO member countries³¹ have made a proposal for the establishment

³¹ Bangladesh, Colombia, Hong Kong, China, The Netherlands, Norway,

of an Advisory Centre on WTO Law, constituted as a foundation by WTO members in accordance with Swiss law,³² to address the constraints of "limited expertise in WTO law, the high costs of hiring external legal advice and the limitations on the assistance that may be provided by the WTO Secretariat"³³ faced by developing countries and economies in transition. The Centre would therefore provide regular seminars on WTO jurisprudence, legal advice on WTO law, support in legal proceedings and internships for officials dealing with WTO legal issues.³⁴ Formally separate from the WTO, the Centre would safeguard the neutrality of the WTO Secretariat and "only developing countries and economies in transition would be eligible as users of the services provided".³⁵ If the necessary financial support from WTO members is obtained, as well as a tax exemption status, the Centre could be in operation in spring 1999.³⁶ However, the lack of funds means that the establishment of such a Centre may be later than sooner.

33. The proposed Centre is absolutely critical in the effort to integrate developing and least developed countries to the multilateral trading system, so they can benefit more from the tremendous opportunities opened by the Uruguay Round, in this way sharing in the objectives of the WTO such as raising leaving standards and generating employment.³⁷ In facilitating active use of the dispute settlement system, developing countries would be better placed to follow up their rights and correspondingly satisfy their obligations, which promotes the credibility and acceptability of the

The Phillipines, South Africa, Turkey, United Kingdom and Venezuela.

³² Executive Summary of the Proposal, paragraph 6

³³ Id, paragraph 2

³⁴ Id, paragraph 5

³⁵ Id, paragraph 6

³⁶ Id, paragraph 11

³⁷ Preamble to WTO Agreement

multilateral trading system on the part of developed and of developing countries.

Recommendations

34. Member countries may wish to recommend that the Secretariat continue its work in WTO related matters especially in facilitating continued training for government legal officers involved in the implementation of the WTO agreements.

35. As regards the WTO dispute settlement mechanism, member countries may wish to recommend that the Secretariat

continue its work in collaboration with other relevant international and regional organisations in providing technical assistance to ensure that member countries, especially developing and least developed member countries which do not have the resources to protect their trading interest are given the necessary assistance.

36. Member countries are also urged to recognise the propriety and importance of the proposed Advisory Centre on WTO Law, and in this connection may wish to indicate their support for this proposal.

ACCESS TO PLANT GENETIC RESOURCES UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY

Paper by the Commonwealth Secretariat

Introduction

1. For the purposes of this paper, genetic resources mean genetic material of actual or potential value. Plant genetic material is to be understood as any plant material containing genetic information which is capable of self reproduction or of being reproduced in a biological system containing functional units of heredity which may be utilised for practical applications.

2. The importance of plant genetic resources is now widely recognised especially, but certainly not exclusively, for their potential in biotechnology and industrial applications (e.g. in the production of new plant varieties and new pharmaceutical products). It is also widely accepted that biological and genetic diversity in general have an important role to play in the daily livelihood of indigenous and local communities worldwide, as an immediate source to satisfy basic health and food needs, as well as to maintain and strengthen their cultural and spiritual beliefs.

The 1992 Convention on Biological Diversity

3. The objectives of the Convention on Biological Diversity 1992 (CBD) as set out in Article 1 are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.

4. The CBD provisions on access are set out in Article 15. It recognises the sovereign right of states over their natural resources and empowers them to determine access to their biological resources in accordance with their national legislation.¹ Such access shall also be subject to prior informed consent (PIC) of the state providing such resources.² It also requires that access to such resources shall be on mutually agreed terms.³

¹ Article 15(1) of the CBD

² Article 15(5) of the CBD

³ Article 15(4) of the CBD

However, while these provisions accord with the principle of customary law which recognises a state's exclusive right to regulate ownership of property within its territory, article 15(2) places an obligation on every contracting party to endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses and to refrain from imposing restrictions that run counter to the objectives of the CBD.

5. Benefit sharing is also particularly important in the context of article 8(j) of the CBD which refers to the use of the knowledge, innovations and practices of indigenous and local communities with the approval and involvement of these communities.

6. While this provision offers a potentially valuable opportunity to developing countries and local communities in those countries to control access to their resources and to derive benefits from their utilisation, a large number of developing countries, most of them CBD contracting parties have yet to take concrete steps to implement this provision.

7. A central and still contentious issue in international debates regarding the CBD relates to alternatives and options through which contracting parties can effectively and equitably share in the benefits which derive from access to and use of their genetic resources.⁴

⁴ The inclusion of Article 15 in the CBD is not without its political undercurrent. Access-related issues were some of the thorniest in the negotiation of the CBD. Prior to the negotiation of the CBD, the principle of free access to genetic resources was integrated into the non-binding 1983 International Undertaking on Plant Genetic Resources of the United Nations Food and Agriculture Organization (FAO). This concept is based on the assumption that genetic resources are the common heritage of humankind to which access must not be restricted. The gene-rich countries of the South rejected this argument and subjected their participation in the negotiations conditionally on the inclusion in the CBD of obligations and measures on three types of access: access to genetic resources, access to relevant

8. The underlying principle behind the CBD's provisions regarding equitable sharing of benefits from the use of genetic resources is based on a general understanding that the industrialised countries of the North which were "biodiversity poor" but economically powerful, have over decades and still continue to do so, used abundant freely available biodiversity and genetic resources from developing countries in the South which are "biodiversity rich" with no compensation for their access and subsequent use, especially in industrial processes.

9. Thus the CBD defines a new relationship between users and the providers of genetic resources, where a more equitable system is now provided which redefines the benefit flows from the use of genetic resources.

The Relationship between Genetic Plant Resources and Intellectual Property Rights

10. The impact of intellectual property rights (IPRs) on the objectives of the CBD is a complex and controversial issue.

11. IPRs raise socio-economic and ethical issues which have been the subject of ongoing discussions within the Conference of the Parties (COP) to the CBD. IPRs may be of relevance to at least three issues addressed under the CBD.

- (i) Access to and transfer of technology, including biotechnology.
- (ii) Benefit sharing, in relation to the use of genetic resources.

technology including biotechnology and access to providing states to benefit ultimately gained from the use of genetic materials in the development of biotechnology.

They contended that it would be unfair to them if industrialised countries could freely access their genetic resources, then patent the products and consequently sell these patented products back to the country where the material was collected. They therefore insisted on having national sovereignty on their genetic resources. Since the coming into force of the CBD, there has been an ongoing process in the FAO to revise the 1983 International Undertaking on Plant Genetic Resources in harmonisation with the provisions of the CBD.

- (iii) The protection of traditional knowledge, innovations and practices of indigenous and local communities relating to the conservation and sustainable use of biological diversity.

The main types of IPRs of relevance to this paper are:

- **patents:** patents grant a time-limited monopoly to the right holder to control the use, production and dissemination of a new product or process, for a specified period of time (generally 20 years):
 - **plant breeders rights (PBRs):** these are available for new plant varieties which are, novel, distinct, uniform, and stable.
12. PBRs are generally granted for a period of 20 - 30 years. They were developed within the framework of the International Convention for the Protection of New Varieties of Plants (known as UPOV)⁵ to reward innovation in the development of new plant varieties at a time when patents were not available for living organisms. PBRs are an area specialised, or *sui generis* system of IPRs.
- **Trade secrets:** These protect confidential information, and allow the owner to stop unauthorised disclosure of the protected information.

13. In order to determine the practical impact of IPRs, the CBD COP has called upon governments, international and regional organisations to conduct case studies of the impact of IPRs and the knowledge, innovations and practices of indigenous and local communities.

⁵ The International Convention for the Protection of New Varieties of Plants (UPOV) sets out standards for the protection of plant breeders rights, or plant variety rights. UPOV was adopted in 1961 to encourage innovation in plant breeding by providing exclusive rights for plant breeders in plant varieties which they have developed. UPOV has since been revised three times, the last revision was in 1991. The 1991 amendments which entered into force in April 1998, broaden the scope of protection marking the shift towards more patent like protection.

Access To and Transfer of Technology

14. The provisions of the CBD which deal with technology transfer are Articles 16 and 19. While these provisions attempt to address the relationship between technology transfer obligations and IPRs, however, they do it in a way which is ambiguous, and which has not yet been clarified by the COP. Articles 16 and 19 cover:

- technology relevant to the conservation and sustainable use of biological diversity;
- technology which makes use of its genetic resources.

15. No limitation is imposed on the type of technology. Indeed the CBD specifically includes biotechnology. The CBD encourages the effective participation in biotechnological research activities of the providers of genetic resources. The intention here is to build, through participation in biotechnological research, the capacity of a party which is a provider of genetic resources. For this purpose, parties to the CBD are required to create a legislative, administrative or policy framework, through which such effective participation can take place.⁶ The CBD also promotes the sharing with the provider of the genetic resources.

16. Article 16 provides that where relevant technology is subject to an IPR such as a patent, the transfer must be on terms which recognise and are consistent with the adequate and effective protection of the property right. However, Article 16 goes on to provide that Parties are to co-operate to ensure that IPRs are supportive of and do not run counter to the objectives of the Convention. The practical effects of the apparent ambiguities in Article 16 are still unclear.

Benefit Sharing and the Use of Genetic Resources

17. In their current form, IPRs, including patents and PBRs, confer exclusive rights to the holder and do not require the holder to share any benefit derived from the exercise of the right, even where a third party may have contributed to the development of the product in question. By contrast, Article 15 of the CBD requires the sharing of benefits between users and providers of genetic resources.

⁶ Article 19 of the CBD

18. But patents granted in respect of products derived from genetic resources do not require the holder to share any benefit with countries of origin, or with communities responsible for conserving the resources from which the product has been produced. Nor do they require the holder to share benefits with communities or individuals whose knowledge may have assisted in the development of the product.

The Protection of Traditional Knowledge, Innovations and Practices of Indigenous and Local Communities

19. Many indigenous and local communities possess special or traditional knowledge about biological diversity including plant genetic resources. Traditional knowledge can be defined as knowledge based on accumulated experience or continuous stage. Often such knowledge has not been committed to writing, but passed on from generation to generation by oral teaching or demonstration. Traditional knowledge encompasses information and know-how on a wide variety of matters, including natural resources management, traditional medicine, crafts and artistic designs.

20. Traditional knowledge and practices potentially provide a crucial lead for bio-prospectors⁷ in search of new useful genetic

⁷ Bio-prospectors are those engaged in "bio-prospecting." This refers to the collection, extraction and screening of samples of biological resources for potential use in pharmaceutical, agricultural and industrial applications. In a few cases, partnership agreements between the source country and the users of the biological resources have been negotiated, either for research purposes or for use in product development. Such agreements, known as access agreements or Material Transfer Agreements (MTAs) set out the terms under which any transfer of biological resources is to take place, including the making of provisions for the source country to share in any benefits derived from the utilisation of the resource. An example of a bio-prospecting arrangement is the agreement between the University of the South Pacific(USP), and the Strathclyde Institute of Drug Research(SIDR)in Scotland, to provide samples of biological resources collected from the Verata Tikina community in Fiji.

resources. In many cases, the use of traditional knowledge has been shown to increase quite significantly the probability of finding genetic resources of potential application in product development.⁸

21. Where, however, pharmaceutical companies go on to develop and commercialise products using the genetic resource concerned, based upon local knowledge and pre-existing uses, it has so far been rare for the indigenous or local community from which the knowledge was obtained to derive any benefits from the use of that resource.⁹

22. To the extent that the application is not "novel" it is questionable whether such applications can qualify for patent protection at all. Article 8(j) of the CBD supports the rights and interests of indigenous and local communities to control access to resources and to share in benefits arising out of the use of those resources. It also provides a basis for indigenous and local communities to assert their own IPRs in relation to existing uses of biodiversity.

⁸ Kava(*Piper mythesticum*) is used as a drink for ceremonial and social purposes in a number of SouthPacific countries, namely, Fiji, Samoa, Tonga, and Vanuatu. Various foreign companies have patented the therapeutic uses of kava. It is widely used in Germany where a high quality extract was pioneered by German researchers, both in root and herb form. More recently a French cosmetic company has patented the use of kava to reduce hair loss and stimulate hair growth.

⁹ Mamala(*Homolanthus acuminatus*) samples of this small endemic tree which are found in Samoa, and which are an important component of Samoan ethnopharmacology were collected and knowledge was acquired from Samoan traditional healers by various American institutions. The Mamala has shown signs of having some impact on the HIV/AIDS virus. The patent held by these American institutions on the anti-viral composition of the Mamala does not indicate any terms of any consent or benefit sharing arrangements with the Samoan Government, local communities or the healers for the collection and the use of the resource and the use of knowledge.

Can IPRs Protect Traditional Knowledge and Innovations?

23. Traditional IPRs such as patents, are not presently capable of providing protection for applications of traditional knowledge and innovations, as patents provide exclusive rights and are granted to individuals or legal entities, rather than communities. Patents also protect the commercial use of inventions, and to be granted a patent an applicant would need to show novelty.

24. The shortcomings in existing IPR and PBR regimes and the need to protect the traditional knowledge of indigenous and local communities in the light of the increasing use of their knowledge by multinational corporations, have led to a number of alternatives, either specialised or *sui generis* IPR type regimes to protect the knowledge and innovations of indigenous and local communities.

- **Community IPRs** - This proposal would render the local community the lawful and sole custodians and stewards of all innovations. Community IPRs include any collective and cumulative knowledge of any use, properties, values and processes of plant varieties. Anyone seeking to use any innovation for commercial purposes would be required to make payments to the local community. The proposal would allow communities to register innovations with a Registry of Innovation to assist in protecting their interests.¹⁰

- **Community Rights Registers** - This approach would require the registration of the knowledge and techniques of local communities relating to biological resources, however information on the registers would be made available only with the consent of the community.

¹⁰ This model has been proposed by the Third World Network as an interim *sui generis* regime for the protection of plant varieties in accordance with the WTO Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPs) 1995, and the Convention on Biological Diversity.

concerned, which could refuse access or set conditions.¹¹

- **1985 WIPO/UNESCO Model Provisions on the Expressions of Folklore** - It has been suggested that these might form the basis of a *sui generis* system.¹² In particular, the Model Provisions allow communities (rather than just individuals) to be recognised as innovators; they recognise that community innovations may be ongoing or evolutionary; and therefore provide for ongoing protection, rather than grant IPRs which are of limited duration.
- **Geographical Indications** - The TRIPs agreement addresses the protection of geographical indications which are defined as indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where given quality, reputation or other characteristics of the good is essentially attributable to its geographic origin. TRIPs requires WTO members to provide legal means to prevent misleading indications of geographic origin.

It has been suggested that this might provide a model for a *sui generis* system for indigenous and local communities to control use of traditional knowledge and to control exploitation of products based on that knowledge.¹³

¹¹ These rights have been proposed by some non-governmental organisations in India. Part of the rationale for having these registers is that they might assist individuals and communities in demonstrating their prior knowledge and use of resources, and therefore assist them in obtaining a share of benefits arising from its use. On the other hand, some fear that the registers risk placing information on knowledge of resources in the public domain, and therefore careful design is necessary.

¹² A *sui generis* system is a kind of its own. Article 27(3)(b) of the TRIPs agreement requires parties to protect new plant varieties either through patents, or a *sui generis* system or a combination thereof.

- **Traditional Resource Rights** - The term Traditional Resource Rights (TRRs) has been introduced to encompass many different types of rights relating to the traditional or customary use of resources by indigenous people and local farming communities. The term reflects an attempt to build upon the concept of IPR protection without restricting it to the concept of property, while recognising that traditional resources - tangible and intangible - are also covered under several other international agreements.

This proposal suggests that there already exist in international agreements (such as human rights) elements which could form the basis of a *sui generis* regime for the protection of traditional knowledge and resources.¹⁴ While there are some difficulties with the application of IPRs to TRRs, however, IPR legislation should not interfere with emerging principles of TRRs.

The Relationship between the CBD and TRIPs

¹³ Downes, 1997, and document UNEP/CBD/COP/3/22.

¹⁴ See Posey and Dutfield 1996. Beyond Intellectual Property Rights: Towards Traditional Resource Rights for Indigenous Peoples and Local Communities. TRRs as a package of rights primarily aim at the protection of the traditional or customary use of tangible and intangible resources by indigenous people and local farming communities. Some of these rights have yet barely materialised in binding regulations, even though the necessity to strengthen them is widely recognised. There is also the difficulty of defining holders of TRRs. A further problem with TRRs is that some of the common legal terms and concepts - like property and tenure - cannot always be easily applied to social situations and relations existing among indigenous peoples or traditional farming communities. For indigenous people, property frequently has intangible and spiritual manifestations and any attempts at individual control, privatisation or creation of a commodity of these is incomprehensible or at least highly problematic.

25. The relationship between TRIPs and the CBD is still unclear, and there is a continuing debate as to whether these important legal instruments are in conflict with each other.¹⁵ While the TRIPs Agreement neither explicitly addresses the issue of plant genetic resources nor mentions the issue of conservation of resources, it does provide under Article 27(3)(b) that new plant varieties must be protected either through patents, or a *sui generis* system or a combination thereof. It is argued that because of Article 27(3)(b) biodiversity falls firmly under the legal regime of TRIPs¹⁶

26. Article 27(3)(b) has been the subject of recent reviews by the TRIPs committee which took place in December 1998 and February 1999. No substantive changes were made as a result of these reviews, however, the expectation is that a further review of Article 27(3)(b) will be held in conjunction with the general review of the TRIPs agreement which is scheduled for the year 2000.

27. The CBD states that patents and IPRs may have an influence on the implementation of the Convention. Article 16(5) explicitly requires contracting parties to ensure that patents and IPRs are supportive of or do not run counter to the objectives of the Convention. On the other hand, according to Article 16(2) of the CBD, in the case of a transfer of technology which is subject to patents and other IPRs, access to and transfer of technology shall only be provided on terms "which recognize and are consistent with the adequate and effective protection of intellectual property rights."

28. However, the application of this requirement to recognise IPRs shall be consistent

¹⁵ The conflict between the CBD and TRIPs appears to stem from the view that the CBD is founded on the principle that local communities generate benefits from and are dependent on biodiversity and should continue to benefit from it, while the WTO administers a global trading system, much of which is founded on the private monopoly rights of transnational corporations over biodiversity.

For further details see: Global Trade and Biodiversity in Conflict, Issue 1, April 1998, Genetic Resources Action International.

¹⁶ Ibid

with the former statement, that IPRs shall be supportive of and not run counter to the objectives of the CBD.

29. The real question is whether WTO member states may invoke the objectives of the CBD in order to justify any measures which may be contrary to the TRIPs agreement. This is a question of conflict of laws for which neither the TRIPs nor the CBD provides any special rules. It has been argued that in the case of a conflict between two countries being members of both treaties, the CBD would as the more specific treaty take priority over the more general TRIPs agreement.¹⁷ On the other hand, it is possible that a WTO panel may take the view that the TRIPs agreement being the latter of the two treaties should take priority over the CBD.

30. Clearly there is an impact of IPRs on the question of ownership and use of plant genetic resources, however, while the CBD tries to address this relationship it appears that it has left the issue open and ambiguous. It is now left to the COP of the CBD to resolve this issue.

Regional and National Approaches to Access

31. Since the entry into force of the CBD, a number of access regimes have been developed at the regional and national levels. An example of a regional legislative initiative is that adopted by the Andean Pact member countries of Bolivia, Colombia, Ecuador, Peru and Venezuela on 17 July 1996. An example of national access legislation, the first of its kind, is the Philippines Executive Order No. 247 - Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, by their by-products and derivatives for scientific and commercial purposes. Other countries have begun to implement Article 15 of the CBD and have done this a number of ways, including:

- **introducing specific legislation on access and benefit sharing;**
- **including access provisions within general environmental framework laws;**

¹⁷ Cameron and Makush, 1995: The UN Biodiversity Convention and the WTO TRIPs Agreement.

- including in access provisions within legislation designed to implement a much broader set of objectives (e.g sustainable development, nature conservation and biodiversity);
- modifying existing sectoral laws in order to incorporate access provisions;
- modifying sectoral laws in order to incorporate access provisions;
- dealing with access and benefit sharing through individual contracts between providers and collectors.

32. By far the most common approach to date has been the latter i.e. negotiating contractual bio-prospecting arrangements. These spell out the terms that will apply to specific samples of biological material. Appropriately drawn up contracts can meet many of the requirements on access and benefit-sharing provided for under the CBD. One example of a bio-prospecting arrangement is that between the USP, the SIDR and the Verata Community in Fiji.

Conclusion

33. While the provisions of the CBD offer a potentially valuable opportunity to developing countries and local communities in those countries to control access to their resources and to derive benefits from their utilisation, many member countries have not developed access legislation to regulate access to their genetic plant resources. Some member countries have already been approached by foreign companies and researchers seeking to carry out prospecting activities in search of genetic resources of potential commercial, e.g. pharmaceutical, application, but have no specific policies or procedures in place for responding to these approaches.

34. The issue of access to plant genetic resources as indicated above is a controversial issue which is still the subject of ongoing negotiations within the CBD COP and its institutions, and also within the relevant WTO bodies.

35. Member countries must avail themselves of the opportunity to take part in these negotiations. The relationship between the CBD and the TRIPs agreement is also an important

issue. Member countries must endeavour to continue working towards a system of equitable sharing of benefits, which would recognise those responsible for innovation, and reward traditional knowledge provided by local communities. However, such access regimes must also create conditions which will facilitate access to genetic resources for environmentally sound uses, and not impose restrictions that run counter to the objectives of the CBD.

Recommendations

36. Member countries are urged to consider implementing the access provisions of the CBD and to develop effective access regimes either through regional or national approaches to ensure that there are adequate mechanisms in place, which will enable them to deal with approaches from corporations and institutions seeking access to their plant genetic resources, and also to ensure that their governments and local communities share from the benefits which are derived from it.

37. Member countries may wish to recommend that the Secretariat continue its work in this important field, and to facilitate assistance to member countries in implementing the provisions of the CBD, particularly in the development of a legal and policy framework on access to plant genetic resources.

April 1999

THE ROME STATUTE AND THE NEED FOR COMPREHENSIVE DOMESTIC PENAL LEGISLATION

Paper prepared for the Commonwealth Secretariat by Katherine L. Doherty¹ and Timothy L.H. McCormack²

I. INTRODUCTION

1. It was asserted at a recent meeting of Legal Experts convened by the International Committee of the Red Cross³ that no single country seems to have comprehensive penal legislation to adequately cover the subject matter jurisdiction of the new International Criminal Court. Even if this assertion is inaccurate, it is certainly difficult to identify any countries with comprehensive legislation. The fact remains that the overwhelming

¹ Katherine Doherty is a Lecturer in Law and a candidate for LL.M. in the Faculty of Law at the University of Melbourne. This article is based extensively on a paper she submitted for examination in the subject International Criminal Law.

² Timothy L. H. McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law and Associate Dean - Research in the Faculty of Law at the University of Melbourne. He participated as a member of the Australian Government Delegation to the Rome Diplomatic Conference for the Establishment of an International Criminal Court. The views expressed here are those of the authors alone and do not reflect those of the Australian Government. The authors wish to thank Jessica Howard for her helpful assistance in the completion of this article.

³ The ICRC Advisory Service recently organised a Meeting of Legal Experts from Common Law States on the Enforcement of International Humanitarian Law (Geneva Nov. 11-13, 1998). This meeting followed an earlier, similar one involving Experts from Civil Law States. The assertion referred to here was made by an expert who had participated in both meetings.

majority, if not all, of the countries which become Party to the *Rome Statute*⁴ will need to closely evaluate the extent to which their existing penal legislation covers the crimes within the Court's jurisdictional competence.

2. The purpose of this paper is to expose the likelihood of inadequate existing domestic penal legislation and to suggest that without adequate review of existing legislation, many Commonwealth countries may not be in a position to exercise primary jurisdiction over the new International Criminal Court. While the option of voluntarily devolving jurisdictional competence to the International Criminal Court will always remain, the assumption here is that most States Parties will not be keen to lose the right to primary jurisdiction merely on the basis of oversight.

II. THE 'COMPLEMENTARITY' FORMULA IN THE ROME STATUTE

3. Although the International Law Commission's 1994 Draft Statute for an International Criminal Court⁵ left open the question of the relationship between the new Court and national courts, it was agreed between governments early on in the preparatory negotiation phase that the new Court would not exercise primary jurisdiction over national courts. The relationship between the two *ad hoc* tribunals for the Former Yugoslavia⁶ and Rwanda⁷ and the relevant

⁴ *Rome Statute of the International Criminal Court* (1998), adopted by the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, A/CONF.183/9.

⁵ See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess, UN Doc A/49/10, Supp No 10 (1994) (containing the original Revised Draft Statute). This was subsequently revised two times: See UN GAOR, 49th Sess, UN Doc A/CN.4/L.491/Rev.2 (1994) [hereinafter *Draft Statute*]

⁶ See SC Res 827, UN SCOR, 48th Sess, (3217th mtg), UN Doc S/RES/827 (1993), 32 ILM 1203 (1993) (establishing the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian

national courts of the parties to those two conflicts was never a serious precedent for the same issue in the Statute of the new International Criminal Court. It is one thing for the United Nations Security Council to establish the tribunals with primary jurisdiction over national courts pursuant to the Council's enforcement powers under Chapter VII of the United Nations Charter and altogether a different thing for the international community to negotiate the terms of a multilateral treaty dealing with this sensitive issue of jurisdictional relationships.

4. Of course the international community could not, nor did it attempt to, undermine or diminish the constitutional authority of the United Nations Security Council in respect of the relationship between the Council on matters which the Council deems constitute a threat to, or breach of, international peace and security and the jurisdictional authority of the International Criminal Court. All governments involved in the Rome Diplomatic Conference accepted, albeit reluctantly in some cases, the fact that whenever the United Nations Security Council acts on the basis of Chapter VII of the United Nations Charter to refer a situation to the Court, it no longer matters: (1) whether the relevant country is a Party to the Statute of the Court or has otherwise consented to the Court's jurisdiction in a particular case; or, (2) whether the relevant country wishes to exercise national jurisdiction over a particular case. It is important to recognise that the principle of complementarity only becomes operative in respect of the two other consent-based "trigger mechanisms" in the *Rome Statute* — that is, a case by way of State Party complaint or by way of the Prosecutor acting *ex proprio motu*.⁸

Law Committed in the Territory of the Former Yugoslavia) [hereinafter *Statute for the Former Yugoslavia Tribunal*]

⁷ See SC Res 955, UN SCOR, 49th Sess. (3453mtg), UN Doc S/RES/955 (1994), 33 ILM 1598 (1994) (establishing the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States) [hereinafter *Statute for the Rwanda Tribunal*]

⁸ Article 13 (a) and (c) *Rome Statute*

5. The agreed formula in the *Rome Statute* is that a country with jurisdictional competence has the first right to institute proceedings unless the International Criminal Court itself decides that the country "is unwilling or unable genuinely to carry out the investigation or prosecution".⁹ The assumption in Rome was that such a determination would be straightforward for the International Criminal Court in either of two situations: (1) where the country, for whatever reason, chooses not to exercise its jurisdictional competence — the "unwilling" country; or (2) where the country's legal and administrative structures have completely broken down — the all too common so-called "failed State" phenomenon as the quintessential "unable" country. Our argument here is that there is a third situation in which it may also be possible for the International Criminal Court to make this determination in favour of its own jurisdiction in a particular case and that governments may have overlooked this third possibility. If a country does not have penal legislation covering one or more of the crimes within the jurisdiction *ratione materiae* of the Court, it may well be relatively straightforward for the Court to determine that the country is "unable genuinely" to proceed with the case. It is this possibility of a prospective State Party to the *Rome Statute* failing to exercise jurisdictional priority over the Court where it may want to do that but is precluded, which ought to facilitate a careful stocktake of existing legislation prior to ratification.

III. INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEMS OF COMMONWEALTH COUNTRIES

6. It is an established doctrine in most Commonwealth countries that international law will not become part of domestic law, in the sense of creating either justiciable rights or enforceable penalties, in the absence of implementing legislation. This proposition does not mean that international law can never have an influence on the development of domestic law in the absence of implementing legislation. However, domestic courts have consistently held that, irrespective of the source of international legal obligation, the failure of

⁹ Article 17(1) (a) and (b) *Rome Statute*

Parliament to enact legislation to implement a particular country's international obligations precludes resort to those obligations either for domestic legal redress or for a source of legal authority.

7. Under the 'Separation of Powers' doctrine which applies to the Westminster system of government in most Commonwealth countries, the Parliament, as the house of the elected representatives of the people, is paramount. Accordingly, if Parliament chooses not to implement the country's international legal obligations, irrespective of the reason for that omission, it is not for the courts to consider the international obligations part of the domestic law. Similarly, if Parliament chooses to exercise a valid constitutional authority to enact legislation which is unambiguously inconsistent with an international legal obligation owed by the country, it is not for the courts to override Parliament's explicit intention. As mentioned above, however, international law can, and increasingly does, have an influence on the development of domestic law apart from the enactment of implementing legislation to give domestic legal effect to international legal obligations. In particular, domestic Commonwealth courts will usually interpret legislation consistently with international obligations where the parliamentary intention permits such an interpretation and, in most countries, the courts are also increasingly willing to look to developments in international law to inform the content of the Common Law.

8. Given the general approach of domestic courts in Commonwealth countries to the reception of international law, it is clear that domestic courts could not exercise jurisdiction in respect of the crimes within the *Rome Statute* by virtue solely of the status of those crimes at international law.¹⁰ It is also clear that Parliaments have the requisite constitutional competence to introduce

¹⁰ Either at customary international law or pursuant to treaty – both the *Rome Statute* itself and/or the instruments on which it was based, such as the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277; Cmdt 4421 (entered into force 12 January 1951) [hereinafter *Genocide Convention*].

legislation to implement the *Rome Statute* crimes into their respective domestic criminal law should they choose to do so. We turn now to consider, briefly, each of the crimes within the jurisdiction *ratione materiae* of the International Criminal Court.

IV. THE SUBSTANTIVE CRIMES IN THE *ROME STATUTE* AND EXISTING DOMESTIC CRIMINAL LAW

A. *Genocide*

9. Despite some support for 'opening up' the definition of genocide to include the targeting of political and social groups, the definition of genocide in the *Rome Statute* replicates *verbatim* that set out in the 1948 *Genocide Convention*.¹¹ Genocide, as such, will not be a crime under the domestic law of most Commonwealth countries in the absence of specific legislation implementing the relevant international law.

10. While the United Kingdom, for example, does have a *Genocide Act*¹² which gives its courts universal jurisdiction over alleged acts of genocide in the territory of the United Kingdom, most Commonwealth countries do not have similar legislation.¹³ Those Commonwealth countries which do have legislation similar to the UK model must ensure that their legislation also provides for universal jurisdiction to maximise the right to exercise primary jurisdiction over the International Criminal Court if that country chooses to do so. Jurisdiction limited only to acts allegedly committed on sovereign territory or by nationals abroad could enable the International Criminal Court, having indicted an individual from that country for genocide

¹¹ Article 2 *Genocide Convention*

¹² *Genocide Act 1969* (UK)

¹³ Australia, for example, has a *Genocide Convention Act 1957* but this legislation fails to criminalise genocide in Australian criminal law. The only substantive section of the Act gives Australian Federal Parliamentary approval for ratification of the *Genocide Convention*. Other Commonwealth Countries have no specific legislation at all.

committed on the territory of a third country, to decide that the requested country is 'genuinely unable' to try the case and national jurisdiction could be forfeited.

11. Some would argue, of course, that in most cases the physical acts set out in Article 6 of the *Rome Statute* would also contravene the domestic criminal law. Laws against murder and causing bodily injury would, for example, squarely cover 'killing members of the group' and 'causing serious bodily or mental harm to members of the group' respectively. However, other genocidal acts may not be so obviously covered. 'forcibly transferring children of the group to another group' may well sit less clearly within existing domestic law. While in some cases this may constitute kidnapping or child stealing, it is possible to imagine situations which would fall outside the parameters of the domestic crimes, yet constitute genocide at international law.

12. In any case, there are two further limitations to the reach of existing domestic criminal law, even where it does cover the *actus reus* of the crime of genocide: (1) the mental element required for a charge of genocide to be sustained; and (2) the jurisdictional limitations of domestic criminal law. Genocide has a very precise and high threshold mental element: the accused must have committed the acts in question 'with intent to destroy, in whole or in part' one of the groups listed. The domestic crime of murder in contrast, focuses on the defendant's intention to kill or seriously injure the individual victim or victims. The victim's status as a member of a group and targeting *for that reason* are irrelevant. Secondly, domestic criminal law is generally based primarily on territorial jurisdiction, and will not usually cover acts committed elsewhere either by nationals or by non-nationals, unless the laws are specifically given extraterritorial and/or universal effect by legislation.

B. Crimes Against Humanity

13. Unlike genocide, there is no conventional definition of crimes against humanity. The definition adopted in the Rome Statute in Article 7(1) is largely referable back

to the Nuremberg Charter¹⁴ and more recently the Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Paragraphs 2 and 3 of Article 7 go on to define and clarify the terms used in paragraph 1. As in the Statute for the Rwanda Tribunal, the Nuremberg nexus of crimes against humanity with the existence of an international or internal armed conflict has been broken.¹⁵

14. Very few Commonwealth countries have a specific offence of 'crimes against humanity'.¹⁶ Obviously, as with genocide, some of the acts referred to in the definition are also domestic crimes per se, such as murder and rape. Laws against assault, intentionally causing serious injury and kidnapping, may, depending on circumstances, cover other acts listed in the definition of crimes against humanity in Article 7 of the Rome Statute. Greater difficulties may, however, arise in respect of acts constituting apartheid and torture. Many Commonwealth countries are party to one or both of the Apartheid Convention¹⁷ and the

¹⁴ *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal*, opened for signature 8 August 1945, 82 UNTS 279 (entered into force 8 August 1945) [hereinafter *Nuremberg Charter*]

¹⁵ See Article 6(c) *Nuremberg Charter*; Article 3 *Statute for the Rwanda Tribunal*. Cf Article 5 *Statute for the Former Yugoslavia Tribunal*

¹⁶ Canada is one exception where 'crimes against humanity' exists as a separate offence under the *Canadian Criminal Code*, RSC 1985, c C-34 (as amended by RSC 1985, c 30 (3d Supp))

¹⁷ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, opened for signature 30 November 1973, 13 ILM 50 (entered into force 18 July 1976)

Torture Convention.¹⁸ The critical question will be whether or not implementing legislation has been enacted to bring those offences into the domestic criminal law. It should also be noted that even if a Commonwealth country already has a Torture Convention Act (or equivalent legislation) which implements the obligations of the Torture Convention, it is likely that the definition of the domestic criminal offence will mirror that in the Convention itself. Given that the Article 7 definition of torture is wider in scope than the Convention definition, a State Party to the Rome Statute will still need to review its existing legislation criminalising torture.

15. Even where domestic criminal law covers the *actus reus* of a crime against humanity, the potential limitations of territorial jurisdiction discussed in relation to genocide may also apply equally here.¹⁹ Moreover, it seems to us that domestic penal provisions fail to capture what makes the international crimes truly heinous and distinguishes them from domestic 'equivalents'. What gives the acts listed their dubious status as international crimes is the additional element – the context or 'situationing' for crimes against humanity and the mental element for genocide.²⁰ The acts listed in Article 7 of the *Rome Statute* are proscribed *when committed as part of a widespread or systematic attack directed*

*against any civilian population, with knowledge of the attack.*²¹ The domestic criminal law of most Commonwealth countries would simply not address these aspects of the international crime.

C. War Crimes

16. The provisions of the *Rome Statute* dealing with war crimes are the most detailed of the four substantive crimes within the Court's jurisdiction *ratione materiae*. They are based primarily on the *Four Geneva Conventions* of 1949²² and on the 1977 First and Second *Additional Protocols*,²³ as well as on *Hague Convention IV* of 1907.²⁴ Article

²¹ This is necessarily going to be an element to be considered by the ICC when determining its own jurisdiction in a particular case

²² *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31 [hereinafter *First Geneva Convention*]; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85 [hereinafter *Second Geneva Convention*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 [hereinafter *Third Geneva Convention*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 [hereinafter *Fourth Geneva Convention*]. All Conventions were opened for signature on 12 August 1949 and entered into force on 21 October 1950. As at 24 March 1999, there were 188 States Parties

¹⁸ *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, UKTS 107 (1991), Cm 1775; 23 ILM 1027(1984); 24 ILM 535 (1985), (entered into force 26 June 1987)

¹⁹ There are obvious exceptions to this as Senator Augusto Pinochet, for example, has discovered in respect of the universal jurisdiction of UK courts in respect of alleged acts of torture!

²⁰ This is not to say that a single instance of torture, for example, is not of the same order of an international crime. However, for those crimes with domestic parallel, what 'elevates' them to the level of international opprobrium is this additional element of context or scale, or intention

²³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 1125 UNTS 3; 16 ILM 1391 [hereinafter *Additional Protocol I*]; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 1125 UNTS 609; 16 ILM 1442 [hereinafter *Additional Protocol II*]. Both Protocols were opened for signature on 8 June 1977 and entered into force on 7 December 1978. As at 24 March 1999, there were 145 States Parties

²⁴ *Convention Concerning the Laws and Customs of War on Land (Hague IV)*, opened for signature 18 October 1907, 205 CTS 277, (entered into force 26 January 1910) [hereinafter *Hague Convention*]

8(1) is a threshold provision: 'The Court shall have jurisdiction in respect of war crimes *in particular* when committed as a part of a plan or policy or as part of a large-scale commission of such crimes' (emphasis added).²⁵ Paragraph 2(a) covers grave breaches of the *Geneva Conventions*; 2(b) covers 'Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law...'; 2(c) and (d) cover common article 3 of the *Geneva Conventions*, dealing with armed conflicts not of an international character; 2(e) and (f) cover prohibitions on other serious violations of the laws and customs applicable in internal armed conflicts.

17. While some Commonwealth countries have no legislation at all to implement their obligations under the *Geneva Conventions*, there are others which do have a *Geneva Conventions Act* (or equivalent legislation) along the lines of the UK Act by the same name.²⁶ The UK legislation took a minimalist approach to the implementation of Convention obligations - only granting universal jurisdiction to domestic courts in relation to grave breaches of the *Four Geneva Conventions* as required pursuant to the Conventions. Most Commonwealth countries have followed this basic approach. Given that the UK recently ratified both *Additional Protocols* of 1977, the legislation has now been amended to include penal sanctions for grave breaches of *Additional Protocol I*.²⁷ Some

Commonwealth countries, which ratified the *Additional Protocols* earlier than the UK, have already amended their legislation to include penal sanctions for grave breaches of *Additional Protocol I*.²⁸ These countries have tended not to include penal sanctions for serious violations of *Additional Protocol II* because the Protocol does not obligate States to do so.

18. The crucial point here is that no Commonwealth country currently has domestic legislation comprehensive enough to cover the full scope of the definition of war crimes in Article 8 of the *Rome Statute*. Even those countries which have legislation implementing penal sanctions for grave breaches of the *Four Geneva Conventions* and *Additional Protocol I* do not currently criminalise violations of international law committed in the context of non-international armed conflicts. A major advance of the *Rome Statute* over the traditional international law of war crimes is that non-international armed conflicts will now be subject to the jurisdictional competence of the International Criminal Court, as will other serious violations of the laws and customs of war. The implication of this is that, at a minimum, Commonwealth countries contemplating ratification of the *Rome Statute* will need to extend existing legislation to cover those aspects of Article 8 of the *Rome Statute* beyond grave breaches of the *Conventions* and *Additional Protocol I*. Countries with no legislation at all will, of course, need to implement more extensive legislation.

D. Aggression

19. The new International Criminal Court will not have jurisdiction over the crime of aggression unless and until the States Parties agree on an acceptable definition. Given the political implications and difficulties involved in drafting any definition, it is likely that agreement, and hence the Court's jurisdiction, will be some time off. Nonetheless, a few

²⁵ One of the other versions suggested at Rome would have substituted 'only' for 'in particular' in the above clause. Another option had no provision on threshold: See Report of the Preparatory Committee on the Establishment of an International Criminal Court: Addendum, *Draft Statute for the International Criminal Court*, A/CONF.183/2/Add.1, (Apr. 14, 1998) at 25.

²⁶ The *Geneva Conventions Act 1957* (UK) (as amended by the *Geneva Conventions (Amendment) Act 1995* (UK))

²⁷ The *Geneva Conventions (Amendment) Act 1995* (UK) enables effect to be given to the *Additional Protocols* of 1977. The instrument which brings this Act into force is the *Geneva Conventions (Amendment) Act 1995 (Commencement) Order 1998* (UK)

²⁸ See, for example, the legislation of Australia: *Geneva Conventions Act 1957* (as amended 1991) (Cth); New Zealand: *Geneva Conventions Act 1958* (as amended 1987) (NZ); and Canada: *Geneva Conventions Act* RSC 1985, c G-3

observations in terms of our present project are warranted.

20. Aggression *per se* is not a crime under the domestic law of any Commonwealth country as far as we can discern. While it would certainly be possible to draft a domestic equivalent for the crime of aggression once a definition is agreed to, this may be a situation in which an independent international tribunal is, if not ideally placed, then better placed than any country to investigate and prosecute any allegation made. The nature of the crime of aggression would involve a country passing judgment on the policies and acts of another country - something domestic courts are understandably loathe to do. Whilst it is not necessarily the case that a charge of aggression before the Court be initiated by a determination of the Security Council, this is likely in practice²⁹

VI. CONCLUSIONS: SOME POSSIBLE APPROACHES IN PREPARATION FOR RATIFICATION OF THE *ROME STATUTE*

21. In summary, it is apparent that, with the exception of the grave breaches provisions of the *Geneva Conventions* and *Additional Protocol I*, there is probably scant specific domestic coverage of the crimes within the jurisdiction of the ICC for most Commonwealth countries. Nonetheless, in many, if not most, cases there will be coverage of the acts making up those crimes by the general domestic criminal law.

22. Any Commonwealth country which wishes to maximise the complementarity provisions of the *Rome Statute*, therefore, has two options. The first is to continue to rely on existing domestic criminal law, accepting that each country may be obliged to defer to the ICC's jurisdiction in relation to any situation not covered. Assuming that most countries will not want to be in the position of automatically forfeiting a right to national jurisdiction, this option seems unlikely to be followed by the majority of countries. The second, and more likely option is to implement new and/or

amending legislation to comprehensively reflect the *Rome Statute* crimes.

23. There are some general issues Governments will need to consider including, for example, whether to extend universal jurisdiction to cover all offences wherever committed, or whether to limit the jurisdictional competence of national courts to acts of nationals. Universal jurisdiction exists at customary international law in relation to all of the international crimes referred to in the *Rome Statute*.³⁰ Governments will also need to consider other general issues such as the 'principles of legality', including the different bases for individual criminal responsibility and the various defences available under the *Rome Statute* to determine the consistency or otherwise of existing domestic criminal law. Governments will also need to determine how any new legislation will define the offences: whether (1) new legislation simply criminalises the offences referred to in the *Rome Statute* and then refers to the Statute, appended to the legislation, for definitions of the crimes — along the lines of existing *Geneva Conventions Acts*; or (2) the new legislation includes more detail on definitions and the elements of each offence.

24. Apart from these general issues, governments can choose either to enact: (1) entirely new omnibus legislation — something along the lines of a new *Crimes (International Criminal Court) Act* which gives national courts jurisdiction over each of the substantive crimes in the *Rome Statute* on the basis of the Statute's own definitions of those crimes; or (2) only amendment to existing legislation — particularly the *Geneva Conventions Act*, for example, or countries' existing *Criminal Codes*. The suggestion here is not that the only choices are one or other of these two approaches. Between the two extremes, governments have a broad range of options to both amend some existing legislation and to enact new additional legislation to supplement amendments as required.

25. Whatever legislative approach is undertaken, legislation is, of course, only part

²⁹ See Timothy LH McCormack and Gerry Simpson (eds), 'Achieving the Promise of Nuremberg: A New International Criminal Law Regime?' in *The Law of War Crimes* (1997) 229.

³⁰ Kenneth C Randall, 'Universal Jurisdiction under International Law' (1998) 66 *Texas Law Review* 785, 788.

of the task. We have focused exclusively on the issue of legislative implementation in this paper. The issue of complementarity presents a welcome opportunity to see tremendous improvement in domestic penal provisions for prosecution of serious international crimes. However, it is fitting to conclude here by recognising that the most comprehensive legislation in the world is no guarantee of an end to impunity. Legislation is usually a prerequisite for prosecution but does not guarantee action on the part of an individual country. The reticence by most States Parties to fulfil the obligation in the *Geneva Conventions* to prosecute or extradite is ample testimony to the reality of the lack of political will to ensure that any legislation does more than salve our collective humanitarian conscience. The greatest outcome of the years of negotiation which culminated in Rome would be for countries - even if only because of the threat of international jurisdiction - to demonstrate an emboldened commitment to enforcement of human rights law and international humanitarian law at home as well as abroad. What an encouraging start to the new Millennium that would be!

April 1999

Human Rights Issues

INTRODUCING THE CONCEPT OF HUMAN RIGHTS IMPACT ASSESSMENT

Memorandum by the Commonwealth Secretariat and Paper by Dr J. Oloka-Onyango, Dean of the Faculty of Law, Makerere University

1. Human rights impact assessment (HRIA) of government policies and programmes is a relatively new concept whereby civil society is increasingly pressurising governments to review the impact of policies and programmes on the realisation/enjoyment of human rights.

2. This concept can be equated to the Environment Impact Assessment, a notion which has been around for some time and is more familiar to governments, donor agencies, multilateral corporations and funding agencies. The closest exercise to HRIAs has been the World Bank's Studies to review the impact of its structural adjustment policies. However, this was only done after the realisation that the effect of the policies had had drastic social implications which had grossly affected the most vulnerable groups in society. Thus, while the envisaged outcome of structural adjustment policies may be positive in the long run, the short term implications for the most vulnerable groups were mostly negative and tended to increase their vulnerability.

3. Today accountability and transparency are recognised as essential elements of good governance. Societies are becoming more aware of their rights and governments' obligation to create the necessary environment for the realisation of these rights. Apart from the obligation, deriving from a moral duty by governments to create such an environment, many Commonwealth governments through ratification or accession to international human rights instruments have a legal duty to create the necessary environment.

4. In reality however, there is a vast gap between the aspirations of the international human rights instruments and the fulfilment of the obligations required by the instruments. Fortunately, the international community is increasingly recognising the fact that human rights can only be fulfilled in the daily lives of individuals by the integration of human rights

norms and principles into the process of the development of society itself and its values. This requires the engagement of not only the actors in the process, but also individuals who are the ultimate beneficiary of development. What is required is a deeper appreciation of the role of the individual in developing effective policies and in determining their direct impact on the individual as a member of society.

5. Privatisation has brought changes which present both challenges and opportunities. The role of the state is changing, there is therefore, also a need to give attention to how non-state actors can be accountable for the impact of their actions on the enjoyment of human rights. There are already attempts to develop codes of conduct for transitional companies, for overseas investment. However, these changes do not relieve states of their legal obligations of guaranteeing human rights. This obligation extends to ensuring that in the implementation of state policies, the implications of specific programmes on human rights are assessed.

6. Subscribing as they do to the Commonwealth fundamental political values of good governance, the rule of law and respect for human rights, Commonwealth governments would benefit from the application of the policy of HRIA. The policy promotes accountability and would ultimately contribute to good governance and respect for human rights.

7. Law Ministers, being the most natural advocates for justice, and given the important role they play in the negotiation and conclusion of bilateral and international agreement, are well placed to influence policy to ensure that in the implementation of such agreements, the impact on human rights is assessed. At the domestic level, the impact of legislation on human rights could also be assessed.

8. The attached paper gives an overview of the policy of HRIA, its essential elements, its objectives and its application.

new ground, a measure which can be said to be truly proactive on the part of Commonwealth governments.

Recommendation

9. Law Ministers may wish to consider the positive elements of this policy, and determine how the policy could be further developed in the context of the Commonwealth's fundamental values for the benefit of member countries. Development of a policy of HRIA will break

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TOWARDS A COMPREHENSIVE HUMAN RIGHTS IMPACT - ASSESSMENT (HRIA) POLICY

Paper by Dr J. Oloka-Onyango
Dean of Law, Makerere University

A. INTRODUCTION

1. It is trite to point out that of the most prominent global movements that have had a far-reaching impact on society in the late 20th Century, one is the question of the environment, while the other is the issue of fundamental human rights. There is nevertheless a marked distinction between the approach of policy-makers, activists and scholars to the two phenomena. Unlike the environment, the matter of human rights — civil and political, and economic, social and cultural — is still very much dealt with in a reactive, rather than proactive fashion. One can hardly imagine a programme of mineral exploration and exploitation, nuclear testing, or dam construction that today does not take into account the possible adverse consequences of such action on the surrounding environment, and attempts to devise methods of countering them. Put another way, the benefits of a positive approach to the environment that is not wholly subordinated to the quest for economic gain have long been recognised and incorporated into the development approaches of the various actors involved. Whether or not the concerned parties genuinely take measures to eliminate or mitigate those consequences, governments, scholars and activists have generally come to acknowledge the benefits of moving to ensure that the environment is not despoiled, rather than waiting for its destruction before reacting to the same. This explains the genesis of the Environmental Impact Assessment (EIA) that is standard fare in all development and industrial projects that may have consequences for the environment.

2. In contrast, it is the exceptional programme of international aid (development assistance), policy

formulation, or domestic legislative enactment which seriously considers the possible (and even the probable) human rights impacts of its application. Basic aspects of civil and political rights including non-discrimination (between sexes, ages, or people with disabilities), equality of treatment, due process, transparency and accountability (to the supposed beneficiaries and not the “donor”) are given short shrift. The same is true for considerations relating to economic, social and cultural rights, among them the impact on the right to shelter (housing), work (employment and conditions therein), or the right to education (and access to it). And yet, at the end of the day, all development must necessarily be sensitive to the needs and demands of the population in which it is supposed to be applied.

3. It is thus high time that all programmes of international development assistance, policy formulation and domestic legislative enactment incorporate Human Rights Impact Assessments (HRIAs) in their formulation. What is thus being urged is not simply an assessment of the human rights impact of the purposes of multi- and bilateral interaction, commerce and investment (between governments). Rather the concern is to see an internal *in-house* assessment by all individual governments of the failure to be sensitive to human rights concerns in all of the various ways they operate. *How, in other words, do development assistance processes, policy measures and the promulgation of domestic legislation affect the promotion and observance of fundamental human rights across the board?*

4. The notion of an HRIA is essentially based on the premise that the observation of all categories of human rights is fundamental and complementary to

the achievement of sustainable human development (SHD). Through its annual Human Development Report and Index the United Nations Development Program (UNDP) has convincingly demonstrated that the various aspects of human existence must be pursued in holistic fashion. Indeed, the Right to Development is considered to be the culmination of the concerted attempt to both respect human rights and to foster positive socio-economic development for the individual and the society in which s/he lives. By taking into consideration the possible human rights impact of any policy, it is possible to avoid needless suffering, exploitative and ultimately unproductive social and economic relations, and in the final analysis, unstable or repressive political arrangements of governance.

B. HRIA: THE ESSENTIAL ELEMENTS

5. Viewed from the broadest perspective, HRIA is concerned with the compatibility of any process of extending development assistance, formulating policy or enacting domestic legislation with international, regional and domestic human rights standards. It seeks to avoid situations of foreseeable human rights violations. Instead of responding to a human rights crisis once it occurs and rushing to seek its resolution, the philosophy underlying the HRIA favours the adoption of effective preventative measures to forestall its initial occurrence.

6. HRIA needs to be contrasted from the idea of human rights conditionality — a practice that has gained in prominence as a tool for the enforcement of human rights observance on regimes which are considered to have crossed the rubicon of acceptable international behaviour regarding the protection of human rights. The essential problem with conditionality is that it is applied in an ad hoc fashion and without a coherent policy framework. Furthermore, it identifies the breach of human rights almost solely with the violation of civil and political rights. In how many instances has conditionality been applied against governments that grossly

neglect the protection of the rights of workers, prioritise defence expenditure over education or reduce the levels of health-care assistance beyond the basic minimum? Finally, the kind of conditionality in place, generally affects the individual citizenry more adversely than it does the leadership of the country to which it is applied. This may in fact result in the prolongation of the regime and enhanced conditions of political repression and social unrest.

7. If instead a country is compelled to make sure that all of its actions comply with human rights standards before they are applied, one can clearly see the benefits entailed for the country at large and its citizenry in particular. An HRIA engages governmental action before its execution and considers the various case scenarios that may result as a consequence thereof. But the use of HRIA as a policy need not be confined to governments alone, but to all those actors (transnational corporations, multi- and bilateral institutions) whose actions may have implications for the protection of human rights.

8. HRIA can be beneficial at several levels. At the level of international monetary policy and development assistance, one can look at the issue of Structural Adjustment Programmes (SAPs) for some lessons. SAPs were applied first before an adequate assessment was made of their possible impact in a single-minded attempt to force developing country economies to adopt the basic tenets of supply-side economics. It is only after the adverse social and economic consequences were apparent that steps were taken to devise policies that addressed their negative impact. Indeed it is in this connection that many of the current programmes of "poverty alleviation" or "social-cost adjustment" have been formulated and applied by the World Bank. Lessons also need to be drawn from the recent experience of the Organization of Economic Co-operation and Development (OECD) in the negotiations over the Multilateral Agreement on Investment, which was recently suspended on account of a variety of factors. The lesson of the

negotiations was that it is high time that governments, multi- and bilateral agencies involved in the area of international trade, investment, finance and development assistance become much more transparent and inclusive in the evolution of their policies. Backdoor negotiations, in smoke-filled rooms are no longer the accepted modes through which multilateral agencies will be permitted to conduct their affairs. The transparency and accountability demanded from governments that receive aid must also be expected and exacted from those which give it. Furthermore, those who are at the receiving end must participate in the formulation and execution of the processes that result in the various policy frameworks eventually adopted.

9. Within the context of domestic legislation, it is quite clear what the benefits of HRIA can be. These extend from the scrutiny of existing and proposed legislative enactments in order to assess their compatibility with basic human rights norms, to seeking their review should they fail to conform. Why should we wait for the judiciary to intervene in order to make the determination that a particular legislation violates human rights when this assessment could have been made at the point at which the legislation was still in bill form? If a government can be advised of the possible and probable negative impacts of any policy that it is seeking to implement before it does so, then clearly much expenditure of time, energy and needless suffering can be avoided.

C. APPLYING THE HRIA

10. HRIA can be applied at several levels, including the level of the formulation of development assistance policy, general government policy and in the process of enacting legislation. The standard of application would be the international, regional and domestic human rights instruments.

11. The key objectives of an HRIA would comprise the following:

- (a) identifying whether or not (YES/NO) a proposed policy or project is likely to have significant impacts on the observation/progressive realisation/respect for the protection of fundamental human rights;
- (b) if YES, what are those significant human rights impacts, or what is the degree to which such proposed policy or project conforms to the basic human rights standards and principles as enshrined within domestic legislation (especially the Constitution), and regional and international obligations entered into by the state;
- (c) can the aid be extended/the policy formulated/the legislation to be enacted be reconstituted in order to avoid the negative impacts identified?
- (d) what are the preventive or mitigative measures that can be taken in order to prevent the envisaged negative human rights outcome?
- (e) an assessment of the human rights implications of the implementation of the policy;
- (f) the consideration of the direct or indirect application of new and existing legislation, particularly in the area of crime and the administration of justice, domestic relations, immigration, elections, citizenship and labour relations to mention only a few areas of concern;

12. An HRIA would commence at the stage of conception, planning and design, and also during the implementation of the project.

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THE RIGHT TO KNOW¹ AND THE PROMOTION OF DEMOCRACY AND DEVELOPMENT

**Paper prepared for the Commonwealth Secretariat
by Deepika Udagama, Senior Lecturer in Law, University of Colombo
and Madhuri Bose, Commonwealth Secretariat**

I. INTRODUCTION

Human Rights and Freedom of Information

1. The concept of freedom of information is founded in international human rights law and has been incorporated in the constitutions of countries. It developed out of the basic right to freedom of opinion and expression enshrined in the Universal Declaration of Human Rights (Article 19) which states: *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."* In order to understand the significance of the freedom of information in the modern world we need to look at the current place of human rights in both international and national legal regimes.

2. Since the signing of the Charter of the United Nations which in its preamble "reaffirmed faith in fundamental human rights", human rights have become part of customary international law. It can be said that human rights constitute the very foundation of the international community which has evolved

especially since the Second World War. Certain human rights principles and norms have indeed become "supra-positive" rights from which no derogation is possible under any circumstances including states of emergency, such as the right to life (although the death penalty does exist in many countries); the right against torture or cruel, inhuman or degrading treatment or punishment; prohibition of slavery and slavery like practices and slave trade. Similarly human rights law totally proscribes genocide and crimes against humanity.

3. While freedom of information cannot be said to fall within this category of non-derogable rights, it certainly assumes pre-eminence in the contemporary world with the spread of democratic culture and the increasing credence given to people's participation in the process of sustainable development.

The Legal Basis of Freedom of Information

4. Freedom of information and communication, or dissemination of information originated in relation to the rights and responsibilities of the mass media.

¹ In this paper the term right to know is used interchangeably with freedom of information or the right to information. The purview of this paper is limited to the right of access to government-held information while recognising that the concept of freedom of information has a much wider meaning and application.

However as with other areas of human rights law the right to freedom of information now extends to many other sectors of civil society, and has been most widely codified in the context of the people's right to access government-held information. The subject has also rapidly become much more complex and controversial in the wake of the virtual revolution in information technology which has made access to a whole range of issues easy, quick and relatively cheap.

5. Given its potential impact and far-reaching implications this right has been made subject to certain conditions. Article 19 of the International Covenant on Civil and Political Rights on freedom of opinion and expression states that the exercise of these rights carries with it special duties and responsibilities. *It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals.* The restrictions imposed in the existing freedom of information legislation of countries are in the main limited to those enumerated here. The challenge is to guarantee this right to all persons with the necessary protections. Increasingly the trend is towards disclosure rather than secrecy.

Freedom of Information, Open Government and Sustainable Development

6. In the political realm the importance of freedom of information may be judged by the extent to which dictatorships have always sought to restrict this right. It can be argued therefore that democracy and freedom of information go hand in hand, and indeed its realisation is a basic pre-condition for the effective functioning of a democratic polity. The role of governments has expanded into almost every field of human activity and consequently the need for access to the decisions made and why has increased enormously. It is almost stating the obvious to say that a democratic government which is based on the principle of choice and consent of the governed presupposes free and wide

dissemination of information. In recent years large-scale corruption and abuse of power by governments have placed a renewed emphasis on transparency and accountability which can only be established where there is a presumption in favour of disclosure and easy access to information, not only those held by government but by a range of actors in the private sector. Similarly, people's active involvement in the development process requires above all the provision of full and accurate information regarding development plans, resource allocations and expenditures. It may be argued that such information does not have any bearing on for example national security or the reputation of others, but it is surprising to see the extent of the use of the claim of privilege to deny disclosure in matters which do not seem to be in the least sensitive or requiring confidentiality. It is outside the scope of this paper to elaborate on the fundamental linkages between democracy, development and the freedom of information which merits a separate study.

The Commonwealth, Human Rights and Freedom of Information

7. The Commonwealth has included fundamental human rights as part of its fundamental political values enumerated in the Harare Commonwealth Declaration of 1991. The Millbrook Commonwealth Action Programme was adopted by Commonwealth Heads of Government in 1995 to fulfil more effectively their commitment to the Harare principles. Heads also established a mechanism called the Commonwealth Ministerial Action Group on the Harare Declaration (CMAG) to address serious and persistent violations of these principles. Thus, as with the United Nations, the ground-rules of the Commonwealth community are also founded on human rights principles.

8. The Meeting of Law Ministers of the Commonwealth in Barbados in 1980 had invited the Commonwealth Secretary-General to consider arranging studies analysing the issues and administrative and other aspects of "Freedom of Information" schemes, bearing in mind the different circumstances of member

countries. In further recognition of the importance of freedom of information in promoting good governance, Senior Officials of Commonwealth Law Ministries at their meeting in May 1998 endorsed a proposal for a Commonwealth-wide process of consultation to share model legislation and experiences, and to develop common standards of law and practice relating to the citizens' right to know.

9. The Expert Group Meeting on the Right to Know (30-31 March 1999) marks the beginning of an effort to assist Commonwealth member countries who are committed to ensuring freedom of information with *good practice guidelines and recommendations* regarding relevant legislation and methods of implementation based on experience both within and outside the Commonwealth. The principal aim of the Expert Group is to examine and endorse the Draft Good Practice Guidelines and Recommendations on the Right to Know for the consideration of Law Ministers at their Meeting in Trinidad, 3-7 May 1999. The Expert Group is also expected to recommend a programme of action for the Commonwealth to contribute and strengthen the movement for the realisation of the Right to Know in particular and freedom of information generally.

10. In summary the specific objectives of the current programme are:

- to develop Commonwealth Good Practice Guidelines and Recommendations on the Right to Know;
- to assist member governments in their current efforts to promote citizens' right to know and their access to information on matters of public policy;
- to identify the role of civil society actors in the promotion of the right to know;
- to facilitate Commonwealth-wide consultations to share legislation and experiences relating to the citizens'

right to know (Freedom of Information legislation);

- to promote the right to know which will in turn help to strengthen both democracy and human rights central to the fundamental political values of the Commonwealth.

II. A REVIEW OF COMPARATIVE LAW AND EXPERIENCES ON THE RIGHT TO KNOW

11. The objective of this section is to examine existing legal regimes relating to the right to know² in Commonwealth members states as well as in non-member states with a view to culling and analysing their principal features. It is expected that such an analysis will assist in the formulation of good practice guidelines for the Commonwealth.

12. Comprehensive legislation on the right to know (hereinafter referred to as FOIAs or Freedom of Information Acts) exist only in a limited number of countries belonging to the Commonwealth. However, the FOIAs in Australia, Canada and New Zealand, for example, have been operating for a considerable period of time and those countries are in a position to evaluate the strengths and weaknesses of their respective regimes. Also, as a result of the intensification of the debate on the right to know, a number of member states such as India, South Africa, Fiji and Trinidad and Tobago are in the process of drafting or adopting FOIAs.

13. A large number of Commonwealth states do not have comprehensive right to information regimes. Such states may, however, have laws that provide for access to information in a piecemeal manner. For instance, most states do permit access to land registers, company registers, certain court and parliamentary records and the like. But in the absence of a **comprehensive** right to know

² In this paper the term "right to know" is used interchangeably with the "right to information". Both terms denote the right of access to government-held information.

regime, most states are governed on the basis of government secrecy, where disclosure is the exception to the rule. It is for this reason that this paper focuses on comprehensive regimes to shed light on good practices.

14. While it is customary for studies on the right to know to focus entirely on FOIAs, the constitutional framework relating to the right, if any, also has to be necessarily examined. It is, after all, the supreme law of the land that sets out the structure and nature of the system of governance in each state. Moreover FOIAs operate only within a given constitutional framework. It is crucial, therefore, to determine the extent to which the constitutional framework of a state ensures open government by guaranteeing the right to know.

Constitutional Protection of the Right to Know

15. In Sweden the constitutional guarantee of the right to know has been a principal feature of governance since 1766. Perhaps no other country in the world can trace open government that far back. Currently, only a few constitutions in the Commonwealth expressly guarantee a right of access to government-held information. Seychelles, New Zealand³ and South Africa are some of the countries whose constitutions explicitly guarantee the right to know. The 1997 Constitution of Fiji requires Parliament to enact a law to give effect to the right of access to official documents of the government and its agencies.

16. The 1996 Constitution of South Africa has broken new ground by guaranteeing a right of access to information held not only by the government but also by private parties. Article 32 declares:

Everyone has the right of access to--

(a) any information held by the state;
and

³ The Official Information Act of 1982 of New Zealand is considered to be a constitutional document, as is the New Zealand Bill of Rights Act of 1990.

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

17. The debate as to the parameters of Article 32 (1) (b) appears to be ongoing. The draft Open Democracy Bill of South Africa limits access to information held by a "private body" only to such information that amounts to personal information concerning the requester.

18. It is important to note that the guarantee in Article 32 is in addition to the guarantee of free expression {Article 16 (1)} that defines the right to free expression as including also "the right to receive or impart information or ideas". The incorporation of two distinct formulations relating to the right of the public to receive information is significant. One specifically guarantees **access** to government-held information while the other guarantees the right to receiving information from any source, including third parties, without arbitrary governmental interference. The formulation adopted by the South African Constitution is very sound as it imposes both positive (to guarantee access) and negative (not to arbitrarily interfere) obligations on the state not to hinder the right of the public to be informed. Such a comprehensive constitutional regime, it could be argued, is essential to ensure the establishment of a culture of open government.

19. Many constitutions, on the other hand, enshrine only guarantees of free expression. National courts are increasingly interpreting these provisions to include also the right to receive information. Such interpretations are in keeping with international law norms on the right to free expression contained in Articles 19 of the UDHR and the ICCPR.⁴

⁴ Article 19 of the UDHR declares--
[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Similarly, Article 19(2) of the ICCPR recognises that
[e]veryone shall have the right to freedom of

However, it is not clear whether such interpretations of constitutional provisions also recognise a right of access to government-held information.⁵

20. The Indian Supreme Court, on the other hand, has held that the freedom of expression clause of the Constitution of India⁶ does oblige the Government to disclose particulars of government transactions.⁷ Also, because of the recognition of public interest litigation by an extremely activist Supreme Court, the ability to force the Government to disclose information on its activities are far greater in India. Yet, in the absence of a law that provides access to government-held information in a systematic manner, the Government of India has put forward proposals to adopt a FOIA.⁸

21. The interpretation of free expression clauses that do not expressly guarantee a right of access to government-held information depends on judicial philosophy. Therefore, it is becoming increasingly clear that having a specific constitutional right to know framework

expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁵ Although the US Supreme Court has held that the First Amendment of the US Constitution does encompass the right to receive information, it has nevertheless been categorical in rejecting the arguments that it guarantees a right of access to government-held information. See, e.g., *Houchins v. KQED, Inc.*, 438 US 1 (1978).

⁶ Article 19(1)(a) of the Constitution of India recognises that "all citizens shall have the right to freedom of speech and expression".

⁷ See *Gupta v. Union of India*, [1982] AIR 149 (SC) and *Uttar Pradesh v. Raj Narain*, [1975] AIR 865 at 884 (SC).

⁸ See Report of the Working Group on Right to Information and Promotion of Open and Transparent Government (Ministry of Personnel, Public Grievances and Pensions, Government of India, May 1997).

is imperative to effectively ensure a system of open government.

Freedom of Information Legislation

22. Some countries, even though without constitutional guarantees of the right to know, have adopted FOIAs (Australia, Canada and the United States). Others have combined (or are proposing to combine) express or implied constitutional guarantees of the right to know with FOIAs (New Zealand, South Africa (proposed) and India (proposed)). Sweden's freedom of information law is an integral part of its Constitution. Seychelles, on the other hand, has a constitutional guarantee of the right to know without an accompanying FOIA.

23. Some of the salient features of the existing as well as proposed FOIA legislation are discussed below.

Who has a right to know?

24. A majority of the FOIAs guarantee a right of access to "any person", that term including both natural as well as legal persons. Some countries require that the person applying for access ought to be resident in the country whether a citizen or not (New Zealand), or at least have an address in that country for purposes of correspondence if that person is not resident in the country (Australia). The Australian FOIA has been interpreted to extend the right to those serving prison sentences and also minors.

25. The Canadian FOIA limits access to citizens or permanent residents. But the Governor in Council has been given the discretion to extend that right to others as well. The proposed Indian law also guarantees the right only to citizens.

26. None of the laws available for purposes of this study require the applicant to state reasons why the information is requested. In other words, there is no qualifying test for a person to be entitled to access. Also, none of the laws grant a special right of access to any category of persons.

Access procedure

Information to facilitate access

27. Most FOIAs require institutions subject to disclosure to publish information during specified time intervals on the structure, functions, procedures, rules and regulations of, and the types of records maintained by each institution. They are also obliged to outline the procedures to be followed in order to access records, especially to identify the official to whom the application must be sent. The proposed South African law has a novel feature that makes provision for making available to the public the information guides and manuals required to be published by government bodies under that law through: (i) each government body; (ii) post offices; (iii) libraries; (iv) institutions of education; and (v) on-line. Furthermore, the telephone directory has to carry the name, contact number and e-mail address of the information officer of each government body as part of the entry for each body. It is also worth noting that both the proposed South African and Indian laws, taking due regard of social realities in those countries, have made provision for receiving requests not only in writing but even orally.

Timeframe

28. All FOIAs under consideration provide for a timeframe within which a government body has to process a request for information and inform the applicant as to whether or not the request can be granted. Generally, the stipulation is that the decision will have to be made as soon as practicable. The maximum time limit allowed varies from 10 working days to 30 days. Extensions of the time limit can be allowed if the government body specifies the reasons for the delay. Providing access in an efficient manner is the key to the success of any FOIA regime. The timeframe is, therefore, of the essence. In order to ensure efficiency, it appears to be the case that the maintenance of records has to be streamlined (e.g. by having an indexing system), that staff are provided necessary training and a specialised officer be appointed (e.g. an Information Officer as provided for by the

proposed South African and Indian laws) to deal with requests for information. It appears to be the case that training of staff has to necessarily undertake the challenge of changing the bureaucratic mindset from one of maintaining secrecy to one of disclosure.

Fees

29. One of the major reasons usually advanced against the adoption of a FOIA regime is the cost that is involved in servicing requests. Most FOIAs provide for the charging of a reasonable fee for searching (by the hour) for and making of copies of documents. Exemption from or reductions in fees are provided where the release of the document is in the public interest, where the applicant is indigent, or where the information sought pertains to the personal affairs of the applicant. If the applicant wishes to have the request processed urgently an extra fee could be prescribed. Here too, fees may be reduced or waived if the release of the information urgently is in the public interest. The fee structure should reflect the need to cover costs, but not impose undue hardship on the public.

Access to "records" or "information"?

30. A clear distinction can be made between a record and information. A record denotes the original document that contains the information stored in writing, electronic or other form. Information on the other hand, can be construed to mean facts culled from the document, and could be a summary of a document.

31. Almost all FOIAs reviewed permit access to official records. Applicants often are given a right to examine the records, obtain copies, view or listen to records that store information in visual or audio form, obtain print-outs from or files in computers, obtain summaries of the information or even oral information about the contents of a record. Under the New Zealand FOIA, for instance, an applicant can request information in any such manner, and if the information cannot be provided in the specified manner reasons have to be given by the relevant authority for not

doing so and the information has to be disclosed in another form. The Australian FOIA has been interpreted to similar effect, also similar provisions are to be found in the proposed laws of South Africa, Fiji, Trinidad and Tobago and India.

32. A novel feature under the proposed South African law is that those applicants who are disabled have a right of receiving information in a form that can be used by them. The authorities are under an obligation to take reasonable steps to provide the information in that manner at no extra cost to the applicant {draft section 23(5)}. Also applicants are permitted to make their own copies of records using their own equipment if that does not cause any inconvenience to the agency, or does not infringe copyright laws {draft section 23 (7)}.

33. Another common feature is the adoption of the principle of severability of a document. That is to say if a document cannot be disclosed for the reason that it contains exempt information, the FOIAs make provision to permit access to the document after severing the exempt information from the document, if that is practically possible. The Australian FOIA has couched this requirement in language which imposes a mandatory obligation on the government. So does the proposed South African legislation. Under proposed legislation in India and Fiji, severance is a discretionary matter.

Access and language policy

34. Many FOIAs do not specifically provide for a language policy to be followed in facilitating access. Sometimes in practice authorities may exercise discretion in determining whether translations are feasible under the circumstances (Australia) even in the absence of a language policy.

35. It is significant to note that countries that have multi-language official languages policies such as Canada and South Africa (proposed) have specific provisions dealing with language policy that has to be complied with in providing access. In both instances,

applicants can request copies of a record in a recognised official language. If the record does not exist in that particular language, the authorities have to provide a translation if it is in the public interest to do so (Canada) or if it does not unreasonably interfere with the effective administration of the authority (South Africa).

Are all branches of government subject to disclosure?

36. A majority of FOIAs traditionally subject only the Executive branch of government to disclosure. Ministries, government departments and public corporations are the entities that are usually subject to FOIAs. More often than not, the Cabinet and the Head of State are exempt. Very rarely are the legislative and the judicial branches subject to disclosure. One has to view this question in the context of the development of a culture of open government. Should open government relate to only some institutions belonging to the Executive and to the exclusion of all others?

37. One can discern a current trend that seeks to subject all branches of the government (at federal, state and local government levels) and to the maximum extent possible, taking into consideration also the need to ensure the effective functioning of government (draft laws of India, Trinidad and Tobago and South Africa).

Is the state obliged to preserve records?

38. There is nothing in most FOIAs, to suggest the imposition of a positive obligation on the state institutions covered by such laws to preserve documents. Most FOIAs only oblige the covered institutions to periodically publish an index of the available documents. It appears from some of the responses received that laws pertaining to archives prohibit the destruction of public records (Australia, New Zealand). But this is not the same as obliging the state to maintain records, e.g., minutes of meetings. The Archives laws seem to oblige governments to protect those documents that already exist. What if a statutory board fails to

maintain minutes of certain meetings? In its 1995 report the Australian Law Reform Commission has recommended that the archives be amended so as oblige public authorities to maintain records. Such an obligation could be created through the FOIA itself, or through the strengthening of archives laws.

Should there be a presumption in favour of disclosure?

39. Several FOIAs require that their provisions be interpreted in favour of disclosure unless the law specifically exempts the record/s in question (Australia, New Zealand and the proposed laws of Fiji, South Africa and Trinidad and Tobago).

40. Some of the laws contain a provision setting out the purposes of the law; others have a clause setting out the objects of the law. Then there is provision that requires that the laws be interpreted in accordance with those purposes/objects. The Australian Law Reform Commission in a report reviewing the operation of the Australian FOIA (released in May 1995) recommends the inclusion of a preamble to the law that sets out the value rationale on which the FOIA is based, rather than merely have a clause setting out the objects (e.g. make records accessible to the public). The law ought to be interpreted in light of the context set out in the Preamble. That will give a clearer indication to courts regarding the spirit in which the law ought to be interpreted.

On what grounds can records be withheld from the public?

41. Perhaps the most contentious feature of any FOIA is the grounds for exempting information from disclosure. Following are frequently stipulated grounds of exemption:

- (i) defence, national security and international relations;
- (ii) inter and intra agency memoranda (internal discussions and advice);

- (iii) law enforcement and legal proceedings;
- (iv) effective management of the economy and commercial interests;
- (v) effective operation of the public service;
- (vi) privacy of an individual;
- (vii) information given in confidence;
- (viii) third party commercial secrets and confidences.

42. A request may also be denied if it is unreasonable, vexatious or too voluminous; if the information has already been made public; or the request is premature in relation to publication; if the record cannot be found or does not exist. Increasingly, it appears that a two tiered test is used in making a decision about disclosure of exempt information (Australia, Canada, proposed South African, New Zealand and Trinidad and Tobago legislation). The test takes the following into consideration:

- (i) that the information is exempt as its disclosure will harm one or more of the stipulated interests on which the exemption is based; and
- (ii) that an otherwise exempt information shall, nonetheless, be disclosed if it is in the public interest to do so taking into consideration the value rationale for which freedom of information is recognised. Factors such as the following will be taken into account in applying the public interest test:

if the disclosure reveals:

- abuse of authority or negligence on the part of a public body
- a danger to the health or safety of an individual or to the environment
- injustice to an individual
- unauthorised use of funds.

43. This two tiered test permits the balancing of the general rule in favour of disclosure with the need to protect larger state and individual interests.

44. Also, as discussed above, disclosure has to be the rule where it is possible to sever exempt information from a document.

Should reasons be given when a request is refused?

45. It is a general requirement of FOIA regimes that reasons for refusing a request for information be given in writing either as a matter of course or when requested by an applicant. Additionally, information on how to lodge an appeal against that decision also must be communicated to the applicant.

Review of unfair decisions

46. In order to ensure that arbitrary decisions relating to requests for information are not made by public bodies, it is imperative that an independent mechanism for review be available to an aggrieved party. All FOIAs under consideration provide for such review mechanisms. The mechanism, however, varies widely. Most FOIAs first allow an internal administrative review before going to a higher administrative body or finally to the courts.

47. The Canadian FOIA creates the office of the Information Commissioner who first reviews a complaint of an aggrieved party before the matter can go to court. In New Zealand, the office of the Ombudsman investigates complaints made under the FOIA. The proposed South African law seeks to establish specialised "Information Courts" as courts of last resort. In India, the proposed FOIA suggests that after an internal review, an aggrieved party could appeal to the bodies set up to enforce the Consumer Protection Act.

48. While countries have adopted varying models of review, it appears to be the case that the establishment of specialised "information" bodies that can function as general FOIA enforcement mechanisms, such as the office of

the Information Commissioner established in Canada, could serve the needs of the public best. It is important that the independence of such bodies is ensured and persons of integrity and competence are appointed to discharge the functions.

Access to personal information

49. A very important component of most FOIA regimes under consideration is the access provided to personal information on individuals held by the state. Modern practices by states indicate that the types of personal information compiled and retained by various public bodies is ever-increasing. Most data banks are also increasingly computerised, thus making access easy by even third parties. First, such personal data has to be protected for purposes of guarding individual privacy rights. Secondly, persons must have access to that data in order to examine the accuracy and the relevance of such information for the purpose/s for which they are maintained, and consequently be able to make corrections where the information is incorrect.

50. Some countries have privacy and data protection regimes in addition to an FOIA regime (Australia, United States). Others have striven to have an all inclusive FOIA regime. In its 1995 report, referred to earlier, the Australian Law Reform Commission takes the position that it is more advisable to have a single regime dealing with personal data. The proposed South African law proposes to include a personal data regime within the FOIA. The proposed FOIAs of Fiji and Trinidad and Tobago also include provisions that permit access to personal data and the right of correction, although not in detail.

51. A modern development in this regard is the extension of obligations to private entities that maintain personal data bases. The proposed South African law encompasses such an extension. The Australian Law Reform Commission too advocated the extension of the Australian Privacy Act to cover the private sector in its 1995 report.

Access to meetings (Sunshine Laws)

52. Some FOIAs permit public access to meetings of certain public bodies. This is in furtherance of the principle of promoting open government. The United States has a separate law (The Government in the Sunshine Act, 1976) that permits access to meetings of federal agencies. It also lists limits to the right. The proposed South African FOIA includes an entire part to provide for access to meetings of governmental bodies; however, access is restricted to meetings only of governing bodies.

Community Based Activities for Promoting the Right to Know

53. Human rights norms and standards are often used as a frame of reference for community based movements. They represent goals to be achieved even if the actual situation is a far cry from those standards, and there are real constraints in the way of reaching them. The rights to freedom of expression and information are perhaps the most commonly used human rights which have been invoked by civil society actors in repressive regimes to expose the anti-people actions of government. The movement for a free press or generally for a free media has been based on these basic rights of peoples.

54. In India in August 1996 a national campaign for people's right to information was launched by a group of activists, lawyers, jurists, media persons, administrators, politicians and academicians. This campaign has a two-fold agenda:

- (i) to take the issue to the people through organising meetings and "public hearings" all over the country where local communities meet with local government officials to enquire about inter alia local development priorities and expenditures. This process has enabled communities to determine their development needs and priorities and influence local government decision-making; and

- (ii) to lobby the Union and State Governments for the enactment of the right to information. This movement which has at its centre a community-based organisation called the Mazdoor Kisan Shakti Sangathan (MKSS) has become a genuine people's campaign for greater transparency and accountability on the part of government using the right to information as the focus of their strategy. This is a remarkable community-based movement in India which has led to the empowerment of the people, and lessons can be drawn from this experience for other countries.

55. It is hoped that the current Commonwealth programme on promoting the right to information will help to gather and disseminate other successful and effective community strategies for translating constitutional and statutory provisions into practical action.

III. THE RIGHT TO KNOW: SUGGESTED GOOD PRACTICE GUIDELINES

1. To ensure that the principle of open government is entrenched in the system of governance, the right of access to government-held information should be expressly incorporated into the constitutions of member states.
2. Member states should adopt Freedom of Information legislation (FOIAs) in order to give effect to the constitutional guarantee of access to government-held information. Such laws should have an overriding effect over other legislation with regard to the right of access.
3. The right of access to government-held information should be guaranteed to every person.
4. The right of access should not be denied to any person on the basis of the reasons for which the information is sought. In fact, no qualifying test should be

- employed to screen persons who apply for access to government-held information.
5. All three branches of the government should be subject to disclosure; instead of exempting entire institutions from disclosure, FOIAs should stipulate only the categories of exempt information so as to protect larger state and individual interests.
 6. The right of access must be in regard to government-held records as opposed to only information. The term "records" must be given a broad definition to include new developments in information technology. Applicants should be given the right to examine and obtain copies of records; listen to or view records; get computer print-outs or copies of computer files; and even obtain summaries of records and oral information on the contents of records. Access must be provided in the manner requested; if not, reasons must be furnished for not doing so, and access must be provided in another form. Reasonable steps should be taken to make records accessible to the disabled in a form that can be used by them.
 7. All government bodies must publish, (at least once a year or in any event regularly), information relating to each body's structure, functions, procedures, rules and regulations and the types of records maintained. They should also publish the procedures to be followed in order to access records, and the name/s and contact information of officials who are entrusted with the task of dealing with right to information requests. Manuals and guidelines containing such information should be made freely and widely available to the public through each government body, post offices, public libraries, educational institutions, and where possible, on-line.
 8. Procedures for requesting information should be uncomplicated.
 9. Each government body must have an officer/s exclusively assigned to deal with right to information requests.
 10. An FOIA must specify a reasonable time period within which a government body should inform an applicant who has requested information as to whether access will be permitted or not. Where access is permitted, the records should be made available promptly
 11. An applicant should be charged only such fees as are reasonable to cover the costs involved. Fees should be reduced or waived where disclosure is in the public interest; where the applicant is indigent; or where the information sought pertains to personal data.
 12. Official language policies in a state should be taken into consideration in facilitating access to records.
 13. FOIAs should impose a positive obligation on the government to maintain and preserve records that are necessary for government accountability. Merely imposing negative obligations on the government not to destroy records is not sufficient.
 14. FOIAs should create a strong rule or presumption in favour of disclosure. Withholding of information should be the exception. An FOIA should be interpreted in the light of the value rational underlying the right to know.
 15. Grounds on which information is exempted from disclosure should be narrowly drawn up and should be based only on public good, effective governance and individual privacy rights.
 16. Information should not be withheld unless the disclosure of such information will (substantially) harm one or more of the stipulated interests on which the exemption is based. However, information, which is otherwise exempt,

should be disclosed if the public interest served by disclosure outweighs the harm caused.

17. Where a document contains exempt information, it should nonetheless be made accessible if it is possible to sever the exempt information from the rest of the document.
18. Where a government body refuses a request for information, it must always give reasons for the refusal in writing.
19. A refusal to disclose information should always be subject to independent review. Bodies that are entrusted with the task of reviewing such refusals must be able to function independently of the authority that refused the request.

April 1999

**Commonwealth Expert Group Meeting on the Right to Know
and the Promotion of Democracy and Development
Marlborough House, London, 30-31 March 1999**

FINAL DOCUMENT

**PROMOTING OPEN GOVERNMENT
COMMONWEALTH PRINCIPLES AND
GUIDELINES ON THE RIGHT TO
KNOW**

I. INTRODUCTION

Commonwealth Law Ministers at their Meeting in Barbados in 1980 emphasised that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information".

Since that time a number of Commonwealth countries have enacted freedom of information legislation establishing a public right of access to government information. Their experience has demonstrated that these laws enhance the effectiveness of government. Other Commonwealth countries are preparing legislation drawing on this rich practical experience.

During the 1990s the Commonwealth, guided by its fundamental political values enshrined in the 1991 Harare Commonwealth Declaration, has sought to promote democracy, the rule of law, just and honest government and fundamental human rights. In consolidating the achievements of the past decade the Commonwealth seeks to focus its efforts on strengthening the processes of open and accountable government together with the promotion of sustainable development.

The 1990s has been a decade of democratisation with a number of countries, many within the Commonwealth, making the transition from one party and authoritarian

regimes to elected representative governments.

The new millennium promises to be an era for transparency and accountability on the part of government and all sectors of society concerned with public life. These trends will be further stimulated by the growth of information technology and increased globalisation and interdependency of national economies.

II. BENEFITS OF FREEDOM OF INFORMATION

Freedom of information has many benefits. It facilitates public participation in public affairs by providing access to relevant information to the people who are then empowered to make informed choices and better exercise their democratic rights. It enhances the accountability of government, improves decision-making, provides better information to elected representatives, enhances government credibility with its citizens, and provides a powerful aid in the fight against corruption. It is also a key livelihood and development issue, especially in situations of poverty and powerlessness.

Following a review of the successful experience of Commonwealth freedom of information laws, the Expert Group on the Right to Know submits for the consideration and endorsement of Commonwealth Law Ministers, at their forthcoming Meeting in Trinidad from 3 to 7 May 1999, the following *Principles and Guidelines on the Right to Know*. The Group further recommends that Law Ministers submit the Principles and Guidelines to Commonwealth Heads of Government at their summit in

South Africa from 12 to 15 November 1999 for their consideration and adoption.

III. PRINCIPLES

- Freedom of information should be guaranteed as a legal and enforceable right permitting every individual to obtain records and information held by the executive, the legislative and the judicial arms of the state, as well as any government owned corporation and any other body carrying out public functions.
- The legislation should contain a presumption in favour of maximum disclosure.
- The right of access may be subject to only such exemptions, which are narrowly drawn, permitting government to withhold information only when disclosure would harm essential interests such as national defence and security, law enforcement, individual privacy or commercial confidentiality, provided that withholding the information is not against public interest.
- Decisions under the legislation should be subject to independent review capable of ensuring compliance.

IV. GUIDELINES

- Governments should enact freedom of information legislation containing appropriate administrative measures for its implementation.
- Governments should permit any individual to obtain information promptly and at low or no cost.
- Legislation should provide for an independent review of decisions capable of providing an effective remedy in any case of delay or denial.

- Governments should maintain and preserve records.
- Governments should promote a culture of openness, publicly disseminating information related to the exercise of their functions and the information held by them.

V. THE ROLE OF THE COMMONWEALTH

The Commonwealth through its various institutions should take steps to promote these principles and report periodically on their progress in this regard. The Secretariat should report to Commonwealth Law Ministers about the progress achieved at their Meeting in 2002.

In particular, the Commonwealth Secretariat should facilitate and assist governments in promoting these principles through technical and other assistance including measures to promote the sharing of experience between member states and the involvement of civil society in this process.

Commonwealth associations and organisations are encouraged to consider ways in which they can contribute to this process.

April 1999

**CONTEMPORARY ISSUES AFFECTING THE ENJOYMENT OF
HUMAN RIGHTS: THE RIGHT TO INFORMATION**

Memorandum by the Commonwealth Secretariat

1. The meeting already has before it, in respect of Agenda Item 3(b)(i), paper number **LMM(99)24** and **LMM(99)24(Supplement)** to facilitate the discussions on this agenda item.
2. The attached extract publication issued jointly by the Commonwealth Secretariat and Transparency International and entitled *Access to Information in Developing Countries*,* is circulated by way of additional background information to facilitate the discussions on Agenda item 3(b)(i). If you require the full publication, please contact the address below.

Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House
Pall Mall
London SW1Y 5HX
United Kingdom

Tel: 00 44 020 7747 6409
Fax: 00 44 020 7747 6406
Email: N.McIntyre@Commonwealth.int

April 1999

ACCESS TO INFORMATION IN DEVELOPING COUNTRIES

A study prepared by Robert Martin and Estelle Feldman

Legal and Constitutional Affairs Division
Commonwealth Secretariat
Marlborough House, Pall Mall
London SW1Y 5HX, United Kingdom

Published with assistance from the Ford Foundation

PREFACE

This publication is the result of a joint collaboration between the Legal and Constitutional Affairs Division of the Commonwealth Secretariat and Transparency International (TI), a non-governmental organisation active in the field of building integrity and countering corruption. It builds on a long history of the Commonwealth Secretariat's work with like-minded and appropriate non-governmental organisations in the pursuit and promotion of common goals.

This particular study, funded by the Ford Foundation, addresses the need for members of the public to have rights of access to official information both to enable them to enforce their rights and to strengthen the democratic processes which are the hallmark of the Commonwealth's Harare Declaration.

Given the depth and breadth as well as the variety and wealth of the Commonwealth's experience in this area, it is appropriate that the contributions by member countries should feature throughout the study. We believe that this publication is a useful addition to the literature on this subject and commend it to policy makers, researchers and those campaigning for needed reforms in an area of critical importance.

We join in thanking the two authors, Robert Martin of Canada and Estelle Feldman of Ireland for the signal contribution they have made to our understanding of the issues and for pointing the way forward to possible reforms.

R C Nzerem
Director
Legal and Constitutional Affairs Division

J D Pope
Executive Director
Transparency International

ABOUT THE COMMONWEALTH SECRETARIAT

The Commonwealth Secretariat (established 1965) is the main intergovernmental agency of the Commonwealth, facilitating consultation and co-operation among member governments and countries. It is responsible to member governments collectively.

The Secretariat organises Commonwealth summits, meetings of ministers, consultative meetings, and technical discussions; it assists policy development and provides policy advice, and facilitates multilateral communication among the member governments. It also provides technical assistance to help governments in their social and economic development and in support of the Commonwealth's fundamental political values.

The Secretariat is headed by a Commonwealth Secretary-General who is elected by Heads of Government.

The Legal and Constitutional Affairs Division of the Secretariat facilitates Commonwealth legal co-operation over constitutional issues, commercial crime, human rights and other aspects of law. This legal co-operation is a unique feature of the Commonwealth, made possible because members have similar legal systems, most based on, or greatly influenced by, the common Law. The division:

- facilitates dialogue among governments on legislation and other legal matters. It organises three-yearly Meetings of Law Ministers, Law Officers of Small Commonwealth Jurisdictions, and Meetings of Senior Law Officers of Ministries of Law;
- informs governments of international legal developments;
- keeps governments apprised of developments in law in other Commonwealth countries through responses to requests from officials and judges, and regular publications including the Commonwealth Law Bulletin;
- promotes co-operation between governments on legal matters including combating corruption in public life.

Legal co-operation schemes: The division initiated and helped to prepare, and promotes implementation of Commonwealth schemes for co-operation in law - for mutual assistance in criminal matters, the transfer of convicted offenders, extradition, and the protection of the material cultural heritage. Commonwealth legal co-operation also covers business regulatory bodies.

Incorporating international conventions: The division also assists governments to bring their national laws in line with international conventions such as the UN Declaration on the Elimination of Violence against Women, the Recommendations of the Financial Action Task Force on Money Laundering, and relevant World Trade Organisation (WTO) Agreements.

Secretariat Headquarters

The Secretariat has its headquarters at Marlborough House, Pall Mall, London SW1Y 5HX, UK. Tel: (44) 171-839 3411. Fax: (44) 171-930 6128.

Website: <http://www.thecommonwealth.org>

TRANSPARENCY INTERNATIONAL'S MISSION STATEMENT

Rationale

- Corruption is one of the greatest challenges of the contemporary world.
- It undermines good government, fundamentally distorts public policy, leads to the misallocation of resources, harms the private sector and private sector development and particularly hurts the poor.
- Controlling it is only possible with the co-operation of a wide range of stakeholders in the integrity system, including most importantly the state, civil society, and the private sector.
- There is also a crucial role to be played by international institutions.

TI's Purpose

- To curb corruption by mobilising a global coalition to promote and strengthen international and national Integrity Systems.

Guiding principles

TI is based on the following guiding principles:

- TI recognises the shared responsibility of actors in all regions for corruption, and its emphasis is on prevention and on reforming systems, not on exposing individual cases;
- TI considers that the movement against corruption is global and transcends social, political, economic and cultural systems;

Internally, TI observes the principles of participation, diversity, accountability and transparency;

- TI is politically non-partisan; and

TI recognises that there are strong practical as well as ethical reasons for containing corruption.

How TI achieves its purpose

- TI builds national, regional and global coalitions, embracing the state, civil society and the private sector, in order to fight domestic and international corruption;
 - TI co-ordinates and supports National Chapters to implement our mission;
 - TI assists in the design and the implementation of effective integrity systems; and
- TI collects, analyses and disseminates information and raises public awareness on the damaging impact of corruption (especially in low-income countries) on human and economic development.

What makes TI different?

- TI is the only international movement exclusively devoted to curbing corruption.
- TI is an international centre of expertise on combating corruption, pooling a large number of highly professional volunteers for an integrated approach.
- TI seeks to empower civil society to play a meaningful role in countering corruption.

April 1998

The Rationale:

“Real democracy cannot be worked by men sitting at the top. It has to be worked from below by the people of every village and town. That sovereignty resides in and flows from the people. So said the Father of the Nation in whose name we swear. Therefore, “Who will watch the watchman?” is the vexed question before our democracy. For this people’s participation at all levels is a must.”
Narendra v. Manikrao A.I.R. 1977 S.C. 2171 (India)

The Authors:

Robert Martin is a Professor of Law at The University of Western Ontario. He is Secretary-Treasurer of the Commonwealth Association for Education in Journalism and Communication and a Bencher of the Law Society of Upper Canada. His books include *A Sourcebook of Canadian Media Law*, 2nd ed. 1994; *Media Law*, 1997; and *Speaking Freely: Expression and the Law in the Commonwealth*, 1998.

Estelle Feldman is a Research Associate in the School of Law, Trinity College, University of Dublin. Her research interests include whistleblowing, access to information, organisation strategy, and people as implementers. In 1996 Estelle transferred from the Trinity School of Business Studies where, for the preceding eight years, she had been Director of the MBA programme. Estelle has an MA in History and Political Science from the University of Dublin, an MBA and Diploma in Counselling and Guidance from the National University of Ireland, and has studied European administration and law in the College of Europe at Bruges. She has held elective office as the first woman president of the Irish MBA Association.

The Publishers:

Transparency International (TI) is a not-for-profit non-governmental organisation with its headquarters in Berlin, Germany. Founded in 1993, it presently has over seventy national chapters formed or in formation, in all parts of the world. TI’s Mission Statement appears on page 2. Full details of the organisation and its finances are on the TI web site, together with the *TI Source Book on National Integrity Systems* to which this publication is an adjunct.

TI is a non-political global movement against corruption. It brings together into a coalition with civil society groups and NGOs interested in promoting just and honest government, a wide range of stakeholders, including development agencies, private sector interests, and international financial institutions.

TI may be contacted at:

97-99 Otto-Suhr-Allee,
D-10585 Berlin, Germany

Tel. + 49 30 343 8200
Fax + 49 30 347 03912

Web site: <http://www.transparency.de>

Email: ti@transparency.de

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Transparency International's acknowledgements

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An extended version of this study, including additional legislation from Ireland and prepared for Hong Kong, appears on TI's web site: see <http://www.transparency.de>

This study is one of a series being prepared to empower civil society to engage in meaningful and effective debates about the development of their countries' National Integrity Systems. An up-to-date list of the studies published, and the publications themselves, may be seen on the TI web site.

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CHAPTER 1

WHAT IS ACCESS TO INFORMATION?

Access to information may be defined as the ability of the citizen to obtain information in the possession of the state. Some states provide for access in their constitutions and laws; many do not. Even where access is recognised, it is invariably subject to limitations. In addition, states may impose fees, and require the payment of administrative costs before citizens actually obtain the information they are seeking.

It has been argued that access to information is an essential element of democratic government. That is, if democracy is to flourish, citizens must be adequately informed about the operations and policies of their government. As a recent report prepared for the Government of India noted:

It is now widely recognised that openness and accessibility of people to information about the government's functioning is a vital component of democracy.¹

Access to information attempts to ensure that this will happen.

The purpose of this study is to survey existing laws and practices respecting access to information in the developing countries. The study is also intended to assist those democracies whose constitutions pledge the passage of freedom of information legislation in framing such legislation. It may also benefit the citizens of those democracies by ensuring that the legislation is clear, well thought-out, and effective. We will begin by discussing access to information in general and then look in more detail at the current situation in the developing countries.

Many people believe that access to information is a fundamental human right. This belief is reflected in international human rights instruments, the most significant being the Universal Declaration of Human Rights, proclaimed in December 1948. Article 19 reads:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media regardless of frontiers.

Article 19 is reaffirmed and expanded upon in the International Covenant on Civil and Political Rights of 1966. This provision, also titled Article 19, states:

Everyone shall have the right to hold opinions without interference.

1. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

¹ Working Group on Right to Information and Promotion of Open and Transparent Government, Report, Ministry of Personnel, Public Grievances and Pensions, New Delhi, 1997 paragraph 2.1. Cited as India Report.

2. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

For respect of the rights or reputations of others;

For the protection of national security or of public order (ordre public), or of public health or morals.

Section 1 of Article 19 establishes the right to hold opinions and section 2 expands on the scope of freedom of expression. Section 3 is a limitation clause in which certain legal restraints are acknowledged as being consistent with the freedom. It is important to note that section 3 specifies that these restrictions “*shall only be such as are provided by law.*” There are two permissible bases for limitations on expression: the first relates to individual rights and the second to state powers.

For the purposes of this paper, the key words in both international instruments are the *freedom to seek, receive, and impart information*. It can be noted that of themselves *seeking, receiving, and imparting information* are not part of a separate and distinct right, but are included in both documents as elements of freedom of expression.

Freedom of expression presupposes something to express. Therefore, access to information is inextricably tied to freedom of expression. The words “to seek, receive, and impart” are set out in the Universal Declaration as if they were the constituent parts of one indivisible right.

While it may be that a right of access to information can be implied from international and national guarantees of freedom of expression, it is nonetheless important to maintain the conceptual distinction. Access to information and freedom of expression are closely related, both practically and theoretically, but they are not identical.

The phrase “freedom of information” originated in the United States. There is a widely held view that the United States has one of the world’s most open and transparent systems of government. But Sweden, in 1766, was the first to enshrine a right of access to information in its laws.² Interestingly, it was not until the latter part of the twentieth century that the U.S. Supreme Court interpreted the First Amendment to the Constitution as including a right of access to information.

Freedom of speech and the press are expressly guaranteed by the First Amendment, but this guarantee had previously been interpreted as only indirectly ensuring the public’s right to know.

Prior to the 1970s,

... members of the (U.S. Supreme) Court on occasion did acknowledge the amendment’s embodiment of affirmative rights, such as the right to receive and gather or obtain information, but only in dicta and dissenting opinions. Furthermore, throughout the 1950s and 1960s affirmative rights to acquire information were recognized only as reciprocal or corollary rights, not independently assertable constitutional rights.³

² “The oldest [freedom of information] law (anticipating the rest of the world by two centuries) is called the Swedish Freedom of the Press Act, though its right of access provisions are not limited to the press at all.” Michael, James *Freedom of Official Information*. OSCE Office for Democratic Institutions and Human Rights Bulletin Vol 5:1 Winter 1996/1997 ps.1-21 at 1

³ O’Brien, David M. The Public’s Right to Know: The Supreme Court and the First Amendment 1980 p.119

An extract from a judgment of Justice Thurgood Marshall, pronounced in 1972, illustrates this earlier position:

In a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak. The reason for this is that the First Amendment protects a process . . . and the right to speak and hear -- including the right to inform others and be informed about public issues -- are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable: they are two sides of the same coin. But the coin itself is the process of thought and discussion.⁴

In this judgment, *the right to inform others and be informed about public issues* is considered to be part of the process of free speech; but, whereas the rights to speak and hear are referred to as two sides of the same coin, the right to information is not so clearly recognised. Indeed, it is nearly impossible to discover a definition of the right to information which is not somehow linked to forms of expression. Perhaps, therefore, the most appropriate metaphor is that information is the metal from which the coin of expression is minted.

Why does defining the right to information matter? Clearly, when one is construing international treaties for legal purposes, the meaning of the words matters a great deal. Moreover, since this paper is specifically about access to information in developing countries, coherence requires an attempt to untangle various well-worn themes.

This confusion of terminology relating to “information exchange” was highlighted by Martin in his book, Media Law:

One must distinguish between four different though related notions: freedom of speech, freedom of the press, freedom of expression, and freedom of information. It is essential to keep the four separate, even though they are often used interchangeably. Although they relate to similar things they are not identical.

Freedom of speech addresses the ability of individuals to communicate ideas and information without interference from the state. Freedom of speech has typically meant the freedom to publish -- publish being used here in its widest possible meaning as writing, speaking, printing, or broadcasting ideas and information--without prior restraint imposed by the state. A prior restraint is any state-created limit whereby individuals must seek some form of official permission before they may lawfully publish material. When we speak of censorship as a legal concept, we mean prior restraint.

Freedom of the press is a related notion, but it is not identical. Freedom of the press includes the absence of prior restraint, but there can be circumstances where distinctions, even contradictions, arise between freedom of speech and freedom of the press. If freedom of speech is to be meaningful in the kind of society in which we live, it must include some notion of access to the mass media. If freedom of speech simply means that I can set up my soapbox in the corner of a field and rave at the blue sky, it may not be a practical or useful freedom. While freedom of the press contains elements of free speech, it also ensures that the managers or proprietors of a newspaper, journal, radio station, or television network are free to have the last

⁴ ibid ps.118/9 Judgment given in *Kleindienst v. Mandel*, 408 U.S. 753, 775 (1972)

word about what they will or will not print or broadcast. While freedom of speech and freedom of the press may often be synonymous, there can be instances where there is tension or even direct contradiction between the two.

Freedom of expression contains many of the basic elements of free speech, but it is a consciously broader and more expansive notion. It clearly embraces the freedom to speak, write, print, and publish but it also means that pure physical acts can attract the same kind of protection. Freedom of expression may also protect the communication of ideas or opinions through purely physical acts.

Freedom of information is a very different notion from freedom of speech, freedom of the press, or freedom of expression. Freedom of information is a phrase which was invented in the United States and which is misleading. It has to do with the ability of individuals to gain access to information in the possession of the state. Freedom of information legislation in the United States gives people a legal right of access to such information. The federal legislation in Canada is more accurately titled as the Access to Information Act. This title describes what the statute is about.

Many people who do not understand what freedom of information means have, in recent years, confused freedom of information and freedom of speech and expression. The confusion is compounded by the fact that freedom of information is a phrase with little inherent meaning.⁵

Access to information is a short way of stating the totality of seeking and receiving information -- the right of individuals to be informed about the activities of their state, past, present, and future.

The phrase *freedom of information* is widely used when referring to the ability of individuals to gain access to information in the possession of the state. In writing this paper, we have treated *access to information and freedom of information* as being synonymous. More important, for the reasons outlined above, we believe the phrase *freedom of information* to be inaccurate and misleading. Throughout this paper we will use *access to information*.

Finally, it is important to distinguish between access to information—*real* information—and access to what is known colloquially as “bumf.” The information to which citizens want access is useful, practical information, not simply unlimited amounts of government propaganda. The Government of Malaysia, for example, makes an enormous volume of information available. Its online “Civil Service Link” is a highly sophisticated, exceedingly detailed guide to government departments and services. This is an admirable initiative, but it is not necessarily the same thing as access to information. Access to information is fundamentally about the quality of the information available from the state, not the quantity.

Often, in a practical sense, access to information means getting information the government doesn’t want you to have.

⁵ Martin, Robert Media Law Toronto 1997. Quoted liberally from Introductory chapter.

CHAPTER 2

WHY IS ACCESS TO INFORMATION IMPORTANT?

Before analysing this question in detail, a word of caution is necessary. We believe access to information to be important. We believe access can render the processes of government more open and make those in power more accountable to their people. But access to information is not a magical cure for all social ills. It can be a useful tool in improving societies, but it cannot, in and of itself, bring about radical transformation.

It is clear that, in order to place value on freedom of expression, people must be informed. One cannot exercise freedom of expression unless one has something to express. Information is a necessary element in the generation of knowledge. The theme of the 1994 Conference of the International Group of the Library Association (IGLA) was *Emerging Democracies and Freedom of Information*. Recent significant political events were cited to illustrate the power of television as an information source contributing to social change.

As one speaker observed:

The public in the German Democratic Republic (GDR) had access to television from the Federal Republic, proving that when the Communist leaders told the GDR citizens that they were living in an ideal socialist society this was not correct. The public had access to information and from it they could make their own comparisons and form their own opinions, rather than accept the opinions that were dictated to them by the Party. Similarly the Albanians had access to Italian television; witness the rush over the Adriatic Sea to Italy when the regime in Tirana collapsed. Today that fear in information from television is still present. For example, the banning of satellite dishes in Iran recently and, ... the banning of ownership of dishes in China. Both countries, for different reasons, appreciate the importance and dangers for the régimes of citizens having access to information which they can use to make comparisons with the situations that they are told exist beyond their borders and to make comparisons with the situation inside their own country.⁶

The speaker continued with examples, from Poland and Nigeria, of the importance of printed sources of information and the courageous role of librarians in ensuring that banned literature remained in circulation. In the early 1980s, the literary works of Solzhenitsyn and Pasternak were banned but circulated underground demonstrating both the power of information, and,

professional responsibilities by librarians in Cracow collecting Polish zamizdat literature illegally and dangerously, believing that at some stage in the future this literature will be seen as an important part of the literary and cultural national heritage.⁷

In Nigeria, during the civil war of 1967 – 1970, the government banned access to any material published on behalf of the break-away régime in Biafra.

⁶ Bowden, Russell *Emerging Democracies and freedom of information* in Emerging Democracies and Freedom of Information: Conference Proceedings 1994 ed. Turfan, B with Ladizesky, K and Smith, I.A. p.6

⁷ *ibid* p.6

The national librarian consulted the military government at some risk to himself to get permission to obtain this material and hold it confidentially, arguing that it was part of Nigeria's literary heritage.

Both actions indicate the courage of librarians in upholding the concept of free access to information.⁸

The eminent American law professor, Thomas Emerson, in his classic commentary on the First Amendment to the United States Constitution, wrote as follows:

[S]uppression of belief, opinion, and expression is an affront to the dignity of man, a negation of man's essential nature. . . From these concepts there follows the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and his state. To cut off his search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others.⁹

In Emerson's view, society uses freedom of expression to protect certain values which can be grouped in four broad categories. The first of these is assuring individual self-fulfilment. The second set of values focuses on means of attaining the truth. The third addresses a method of securing the participation of members of society in social and political decision-making; and the fourth category of values seeks to maintain the balance between stability and change in society.

In expanding on the concept of participation in decision-making, Emerson noted:

The third main function of a system of freedom of expression is to provide for participation in decision-making through a process of open discussion which is available to all members of the community. Conceivably the technique of reaching the best common judgment could be limited to an elite, or could be extended to most members of the society excluding only those who were felt to be clearly unworthy . . .

It is through the political process that most of the immediate decisions on the survival, welfare and progress of a society are made. It is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression. Freedom of expression in the political realm is usually a necessary condition for securing freedom elsewhere. It is in the political sector, therefore, that the crucial battles over free expression are most often fought . . .

Freedom of discussion in public affairs serves as an important function regardless of whether the political structure of a nation is democratic or not. Every government must have some process for feeding back to it information concerning the attitudes, needs and wishes of its citizens, to make known their wants and desires.¹⁰

These are strong statements in support of open and transparent government. While Emerson did not directly refer to access to information, it seems clear that freedom of speech cannot be achieved without it.

⁸ *ibid* p.7

⁹ Emerson, Thomas I. *Toward a general theory of the First Amendment* The Yale Law Journal Vol 72, 1963 ps.877-956 at p.880.

¹⁰ *ibid* p.882ff

As recently as late 1996 and in a more direct vein, a European expert on access to information suggested that its purpose is to redress the imbalance of power between the citizen and the state and to promote efficiency.

He observed that:

Most "Freedom of Information" statutes evolved from administrative law. There was first established a basic rule that government is subject to law, and that the citizens have rights to take legal actions against the state for breaches of the law. A consequence of such a right is that citizens have legally enforceable rights of access to records in the possession of government that are relevant to their claims. Once such a right of access is established, the next major step is to remove the requirement that the records be relevant to a legal claim, making the right of access a right of citizenship (or often simply a right of humanity).¹¹

Commenting on the most recent experiences of access to information, the same writer related access to encouraging efficiency and honesty in government:

Open government laws are not simply for the satisfaction of citizens' curiosity. They usually derive from rights of access to records relevant to a legal interest, and there is a continuing connection between the interest which a citizen has in how the country is governed and a right of access to records about government. Such a right of access may be important in disclosing inefficiency and even corruption.¹²

The article concluded with a brief explanation of terminology. This is included here as further evidence of the complexity that can be encountered in attempting to explicate the topic of access to information across borders and across cultures.

The term "open government" has generally been preferred ... to that of "Freedom of Information," as the subject has been laws which establish a public right of access to government records. As such legislation has been adopted, several languages have provided for expressions of the basic principle. Swedish was first by far, with *offenlighetsprincip* (with similar expressions in other Nordic languages), usually being translated as "the publicity principle." Although the United States is committed to the words "Freedom of Information" ... by the U.S. Act, Americans also use "the people's right to know" and "open government." The 1978 French law has contributed *transparence administrative*, usually translated into English as "open government" or "administrative openness." From the former Soviet Union, we have the word *glasnost* for the principle "that every citizen has the inalienable right to obtain exhaustive and authentic information on any question of public life that is not a state or military secret."¹³

Once again, we observe the complexity in addressing the many facets of information. In this instance, information is the basis of open government. Rooting out inefficiency and corruption is viewed as the principal objective of openness and transparency in government.

The extent of corruption in government world-wide has led to the recent establishment of Transparency International (TI), a non-governmental organisation based in Berlin. To focus attention on corruption, TI conducts surveys of the perceptions of international business people

¹¹ Michael, *op cit* p.15

¹² *ibid* p.15

¹³ *ibid* p.21 including n6 Gorbachev, Mikhail *Perestroika* p.304, Fontana edition 1988

concerning corruption in the countries where they operate. The results are published in an annual Corruption Perception Index. The 1997 Index found Nigeria perceived to be the most corrupt country, followed by Bolivia, Colombia, and Russia; Denmark was perceived to be the least corrupt.¹⁴ TI considers one of the first steps in fighting corruption should be:

to ascertain what the public perception is regarding existing levels of corruption and where corruption takes place in order to provide a baseline against which the progress of anti-corruption reform can be measured. Secondly, the legal and administrative environment should provide an enabling environment for a free press. The freedom of the press will be aided by several measures, such as passing Freedom of Information laws giving private citizens, including journalists, access to government information; repealing or revising anti-defamation laws and "insult" laws to ensure that these cannot be used to threaten and fetter the press; ending press and media censorship; raising the professional standards of journalists; ending government discrimination such as controlled access to newsprint, advertising of certain media; and, ensuring that state-owned media employees can maintain professional standards of independence and responsibility.¹⁵

In relation to developing countries, TI regards South Africa as an exemplar in introducing open government. South Africa has attempted to render the entire parliamentary process as open to the public and the press as possible, empowering select committees, particularly the Public Accounts Committee, to hold the Executive accountable. In the TI Source Book the comment is made that:

The inauguration of public accountability through parliament in South Africa demonstrates in a very practical way, the worst features of a secretive and highly corrupt form of governance -- the apartheid years were characterised by obsessive secrecy -- and the very best features of open government . . .

All select committees must meet in public, and if they wish to go into a closed session they must publicly debate the reasons for doing so. (South African journalists used to processing only pre-prepared government handouts, are now complaining that there is too much for them to cover!) Parliamentarians have been empowered to call civil servants to account, and the passage of budgetary estimates through the democratic process has been a frightening experience for senior civil servants who were accustomed to getting approval literally "on the nod."

. . . In the hands of a newly, and transparently appointed and high-powered constitutional court, these constitutional provisions can be expected to take a bite out of parliamentary corruption.¹⁶

Thus, the constitution of the country not only purports to guarantee open, fair, and transparent government procurement, but also to ensure access to information.

Another model for open government legislation is found in the Bolivian Transparency Decree (Number 23318-A of 3 November 1992). An unofficial translation of Article 5 has been provided by Transparency International:

¹⁴ Transparency International (www.transparency.de), Corruption Perception Index, 1997

¹⁵ *ibid*, The TI Source Book *National Integrity Systems*, extract from Executive Summary

¹⁶ *ibid* extract from Chapter 5: The Democratic Process

The transparent performance of their duties by public servants is fundamental for the credibility of their acts and comprises:

the generation and transmission in an appropriate manner of useful, timely, comprehensive, reliable and verifiable information to their hierarchical superiors, public entities which provide the funds being used, or any other person who is empowered to supervise their activities;

preserving and allowing access at all times to such information by their superiors and persons who are in charge of internal or external controls, as well as verifying the efficiency and trustworthiness of the information system;

open information before, during and after the execution of their acts in order to report to society with regard to the essence of public funds allocation, their use, main results obtained and main issues affecting their investment and results; and,

providing processed information to all persons who require it and demonstrate a legitimate interest in it.

Any limitation on, or reservation of, transparency must be specified for each category of information and shall not be expressed in general terms in respect of any entity or its agencies. It must also be expressly authorised by a law which indicates clearly to which independent office such limitations or reservations must be accounted for and how individual classified or reserved acts are to be accounted for.

The exposure and ultimate elimination of corruption are important in all countries. Resources are finite and governments need to be efficient as well as effective in their application. Transparency in government in order to ensure that citizens' interests are pursued and protected by those in power is just one of the reasons access to information is essential to good governance.

HUMAN RIGHTS AND THE ENVIRONMENT

Paper by the Commonwealth Secretariat

1. In today's world, society has become more and more conscious of the tremendous environmental damage being caused to our planet. News abounds of rainforest depletion, trees dying because of acid rain, toxins present in our lakes and water supplies, and the continuous endangering and in some cases extermination of our wild life. Disasters, such as the explosion at Union Carbide's chemical complex in Bhopal, India, which cost over 2,500 lives, in addition to those who suffered injuries and displacement, the Exxon Valdez disaster, the Chernobyl nuclear plant disaster in the former Soviet Union, have caused serious damage to our environment. All these incidences have cost a lot of lives, resulted in chronic diseases, created atmospheric and water pollution, soil degradation, dying forests, and caused displacement of whole communities creating environmental refugees.¹

2. There are debates going on in the international community, as to how best to resolve these environmental problems. The view has been expressed that the international financial institutions which provide the financial means for development projects should attach conditionalities to their credits to ensure that humanitarian aspects, including environmental issues, are not neglected. The attachment of conditions to financial support apart, more and more national legislation is appearing in the field of environmental law. But there are many examples that provide evidence that the legal framework is inadequate to deal with ecological disasters and other environmental problems. Many environmentalists are therefore arguing that legislation is not enough, that true guarantees of environmental protection will only come

when society extends the concept of "rights" to the environment.² Only when the personal entitlement to a clean environment is successfully placed in the category of "rights" can it be preserved from the day-to-day political process. In that way, domestic political decisions will be significantly limited, which is very important "particularly given the high short-term costs involved in many environmental protection measures and the resulting political favour".³

3. Various views and alternatives have been proposed.⁴ Firstly, environmental problems may be combated through the assertion of existing human rights such as the right to life, personal security, health, and food. In this regard, a safe and healthy environment may be viewed as a precondition to the existing rights. A second, intermediate position proposes a set of environmental rights based upon existing rights to information. However, it has been argued that environmental rights can be derived from other existing rights such as life, property, or health but only to a limited extent.⁵ The third proposition is that a specific right to a clean

² Giagnocavo, C., & Goldstein, H., 1990, *Law Reform or World Reform: The Problem of Environmental Rights*, *McGill Law Journal*, 35, p. 345.

³ Shelton, D., 1991, *Human Rights, Environmental Rights, and the Right to Environment*, *Stanford Journal of International Law*, 28, p. 107.

⁴ Ibid.

⁵ Boyle, A., 1993, *Human Rights and the Protection of the Environment: An Overview*, Conference paper delivered at the Commonwealth Institute/SOAS conference on Human Rights Approaches to Environmental Protection in the Commonwealth and Beyond, London, 27-28 May 1993.

¹ Awuku, E. O., 1994, *The Right to Clean Environment: Lessons from India and Tanzania*, *Verfassung und Recht in Übersee*, 27, 516-532.

environment could be formulated and added to the current catalogue of human rights. One way would be to treat a clean environment as a collective economic and social right comparable to those rights loosely protected by the 1966 United Nations Covenant on Economic, Social and Cultural Rights. It is argued that this approach would give environmental quality comparable status to other collective rights.⁶ These positions suggest that environmental issues belong within the category of human rights. However, some argue that human beings are only one element of the ecosystem, and that it is necessary to protect nature as a whole, including animals and plants. So, clearly, human rights and environmental protection are different, but overlapping societal values⁷.

4. There have been many efforts in the last few decades by the international community and non-governmental organisations (NGOs) to address environmental problems. The United Nations Conference on the Human Environment was the first occasion when political, social and economic problems of the global environment were discussed at an intergovernmental level. The Conference took place in Stockholm, Sweden, from 5 to 16 June 1972, and was attended by the representatives of 113 governmental organisations. The aim of the Conference was to create a basis within the United Nations on which problems of the human environment could be comprehensively considered, and to draw the attention of governments and public opinion to the importance of the problem.⁸

5. The Conference produced a Declaration, a list of principles and an action plan. The Declaration was intended to outline broad goals and objectives without making legally binding provisions. It proclaimed that man is both creature and moulder of his

environment, and that a stage had been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and man-made, are essential to his well-being and to the enjoyment of basic human rights. The 26 principles were concerned with the following five broad issues.

- Natural resources should be safeguarded and conserved, the earth's capacity to produce renewable resources should be maintained, and non-renewable resources should be shared.
- Development and environmental concerns should go together, and less developed countries should be given every assistance and incentive to promote rational environmental management.
- Each country should establish its own standards of environmental management and exploit resources as they wish, but should not endanger other states; there should be international co-operation aimed at improving the environment.
- Pollution should not exceed the capacity of the environment to clean itself, and oceanic pollution should be prevented.
- Science, technology, education, and research should all be used to promote environmental protection.

6. The Action Plan provided recommendations for internationally co-ordinated activities aimed at increasing knowledge about environmental issues, and protecting and improving the quality of the environment. A major result of the Conference was that it forced a compromise between the developed countries and developing countries, in that the need to find a balance between

⁶ Ibid.

⁷ supra note 3, pp. 104 -105.

⁸ Declaration of the United Nations Conference on Human Environment, Principle 2, U.N. Doc. A/Conf.48/14rev.1.

environmental management priorities and aims of economic development was recognised. A direct result of the conference was also the creation of the United Nations Environment Programme (UNEP) which was to ensure that the principles were turned into policies and active programmes.⁹

7. The Stockholm Conference and Declaration were followed by a number of other international proclamations regarding environmental protection. The 1989 Hague Declaration on the Environment, for instance, provides the right to live in dignity in a viable global environment. It also called for the preservation of the world economy, and proposed a more powerful authority under the United Nations' system to protect the earth's atmosphere. The Declaration accepted the principle of economic sanction, with control exercised by the International Court of Justice, and the principle of fair compensation.¹⁰

8. Another milestone was the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. Agenda 21, the plan of action that emerged from the Conference, emphasised the need for enhanced accessibility of integrated environment and development information, and enhanced national capacity to deal with such information in decision making and policy setting. The UNEP has consequently revised its Environment Assessment Programme with a shift of emphasis towards:

- providing an information base for policy formulation, in addition to raising awareness;
- supporting the production of integrated environmental information for sustainable development, in addition to sectoral information;

- providing products for a wide range of users, in addition to scientific assessments;
- focusing on emerging issues and early warning, in addition to describing the current situation; and
- working towards an integrated UNEP information delivery system rather than a set of disparate systems.¹¹

9. The state of the environment is clearly linked to economic as well as social rights, such as access to food, shelter, health care and education. Economic rights recognise that all economic activities have a common and indivisible resources' base on the environment, air, water, soil, vegetation and seas. All these resources can be sustained when they are well managed, and they must be sustained for they are essential for human life and development on the planet.¹² So if states are claiming the right to development, then there is the need for them to safeguard the environment, conserve the natural resources and plan their utilisation according to their availability, both nationally and internationally.

10. The human right to clean environment has also found recognition in various international and regional instruments. The United Nations have in their Charter affirmed their faith in fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women, and expressed their determination to promote social progress and better standards of life in larger freedom. Article 12 of the International Covenant on Economic, Social and Cultural Rights of 1966 recognises "the right of everyone to the enjoyment of the attainable standard of physical and mental health". It imposes on states correlative duties including the

⁹ McCormick, J., 1989, *The Global Environmental Movement*, London, p. 150.

¹⁰ Declaration of the Hague on Environment, 1989, *International Legal Materials*, 28, pp. 1308-1309.

¹¹ Environmental Assessment Programme, TIEMPO, Issue 15, March 1995, p.11.

¹² Rights and Humanity, *Celebrating the Universal Declaration of Human Rights and the Achievements of the United Nations*, London 1989, p.28.

obligation to take the necessary steps for the improvement of all aspects of environmental hygiene. Recognising the growing political and legal importance of environmental issues, the International Court of Justice has established a Chamber on Environmental Matters.

11. In Africa, the environment is a central issue, because most African states are not industrially developed and depend to a large extent on the exploitation of natural resources. The African Charter on Human and Peoples Rights, which was ratified in 1986 by the majority of states from the Organisation of African Unity and certain NGOs, therefore called for the right to a clean environment. Article 24 of the Charter states that "all people shall have the right to a general satisfactory environment favourable to their development".

¹³ Similarly, Article 11 of the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights of 1988 states that "everyone shall have the right to live in a healthy environment". It imposes correlative duties on states, and calls upon state parties to promote the protection, preservation, and improvement of the environment¹⁴. The Association of South East Asian Nations (ASEAN) states have also recognised environmental rights. In the ASEAN Agreement on the Conservation of Nature and Natural Resources, Article 16, contracting parties are required to circulate, as widely as possible, information on conservation measures and their relationship with sustainable development objectives. The parties also have a duty to organise the participation of the public in the planning and implementation of conservation measures, which are considered fundamental to environmental protection.

¹³ Human Rights: The African Charter on Human and Peoples Rights, Article 24, New York: The United Nations, p.11.

¹⁴ Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, *International Legal Materials*, 28, 1998, p.165.

12. At the Commonwealth Heads of Government Meeting at Kuala Lumpur in 1989, participants recognised the threats to the planetary environment, and issued the Langkawi Declaration on the Environment. This Declaration expressed in simple and direct language a profound concern about the serious deterioration of the environment and the threat that this poses to the well-being of the present and the future generations. Heads of Government identified the main environmental problems facing the world today as the greenhouse effect, which can lead to severe climatic changes that could induce floods, droughts and rising sea levels, the depletion of the ozone layer, acid rain, marine pollution, land degradation and the extinction of numerous animal and plant species. Commonwealth Heads of Government realised that the success of global and national environmental programmes requires mutually reinforcing strategies and the participation and commitment of all levels of society - governments, individuals and organisations, industry and the scientific community. They resolved to act collectively and individually, and committed themselves to the following programme of action:

- to advance policies and programmes which help achieve sustainable development, including the development of new and better techniques in integrating the environmental dimension in economic decision making;
- to strengthen and support development of international funding mechanisms and appropriate decision making procedures to respond to environmental protection needs which will include assisting developing countries to obtain access to and transfer of needed environmental technologies and which should take account of proposals for an international environmental fund/Planet Protection Fund;

- to support the work of the UNEP/WMO Intergovernmental Panel on Climatic Change (IPCC);
- to call for the early conclusion of an international convention to protect and conserve the global climate and, in the context, applaud the efforts of the member governments to advance the negotiation of a framework convention under the auspices of the United Nations;
- to promote the reduction and eventual phase-out of substances depleting the ozone layer;
- to promote afforestation and agricultural practices in developed and developing countries to arrest the increase in atmospheric carbon dioxide and halt the deterioration of land and water resources; and
- to strengthen national, regional and international institutions responsible for environmental protection as well as the promotion of active programmes on environmental education to heighten public awareness and support.

Commonwealth Heads of Government reaffirmed in the 1991 Harare Declaration their commitment to protect and promote fundamental political values, i.e. democracy, democratic processes and institutions which reflect national circumstances, the rule of law and independence of the judiciary, just and honest government and also to protect the environment through respect for sustainable development which was enunciated at Langkawi.¹⁵

13. Since the 1972 Stockholm Conference on Human Environment, the pace of international environmental legal regulation has accelerated considerably. International and

multilateral agreements concerning the environment include, for example, the Plant Protection Agreement for the South-East Asia and Pacific Region (1956), the European Convention on the Conservation of Nature and Natural Resource (1968), the Convention to Regulate International Trade in Endangered Species (1973), the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), the Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989), the United Nations Framework on Climate Change (1992), the Convention on Biological Diversity (1992) and the Oslo Protocol to the Convention on Long-Range Transboundary Air Pollution on Further Reductions of Sulphur Emissions (1994).

14. International law determines the validity of treaties in the international legal system. It provides guidance on the process of becoming party to treaties and when treaties become binding upon states. It also determines the remedies available on the international plane for any breach. However, it is the national legislation which determines the status or force of law which will be given to a treaty within a legal system. For example, when a particular human right becomes part of the domestic law, national judges and administrators apply them, and individuals in the ratifying state may receive rights as a result of the treaty provisions. In other words, the international legal system does not reach directly into the national system to enforce its norms; it attempts to do so indirectly. States are required under international law to bring their domestic laws into conformity with the validly contracted international commitments. International human rights norms appearing in international treaties are not, as such, part of domestic law, unless they are specifically incorporated by national legislation. International law leaves it to states to adopt such legislative and other measures, consistent with their own constitutional processes, to give effect to the obligations which they undertake to implement, and more importantly, to ensure that any person whose rights or freedoms are violated has an effective

¹⁵ Commonwealth Declarations and Statements issued by Commonwealth Heads of Government 1971-1991, Commonwealth Secretariat, 1993.

remedy justiciable before independent and impartial tribunals.¹⁶

15. Environmental rights fall into the category of third generation rights, and many states, such as Namibia, Tanzania, Ghana, and India, have included environmental rights in their constitutions under State Directive principles. The Indian Government, for example, honouring its international obligations on environmental issues, amended its Constitution in 1986. The Amendment Act called for the obligatory duty of the state and every citizen to protect and improve the environment. The most important parts of the Constitution which are relevant here are Part III and Part IV. Part III of the Constitution enumerates a Bill of Rights. Article 13 of Part III provides that any laws which are inconsistent with the Constitution are void. Article 14 states that everybody is equal before the law and has equal protection by the law. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedures established by the law. Part IV of the Constitution specifies the Directive Principles of State Policy of India. Article 48A provides that "the state shall endeavour to protect and improve the environment and safeguard the forest and wildlife of the country". Article 51A (g) deals with the fundamental rights and duties of the Indian people with regard to the environment. The Article provides that it "shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures".¹⁷ Although Article 37 explicitly states that the principles of Part IV are not enforceable in court, it affirms that they are nonetheless fundamental to the governance of the country, and imposes an obligation of the states to comply with the

principles when making laws. Also, the court will have to take cognisance of the interests protected by Part IV when deciding the scope, value and meaning of the rights contained within Part III.

16. Another important aspect concerns the facilitation of public participation, which rests on the view that environmental protection cannot be left to governments alone but requires and benefits from the involvement of individuals, NGOs and public interest groups. This approach uses human rights law to confer procedural rights on individuals within their national legal systems, and involves access to legal remedies for pollution and environmental damage, access to information concerning environmental practices and policies, and access to national decision-making processes and procedures. This approach is endorsed in Principle 10 of the 1992 Rio Declaration on Environment and Development, and is already employed by many national legal systems and constitutions, including the European Union and India¹⁸. In India, for instance, the emergence of public interest litigation relaxed the rules of standing to allow concerned individuals or groups sufficient grounds to address the court. Since 1985 when for the first time the right to a clean environment found its expression in the Indian justice system through public interest litigation, there have been many public interest cases that sought the courts' help in remedying pollution and environmental damage.¹⁹

17. An alternative to courts are national human rights institutions such as offices of the Ombudsman and human rights commissions. They can make an important contribution towards the protection and promotion of environmental rights at the national level. The main function of an Ombudsman is generally to investigate complaints by individuals concerning grievances against government agencies. The function of human rights commissions, on the other hand, is more specifically focused to receive and investigate

¹⁶ Justice R. Lallah, 1989, International Human Rights Norms, In: *Developing Human Rights Jurisprudence Vol. 2*, Judicial Colloquium in Harare, 1989, p.47, Commonwealth Secretariat.

¹⁷ F. Zohra Krentin, 1992, Economic and Social Council: Commission on Human Rights, Progress Report on Human Rights and Environment, p.25.

¹⁸ Supra note 5.

¹⁹ See for further details on public interest litigation in India: Awuku, E.O., supra note 1.

complaints from individuals alleging human rights abuses in violation of existing national laws. They also have an important educational and promotional function as regards human rights. Although only a few national institutions in the Commonwealth have a specific mandate (e.g. the Namibia Ombudsman office), many can investigate environmental issues. This jurisdiction though seems little known by most people. In addition, national human rights institutions can play an important part in helping raise public awareness and tackle environmental problems through education and training.²⁰

where their legitimate interests are affected.

18. In conclusion this paper calls on the Law Ministers to consider the following recommendations.

April 1999

1. Reaffirmation by governments of their commitment to the programme of action adopted in Langkawi in 1989 by the Commonwealth Heads of Government Meeting.
2. Ratification by those Commonwealth countries which have not yet done so of international and regional human rights instruments and other multilateral environmental agreements.
3. Incorporation by those Commonwealth countries which have not yet done so of environmental rights in their national legislation.
4. Strengthening of the complaints and investigation facilities of national human rights institutions with regard to environmental measures as well as their protection and promotional functions, and access for individuals and public interest groups to the courts

²⁰ Hatchard, J., 1993, The Role of National Institutions in the Protection and Promotion of Environment Rights, Conference paper delivered at the Commonwealth Institute/SOAS conference on Human Rights Approaches to Environmental Protection in the Commonwealth and Beyond, London, 27-28 May 1993.

PROPOSED UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANISED CRIME

Note by the Commonwealth Secretariat

BACKGROUND

1. Ministers may be aware that the United Nations is in the process of negotiating an international convention to combat transnational organised crime (the TOC Convention). This process follows UN Resolution 53/111 of 9th December 1998, mandating:

- (a) the setting up of an open-ended intergovernmental committee to elaborate the convention; and
- (b) the negotiation of additional international instruments to address the important issues of:
 - (i) trafficking in women and children;
 - (ii) illegal trafficking of migrants; and
 - (iii) the illicit manufacture of, and trafficking in arms and ammunition.

2. The purpose of the TOC Convention is to promote international co-operation among states in combating transnational criminal activities which are becoming more sophisticated in their organisation and diverse in nature and are therefore a major concern of governments. Like the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the TOC Convention covers money laundering, extradition, mutual legal assistance, protection of witnesses and victims and co-operation between law enforcement agencies. The Convention also contains anti-corruption measures and requires specific measures at the national level to reduce the chances of criminal gangs being able to

participate in legal markets while acquiring illegal gains.

3. In addition to the TOC Convention, the three optional protocols are to cover areas requiring specificity. They are:

- (a) Draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children the title of which speaks for itself. The Protocol is aimed at promoting co-operation among member states to "prevent, investigate and punish international trafficking in women and children for the purpose of forced labour or sexual exploitation";
- (b) Protocol on the Illegal Trafficking of Migrants which includes specific co-operation measures designed to curb such activities by sea; and
- (c) Draft Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Materials which, as in the case of the other instruments, is designed to facilitate co-operation.

4. The participation of the Commonwealth Secretariat in the open ended intergovernmental committee follows from both the status of the Secretariat as a body invited to participate as a matter of course in United Nations work and the close collaborative links between the Legal and Constitutional Affairs Division and the United Nations Centre for International Crime Prevention.

THE NEGOTIATIONS

5. The most recent negotiating session (March 1999) concentrated on the draft text of

Articles 1 to 3 of the Draft Convention relating to:

- (a) Statement of objectives;
- (b) Scope of application/ Use of terms;
- (c) Participation in criminal organisations;

6. In essence, the discussions centred on the question whether the Convention should contain an indicative list of offences to which its substantive provisions would apply. The majority of delegates do not, at this stage, favour a list because of the difficulty of ensuring that the list keeps abreast of international criminal activity and also of the obvious impossibility of being able to list all possible transnational criminal activity. There were, however, a number of delegates who were of the view that an indicative list of offences was necessary to give a definitive scope to the Convention. It appears to the Commonwealth Secretariat that the general trend in international co-operation (and in Commonwealth Schemes) is to move away from lists of offences in instruments dealing with co-operation in combating international crime for the simple reason that it avoids the need to review the list every time a new form of criminal conduct surfaces.

7. Another issue of relevance arising during the deliberations concerned the relationship between the Draft TOC Convention and other international instruments. Some delegations were of the view that the TOC Convention should have supremacy over other relevant UN conventions. The Commonwealth Secretariat identified itself with those delegations who advocated a provision which allowed concurrent application of the TOC Convention with other bilateral and multilateral agreements and arrangements since this will take into account the Commonwealth's existing Schemes in the field.

8. Negotiations commenced on the Draft Protocol against Trafficking in Women and Children. It was generally agreed that the instrument should cover trafficking in all persons but that there should be specific

emphasis on women and children because they were the most vulnerable group to suffer this form of abuse¹. The Secretariat is of the opinion that it is important that it continues to collaborate with the United Nations on the development of this Protocol notwithstanding that the Protocol has a wider scope than the present work of the Secretariat.

FUTURE NEGOTIATIONS

9. The mandate of the Ad-Hoc Committee is that work on the Convention and additional Protocols should be completed by the end of the year 2000, and further sessions will be held. Documents relating to the meetings of the open ended intergovernmental group and copies of the Draft TOC Convention and related protocols can be found on the Web at <http://www.ifs.univie.ac/~uncjin/dcatoc.htm>.

POSSIBLE ACTION BY LAW MINISTERS

10. Law Ministers may wish to take note of the progress being made on this issue and express any views they may have on the possible development of common approaches by Commonwealth member countries to issues being considered during the negotiations.

March 1999

¹ The Commonwealth has already embarked upon a project for the development of an administrative and legislative guide on the commercial sexual exploitation of women and children, following the results of studies carried out in some of its member states on the issue

TRAFFICKING IN PERSONS: WITH SPECIAL REFERENCE TO THE COMMERCIAL SEXUAL EXPLOITATION AND ABUSE OF WOMEN AND CHILDREN

Paper by the Commonwealth Secretariat

INTRODUCTION

1. This paper gives an overview of the problem of trafficking and the commercial, sexual exploitation and abuse of women and children. It is based on the information collated for the World Congress Against Sexual Exploitation of Children in August 1996 and is intended to raise the awareness of Law Ministers on the existence of the problem and on the measures that can be adopted to combat the problem effectively.

TRAFFICKING

2. Trafficking or the illegal moving and selling of human beings across countries and continents in exchange for financial gain or other compensation, has long been outlawed by most national legislation and international human rights conventions. It is marked as the third most serious illegal trade after drugs and weapons, trafficking of children, is a multibillion dollar industry. Though a hidden phenomenon, this abhorrent practice continues in its most virulent form: in the trafficking of girls and women, and increasingly a growing number of boys for sexual purposes. Such trafficking takes place between villages, cities, across countries and continents.

3. Because trafficking is an illegal underground operation, and because it usually involves more than one national jurisdiction, data is often not easy to obtain. In Asia, there has been significant compilation of data by non-governmental organisations (NGOs) and researchers working on the subject. However, trafficking occurs throughout the world and is constantly shifting and expanding its frontiers and opening new markets. It occurs in different forms including illegal adoption, theft of body parts, debt bondage of workers, sexual

exploitation and sham marriages. Trafficking can be small-scale and informal or large-scale and organised. At national and international levels it is often governed by syndicates that have the resources, contacts and expertise to co-ordinate the movement of human beings illegally and clandestinely across borders. Bribery and abduction, false identification and documentation, violence and bonded labour are all part of the practice. It usually involves complex networks and immigration and law enforcement officials have been implicated in some countries, in facilitating the practice.

4. Trafficking of children results from a broad range of factors including, the effect of poverty and social and economic crises, globalisation, with the lifting of import restrictions, resulting in the influx of money and goods, further aggravating disparities and promoting new levels of consumerism. In families beleaguered by poverty and losing ground in efforts to make ends meet, girls are especially at risk. They may be sold by their families to traffickers or put in vulnerable positions when sent as domestic workers to large urban centres. Their communities may also be seen as easy targets by traffickers.

Commercial Sexual Exploitation

5. Commercial, sexual exploitation of children constitutes some of the worst violations of children's rights. It usually goes hand in hand with trafficking in persons. These crimes are perpetrated in many countries in the world including Commonwealth countries. These related crimes have reached proportions which have raised international concern. The World Congress Against Sexual Exploitation of Children in August 1996, helped to draw international attention to the problem of commercial sexual exploitation of children.

The Congress defined the scope of the problem and highlighted relevant issues relating to the problem.

6. The Congress also adopted a declaration and developed a strategic, agenda for action against the commercial sexual exploitation of children and the protection of children's rights. The Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs, at Port of Spain in November 1996, urged governments to adopt and promote the effective implementation of the declaration. The implementation includes the collection of data and information to be used as the basis for formulating effective strategies and the lobbying of governments. The Declaration is attached as **Annex**.

7. Though similarities occur, trafficking and the commercial exploitation of children manifests itself in different ways in different parts of the world. The studies presented at the congress indicated distinct but similar patterns in the factors contributing to the commercial sexual exploitation of women and children.

Europe and North America

8. Commercial sexual exploitation in industrialised countries primarily occurs as child prostitution and pornography. In recent years with the collapse of the Soviet Union, child trafficking from Eastern to Western Europe is on the rise. The factors driving child prostitution in these countries are poverty, growing economic disparities, severe stress in families, drug abuse and in more affluent societies, rampant consumerism. The majority of children involved in street prostitution in the United States and Western Europe are runaways, often fleeing family abuse.

Sub-Saharan Africa

9. Poverty, wars and other forms of destabilisation are the major underlying factors driving the commercial sexual exploitation of children in Africa. Wars have had the effect of destabilising families, while civil strife has destroyed subsistence systems and livelihoods through the enforced displacement of people.

Vast numbers of refugees and internally displaced people have been forced across unfamiliar territories into precarious situations on the very margins of existence. In such situations, exchanging sex for food, money or even relief supplies becomes an easy alternative. The vulnerability of children in refugee camps is particularly high. Child marriages and bondage are also known to be prevalent. Structural adjustment programmes have had the effect of decreased resources allocations to the social sector, increasing economic and social hardships.

Asia and Pacific

10. In many countries in Asia, trafficking of children is prevalent as is brothel-based prostitution. Social and economic conditions in the region are the foundation from which the commercial exploitation of children grows. The growth of sex tourism in the last few decades is another contributing factor. The generally low status of girls and women, with limited opportunities for education and employment also leave them extremely vulnerable to sexual exploitation. Wars and conflicts have also disrupted economies and traditional social patterns.

Impact on Children

11. The children who are trafficked into prostitution face dangers far beyond the injuries, disease and trauma associated with multiple sexual encounters. Betrayed by those they love or trust, forcibly separated from their families by long distances and even across borders, where they are isolated by strange surroundings including a foreign language and/or culture, these children may become dependent and dangerously attached to pimps and brothel operators. Their illegal status, though usually not of their choice, makes it hard for them to seek help, and they live in fear of arrest and prosecution for prostitution, illegal immigration and false documentation. Often, drugs are used to subdue the children not only endangering their health, but imposing dependency upon them, which makes escape and rehabilitation even more difficult.

12. Children who manage to escape, face difficulties in explaining who they are and where they come from, because of language barriers and lack of documents if police arrest them on prostitution charges, courts may deport them. Even when they do succeed in returning home, they may be rejected by their families and communities. Often lacking employment skills and with physical and psychological problems from their experience, these children may return to prostitution as their only means of survival.

Preventive Measures

13. A broad range of interrelated measures are necessary to curb the trafficking of children and women. These measures include legislation, rehabilitation and reintegration programmes for the victims and steps to raise awareness among families and communities on the dangers involved. Training for social workers, the police and the judiciary is also essential. An international consensus and close collaboration are vitally important in dealing with the issue. The problems and dimensions are becoming clearer as are the steps needed.

14. Studies indicate that poverty, relative and absolute, is a key factor in many situations but it appears that it is its co-existence with other risk elements that creates a situation in which the sexual exploitation of children is most likely.¹ The additional components include changing value systems, the classification of individuals as commodities, the existence of an underclass, either due to ethnic differences or wide disparities in economic status and family breakdown. These factors create an environment, where despite widespread commitment in principle to child welfare and protection, sexually exploited children frequently fall outside the welfare net.

15. The studies give practical insights into strategies that have been adopted by NGOs aimed at protecting children from all forms of sexual abuse and exploitation. Many have stressed the paramount importance of creating a

climate that is child centred, that recognises and supports the rights and special position of all children, that understands the extent and nature of the abuse and its impact on children. This is critical for the successful rehabilitation of the victims of these crimes.

NATIONAL LEGISLATIVE AND ENFORCEMENT - RESPONSES

Legislation

16. New legislation may have to be initiated or the revision of existing legislation undertaken to achieve the desired effect and in order to comply more effectively with the provisions of the Convention on the Rights of the Child to which all Commonwealth countries are party. Such legislation should ideally include: the criminalisation of specific offences involving children, prohibition of pornography, mandatory reporting of cases of sexual abuse by hospitals, medical workers, teachers and law enforcement officials, extraterritorial legislation, sex tourism legislation, prohibition of trafficking or sale of children, appropriate procedures for child witness programmes, the right of the accused and victims rights.

Enforcement and Prevention at the National Level

- (a) This requires the political will of both the government law enforcement machinery and the community.
- (b) Central authority to deal with child exploitation and abuse.
- (c) Special care units in the police force.
- (d) Adequate training and sensitisation for the police and prosecutors is essential.
- (e) Missing Children Registries.
- (f) Customs surveillance.
- (g) Community services or telephone helplines.
- (h) Interdisciplinary approach to law enforcement. It is essential to co-

¹ Studies were conducted by End Child Prostitution In Asian Tourism (ECPAT) in 22 different countries

ordinate the efforts of the police, social welfare, education and health authorities, and where appropriate, NGOs and communities.

Punishment and Deterrence

17. Complex issues relate to the sentencing of offenders. There is the problem of recidivism particularly in relation to paedophiles, should penalties of these offenders continue after their sentences are served? Should they be registered and continue to be surveilled? Should courts require actual evidence of physical and psychological injury before determining the nature of sentencing or should this automatically presumed. In some countries legislation is extraterritorial to include offences committed by their nationals abroad. In sentencing, offences committed against foreign children should not be seen as less serious.

Enforcement through International Co-operation

18. Due to the transboundary nature, of the commercial sexual exploitation, particularly of children, co-operation between governments and INTERPOL is vitally important. Therefore, information sharing and networking between agencies is important as are mutual assistance treaties, extradition, police liaison officers and development aid.

Conclusion

19. Because of its universal nature and the virtual acceptance by all Commonwealth countries of the international covenant on the Rights of the Child, through ratification and accession, commercial sexual exploitation can no longer be regarded as a sensitive domestic issue. It is now a global phenomenon demanding urgent action. At national level there have been fundamental changes through the enactment of legislation and action by NGOs to protect children. However, in the particular case of commercial sexual exploitation, more specific action including the enactment of specific provisions in legislation needs to be taken.

20. The creation of a legal framework is often the initial reflection of the political will to deal with problems. However, while this is vitally important in combating the problem of the commercial sexual exploitation and abuse of children, it is only the beginning of creating an integrated and effective system to deal with the problem effectively. (See **Annex B** for more detailed information on measures.)²

21. Following the recommendation of the Fifth Meeting of Commonwealth Ministers Responsible for Women's Affairs, to give effect to the effective implementation of the Stockholm Declaration, the Commonwealth Secretariat has commissioned the preparation of Guidelines on Administrative and Legislative Measures to Address the Commercial Sexual Exploitation and Abuse of Children in the Commonwealth. The Guidelines draw upon the experience and good practice of countries which have put in place administrative and legal measures to combat the problem. It is intended that the Guidelines together with the already existing Commonwealth schemes for mutual assistance and co-operation in criminal matters will constitute a solid base for co-ordinated, collective Commonwealth action to fight this abhorrent practice.

Recommendation

22. Law Ministers may wish to take note of the efforts already being made at the international level to negotiate an international convention to combat transnational crime, including trafficking in women and children, as described in paper **LMM(99)12**, and to give their support to this work, as well as to support the continued participation of the Secretariat in the ongoing negotiations.

April 1999

² Maureann OBriann, "The International Legislative and enforcement responses". A paper prepared for ECPAT for the World Congress on the Commercial Sexual Exploitation of Children

DECLARATION AND AGENDA FOR ACTION AGAINST THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 1996

DECLARATION

1. We, gathered in Stockholm for the World Congress against Commercial Sexual Exploitation of Children, representing the Governments of 119 countries, together with non-governmental organisations, the End Child Prostitution in Asian Tourism (ECPAT) campaign, UNICEF and other agencies within the family of the United Nations, and other concerned organisations and individuals worldwide, hereby commit ourselves to a global partnership against the commercial sexual exploitation of children.

THE CHALLENGE

2. Every day, more and more children around the world are subjected to sexual exploitation and sexual abuse. Concerted action is needed at the local, national, regional and international levels to bring an end to the phenomena.

3. Every child is entitled to full protection from all forms of sexual exploitation and sexual abuse. This is reaffirmed by the Convention on the Rights of the Child, an international legal instrument of universal significance (to which there are 187 States Parties). States are required to protect the child from sexual exploitation and sexual abuse and promote physical and psychological recovery and social reintegration of the child victim.

4. According to the Convention on the Rights of the Child, the best interests of the child shall be a primary consideration in all actions concerning children, and their rights are to be enjoyed without discrimination of any kind. In all matters affecting the child, the views of the child should be given due weight, in

accordance with the age and maturity of the child.

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

6. Poverty cannot be used as a justification for the commercial sexual exploitation of children, even though it contributes to an environment which may lead to such exploitation. A range of other complex contributing factors include economic disparities, inequitable socio-economic structures, disfunctioning families, lack of education, growing consumerism, urban-rural migration, gender discrimination, irresponsible male sexual behaviour, harmful traditional practices, armed conflicts and trafficking of children. All these factors exacerbate the vulnerability of girls and boys to those who would seek to procure them for commercial sexual exploitation.

7. Criminals and criminal networks take part in procuring and channelling vulnerable children toward commercial sexual exploitation and in perpetuating such exploitation. These criminal elements service the demand in the sex market created by customers, mainly men, who seek unlawful sexual gratification with children. Corruption and collusion, absence of and/or inadequate laws, lax law enforcement, and limited sensitisation of law enforcement personnel to the harmful impact on children, are all further factors

which lead, directly or indirectly, to the commercial sexual exploitation of children. It may involve the acts of a single individual, or be organised on a small scale (e.g. family and acquaintances) or a large scale (e.g. criminal network).

8. A wide range of individuals and groups at all levels of society contribute to the exploitative practice. This includes intermediaries, family members, the business sector, service providers, customers, community leaders and government officials, all of whom may contribute to the exploitation through indifference, ignorance of the harmful consequences suffered by children, or the perpetuation of attitudes and values that view children as economic commodities.

9. The commercial sexual exploitation of children can result in serious, life-long, even life threatening consequences for the physical, psychological, spiritual, moral and social development of children, including the threat of early pregnancy, maternal mortality, injury, retarded development, physical disabilities and sexually transmitted diseases, including HIV/AIDS. Their right to enjoy childhood and to lead a productive, rewarding and dignified life is seriously compromised.

10. While laws, policies and programmes exist to counter the commercial sexual exploitation of children, greater political will, more effective implementation measures, and adequate allocation of resources are needed to give effect to the spirit and letter of these laws, policies and programmes.

11. The primary task of combating the commercial sexual exploitation of children rests with the State and families. The civil society also has an essential role to play in preventing and protecting children from commercial sexual exploitation. It is imperative to build a strong partnership between Governments, international

organisations and all sector of society to counter such exploitation.

THE COMMITMENT

12. The World Congress reiterates its commitment to the rights of the child, bearing in mind the Convention on the Rights of the Child, and calls upon all States in co-operation with national and international organisations and civil society to:

- *Accord* high priority to actions against the commercial sexual exploitation of children and allocate resources for this purpose;
- *Promote* stronger co-operation between States and all sectors of society to prevent children from entering the sex trade and to strengthen the role of families in protecting children against commercial sexual exploitation;
- *Criminalise* the commercial sexual exploitation of children, as well as other forms of sexual exploitation of children, and condemn and penalise all those offenders involved, whether local or foreign, while ensuring that the child victims of this practice are not penalised;
- *Review and revise*, where appropriate, laws, policies, programmes and practices to eliminate the commercial sexual exploitation of children;
- *Enforce* laws, policies and programmes to protect children from commercial sexual exploitation and strengthen communication and co-operation between law enforcement authorities;
- *Promote adoption*, implementation and dissemination of laws.

- policies, and programmes supported by relevant regional, national and local mechanisms against the commercial sexual exploitation of children;
- *Develop and implement* comprehensive gender-sensitive plans and programmes to prevent the commercial sexual exploitation of children, to protect and assist the child victims and to facilitate their recovery and reintegration into society;
- *Create* a climate through education, social mobilisation, and development activities to ensure that parents and others legally responsible for children are able to fulfil their rights, duties and responsibilities to protect children from commercial sexual exploitation;
- *Mobilise* political and other partners, national and international communities, including intergovernmental organisations and non-governmental organisations, to assist countries in eliminating the commercial sexual exploitation of children; and
- *Enhance* the role of popular participation, including that of children, in preventing and eliminating the commercial sexual exploitation of children.

13. The World Congress adopts this Declaration and Agenda for Action to assist in protecting child rights, particularly the implementation of the Convention on the Rights of the Child and other relevant instruments, to put an end to the commercial sexual exploitation of children worldwide.

AGENDA FOR ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN

1. The Agenda for Action aims to highlight existing international commitments, to identify priorities for action and to assist in the implementation of relevant international instruments. It calls for action from States, all sectors of society, and national, regional, and international organisations, against the commercial sexual exploitation of children.
2. Co-ordination and Co-operation:
 - (i) *Local/National Levels*
 - (a) urgently strengthen comprehensive, cross-sectoral and integrated strategies and measures, so that by the year 2000 there are national agenda(s) for action and indicators of progress, with set goals and time-frames for implementation, targeted to reducing the number of children vulnerable to commercial sexual exploitation and nurturing an environment, attitudes and practices responsive to child rights;
 - (b) urgently develop implementation and monitoring mechanism(s) or focal point(s) at the national and local levels, in co-operation with civil society, so that by the year 2000 there are data bases on children vulnerable to commercial sexual exploitation, and on their exploiters, with relevant research and special attention to disaggregating data by age, gender, ethnicity, indigenous status, circumstances influencing commercial sexual exploitation, and respect for confidentiality of the child victims especially in regard to public disclosures;
 - (c) foster close interaction and co-operation between the government and non-government sectors to

plan, implement and evaluate measures against the commercial sexual exploitation of children, coupled with campaigns against exploitation, and with adequate allocation of resources;

(ii) Regional/International Levels

- (d) promote better co-operation between countries and international organisations, including regional organisations, and other catalysts which have a key role in eliminating the commercial sexual exploitation of children, including the Committee on the Rights of the child, UNICEF, ILO, UNESCO, UNDP, WHO, UNAIDS, UNHCR, IOM, the World Bank/IMF, INTERPOL, UN Crime Prevention and Criminal Justice Division, UNFPA, the World Tourism Organization the UN High Commissioner for Human Rights, the UN Centre for Human Rights, the UN Commission on Human Rights and its Special Rapporteur on the Sale of Children, and the Working Group on Contemporary Forms of Slavery, each taking guidance from the Agenda for Action in their activities in accordance with their respective mandates;
- (e) advocate and mobilise support for child rights, and ensure that adequate resources are available to protect children from commercial sexual exploitation; and
- (f) press for full implementation of the Convention on the Rights of the Child by State Parties, including requirements for reporting to the Committee on the Rights of the Child in accordance with existing deadlines, and encourage follow-up of countries'

progress towards full realisation of child rights in the context of other relevant United Nations organs, bodies and mechanisms, including the UN Commission on Human Rights and its Special Rapporteur on the Sale of Children.

3. Prevention:

- (a) provide children with access to education as a means of improving their status and make primary education compulsory and available free to all;
- (b) improve access and provide relevant health services, education, training, recreation and a supportive environment to families and children vulnerable to commercial sexual exploitation, including those who are displaced, homeless, refugees, stateless, unregistered, in detention and/or in state institutions;
- (c) maximise education on child rights and incorporate, where appropriate, the Convention on the Rights of the Child into formal and non-formal education for all communities, families and children;
- (d) initiate gender-sensitive communication, media and information campaigns to raise awareness and educate government personnel and other members of the public about child rights and the illegality and harmful impact of the commercial sexual exploitation of children, and promote responsible sexual attitudes and behaviour in society, in keeping with the child's development, sense of dignity and self-esteem;
- (e) promote child rights in family education and family development assistance, including an

- understanding that both parents are equally responsible for their children, with special intervention to prevent sexual violence against children;
- (f) identify or establish peer education programmes and monitoring networks to counter the commercial sexual exploitation of children;
 - (g) formulate or strengthen and implement gender-sensitive national social and economic policies and programmes to assist children vulnerable to commercial sexual exploitation, families and communities in resisting acts that lead to the commercial sexual exploitation of children, with special attention to family abuse, harmful traditional practices and their impact on girls, and to promoting the value of children as human beings rather than commodities; and reduce poverty by promoting gainful employment, income generation and other supports;
 - (h) develop or strengthen, implement and publicise relevant laws, policies and programmes, to prevent the commercial sexual exploitation of children, bearing in mind the Convention on the Rights of the Child;
 - (i) review laws, policies, programmes and practices which lead to or facilitate the commercial sexual exploitation of children and adopt effective reforms;
 - (j) mobilise the business sector, including the tourism industry, against the use of its networks and establishments for the commercial sexual exploitation of children;
 - (k) encourage media professionals to develop strategies which strengthen the role of the media in providing information of the highest quality, reliability and ethical standards concerning all aspects of commercial sexual exploitation of children; and
 - (l) target those involved with commercial sexual exploitation of children with information, education and outreach campaigns and programmes to promote behavioural changes to counter the practice.
4. Protection:
- (a) develop or strengthen and implement laws, policies and programmes to protect children and to prohibit the commercial sexual exploitation of children, bearing in mind that the different types of perpetrators and ages and circumstances of victims require difference legal and programmatic responses;
 - (b) develop or strengthen and implement national laws to establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child trafficking, child pornography, including possession of child pornography, and other unlawful sexual activity;
 - (c) develop or strengthen and implement national laws, policies and programmes that protect child victims of commercial sexual exploitation from being penalised as criminals and ensure that they have full access to child-friendly personnel and support services in all sectors, and particularly in the legal, social and health fields;
 - (d) in the case of sex tourism, develop or strengthen and implement laws

- to criminalise the acts of the nationals of the countries of origin when committed against children in the countries of destination ("extra-territorial criminal laws"); promote extradition and other arrangements to ensure that a person who exploits a child for sexual purposes in another country (the destination country) is prosecuted either in the country of origin or the destination country; strengthen laws and law enforcement, including confiscation and seizure of assets and profits, and other sanctions, against those who commit sexual crimes against children in destination countries; and share relevant data;
- (e) in the case of trafficking of children, develop and implement national laws, policies and programmes to protect children from being trafficked within or across borders and penalise 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;
- (f) identify and strengthen or establish networks between national and international law enforcement authorities, including INTERPOL, and civil society to monitor against the commercial sexual exploitation of children; set up special units among law enforcement personnel, with adequate resources and child-friendly facilities, to counter the commercial sexual exploitation of children; appoint liaison officers aimed at guaranteeing child rights in police investigations and judicial procedures for the exchange of key information; and train all law enforcement personnel on child development and child rights, in particular the Convention on the Rights of the Child, other relevant human rights standards and national legislation;
- (g) identify and encourage the establishment of national and international networks and coalitions among the civil society to protect children from commercial sexual exploitation; foster action and interaction among communities, families, non-governmental organisations, the business sector, including tourist agencies, the World Tourism Organization, employers and trade unions, the computer and technology industry, the mass media, professional associations, and service providers to monitor and report cases to the authorities, and to adopt voluntary ethical codes of conduct; and
- (h) create safe havens for children escaping from commercial sexual exploitation, and protect those who provide assistance to child victims of commercial sexual exploitation from intimidation and harassment.
5. Recovery and Reintegration:
- (a) adopt a non-punitive approach to child victims of commercial sexual exploitation in keeping with the rights of the child, taking particular care that judicial procedures do not aggravate the trauma already experienced by the child and that the response of the system be coupled with legal aid assistance, where appropriate, and provision of judicial remedies to the child victims;
- (b) provide social, medical, psychological counselling and other support to child victims of

- commercial sexual exploitation, and their families, paying particular attention to those with sexually transmitted diseases, including HIV/AIDS, and with a view to promoting the self-respect, dignity and rights of the child;
- (c) undertake gender-sensitive training of medical personnel, teachers, social workers, non-governmental organisations and others working to help child victims of commercial sexual exploitation on child development and child rights, bearing in mind the Convention on the Rights of the Child and other relevant human rights standards;
 - (d) take effective action to prevent and remove societal stigmatisation of child victims and their children; facilitate the recovery and reintegration of child victims in communities and families; and where institutionalisation of the child is necessary, ensure that it is for the shortest possible period in accordance with the child's best interests;
 - (e) promote alternative means of livelihood with adequate support services to child victims and their families so as to prevent further
- commercial sexual exploitation; and
- (f) adopt not only legal sanctions against the perpetrators of sexual crimes against children, but also socio-medical and psychological measures to create behavioural changes on the part of the perpetrators.
6. Child Participation:
- (a) promote the participation of children, including child victims, young people, their families, peers and others who are potential helpers of children so that they are able to express their views and to take action to prevent and protect children from commercial sexual exploitation and to assist child victims to be reintegrated into society; and
 - (b) identify or establish and support networks of children and young people as advocates of child rights, and include children, according to their evolving capacity, in developing and implementing government and other programmes concerning them.

The International Legal Framework and Current National Legislative and Enforcement Responses



**Submitted by
ECPAT for the**

**World Congress against
Commercial Sexual Exploitation
of Children
Stockholm, Sweden, 27 - 31 August 1996**

The World Congress against Commercial Sexual Exploitation of Children aims to draw international attention to the problems of child prostitution, child pornography and the sale and trafficking of children for sexual purposes and to initiate decisive action - nationally and internationally - to put an end to these heinous violations of childrens' rights.

Commercial sexual exploitation of children occurs in many different ways and in a wide variety of settings. The underlying causes are numerous, complex and closely interrelated and must be analysed, understood and confronted accordingly. In order to facilitate greater understanding, the Planning Committee (The Government of Sweden, UNICEF, ECPAT and the NGO Group on the Convention on the Rights of the Child) has commissioned theme papers on nine major topics. These will be discussed in panel sessions and workshops at the Congress. The papers complement each other and taken together represent an attempt to provide a broad overview, touching on all facets of this problem. The themes that they cover are: The International Legal Framework and Current National Legislative and Enforcement Responses; Prevention and Psychosocial Rehabilitation of Child Victims of Commercial Sexual Exploitation; Health; Education; The Sex Exploiter; Tourism and Children in Prostitution; Child Pornography: An International Perspective; The role of the Media; and Human Values.

This paper has been written by Muireann O'Briain for the ECPAT working group on Law Reform and Law Enforcement as a contribution to the World Congress against Commercial Sexual Exploitation of Children. Mr. Nigel Cantwell, a UNICEF Consultant also contributed to the paper. The views expressed do not necessarily reflect endorsement by the Planning Committee.

May 1996

THE INTERNATIONAL LEGAL FRAMEWORK
and
CURRENT NATIONAL LEGISLATIVE AND ENFORCEMENT RESPONSES

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THE INTERNATIONAL LEGAL FRAMEWORK and CURRENT NATIONAL LEGISLATIVE AND ENFORCEMENT RESPONSES

EXECUTIVE SUMMARY

In adopting a succession of treaties throughout the XXth Century, the international community has demonstrated long-standing concern about sexual exploitation and connected issues such as trafficking and certain aspects of slavery, in general or with specific reference to children. These instruments have been drawn up in various contexts - human rights, humanitarian law, refugee law, labour standards, etc. - and have also instigated the development of a number of regional treaties tackling the issues involved.

Examination of this body of international law shows that it has concentrated more especially on protection from exploitation in prostitution as opposed to exploitative use in pornography, a field in which clear definitions - and hence a clear basis for consensus and cooperation - are lacking.

The degree of adherence to these international treaties ranges widely. However, the most significant instrument for efforts in this sphere - the Convention on the Rights of the Child - has achieved almost universal ratification. Furthermore, no State Party has notified a reservation on article 34, the main provision concerned. Implementation of this Convention is facilitated by the existence of the other instruments which indicate the scope covered and, in addition, often give guidance as to the interpretation of the relevant provisions.

These texts have variously generated and been inspired by measures taken at national level, whether of a legislative, administrative or other nature. In both industrialised and developing countries, preoccupation over the growing incidence of sexual exploitation of children and the increasingly international character of several of its manifestations has triggered a spate of new legislation during the Nineties in particular. This paper discusses national measures taken in the areas of child prostitution, trafficking, pornography, sex tourism, extra-territorial legislation and problems relating to child witnesses and the rights of the accused.

Whilst gaps in legislation still exist, law enforcement now poses the major challenge. This and the prevention aspect, including forms of punishment and deterrence, are addressed in the paper, as are the goals of international cooperation in this regard.

It is recommended, *inter alia*, that governments and non-governmental organizations (NGOs) use the Convention on the Rights of the Child as the basis for reviewing and monitoring legislative provisions and law enforcement. The paper also suggests the establishment of an intersectoral task-force and a monitoring system (e.g. Ombudsperson) in every country as necessary elements of a coherent effort to combat the commercial sexual exploitation of children.

PART I: THE INTERNATIONAL LEGAL FRAMEWORK

Introduction

International concern over phenomena more or less closely associated with sexual exploitation - slavery, forced labour, trafficking, financial gains from the prostitution of others, obscene publications, etc. - has been reflected in a relatively large number of treaties drawn up since the beginning of this century, within the framework of the global development of international human rights law.

The following were the main treaties adopted prior to the founding of the United Nations (excluding International Labour Organisation (ILO) Conventions - see 2 below):

1904 International Agreement for the Suppression of the White Slave Traffic (amended by Protocol of 3 December 1948)

1910 International Convention for the Suppression of the White Slave Traffic (amended by Protocol of 3 December 1948)

1919 Convention of Saint-Germain-en-Laye (to secure the complete suppression of slavery in all its forms and of the slave trade by land and sea)

1921 International Convention for the Suppression of the Traffic in Women and Children (amended by Protocol of 20 October 1947)

1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (amended by Protocol of 12 November 1947)

1926 Slavery Convention (amended by Protocol of 23 October 1953)

1933 International Convention for the Suppression of the Traffic in Women of Full Age (amended by Protocol of 20 October 1947)

Those amended by protocols were taken on board by the United Nations; the 1919 convention has lapsed.

The following sections focus more especially on binding texts, but also cover selected components of "soft law" dealing explicitly or implicitly with the subject. These sections are: (1) United Nations texts that are currently in force or valid, (2) ILO instruments, (3) refugee law, (4) humanitarian law, (5) international texts in preparation, (6) regional treaties which contain provisions relevant to the protection of children from commercial sexual exploitation, and (7) extracts from comments by the Committee on the Rights of the Child. Section 8 is a short commentary.

1. UNITED NATIONS TREATIES IN FORCE

1.1. 1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (amended by Protocol of 12 November 1947)

This Convention as amended had been ratified by 53 countries as at 31 December 1994. The ratification rate in recent years has, however, been extremely low: the most recent ratification apart from the succession of the Czech Republic and Slovakia in 1993 dates back to 1983 (Cuba). Only one other country (Solomon Islands, 1981) ratified during the Eighties, and only three countries ratified during the Seventies (Fiji in 1971, Zambia in 1974 and Lesotho in 1975).

Interestingly, two countries that had been States Parties since 1949 subsequently notified denunciation: Denmark in 1967 (no motive recorded) and the Netherlands in 1985 which motivated the decision by saying that the provisions of the Dutch Criminal Code had been amended to concern only production, possession or trade relating to "the portrayal of - or any medium of information which portrays - sexual activity involving persons under the age of 16 (i.e. child pornography)" or the sending of any pornographic materials "unsolicited through the mail or to supply, offer or show them to children".

The treaty indeed covers all forms of pornography, notably making it a punishable offence in States Parties "[f]or purposes of or by way of trade or for distribution or public exhibition to make or produce or have in possession obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other obscene objects". Also punishable are export, import, conveyance, advertising and taking part in a business concerned with any such "obscene matters or things".

Offenders are in principle to be brought to trial in the State Party "in whose territories the offence, or any of the constitutive elements of the offence, was committed" but, when the laws of the country so permit, they may alternatively (not additionally) be prosecuted in the State Party of which they are nationals "if they are found in its territories, even if the constitutive elements of the offence were committed outside such territories".

1.2. 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others

This Convention had been ratified by 70 countries as at 31 December 1994. It was designed to consolidate the above-mentioned treaties of 1904, 1910, 1921 and 1933 which were in force at the time it was adopted and which thereby became obsolete. Essentially, it obliges States Parties to punish any person who, "to gratify the passions of another, [p]rocures, entices or leads away another person for purposes of prostitution" or "exploits the prostitution of another person", even with the latter's consent. Also punishable is the running of a brothel and renting accommodation for the purpose of the prostitution of others. Under the treaty, such offences are to be regarded as extraditable or, in States where extradition is not permitted, nationals who have returned to their own State after the commission

abroad of any such offence are to be prosecuted in and punished by the courts of their own State. The Convention then sets out procedures for combating international traffic in persons (especially women and children) for the purpose of prostitution.

1.3. 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery

This Convention had been ratified by 114 countries as of 31 December 1994. It was designed to complement, not to replace, the 1926 Slavery Convention. For the purposes of this paper, the most pertinent provision of this treaty is Article 1, which obliges States Parties to "take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of", *inter alia*, "[a]ny institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour".

1.4. 1979 Convention on the Elimination of All Forms of Discrimination against Women

This Convention, in force since 1981, had been ratified by 131 countries as of 30 June 1994. Article 6 directs States Parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."

1.5. 1989 Convention on the Rights of the Child

This Convention (CRC) had been ratified by 187 countries as of 15 April 1996. It defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier". It contains several provisions relevant to the issues under consideration.

Article 19 stipulates that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from [...] maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

Under Article 32, "States Parties recognise the right of the child to be protected from [...] performing any work that is likely to be hazardous or [...] to be harmful to the child's health or physical, mental, spiritual, moral or social development". A minimum age or ages for employment are to be set (cf. ILO Convention 138, under 2.2. below) and States are bound to "[p]rovide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

Article 34 provides that "States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse" and to "take all appropriate national, bilateral and multilateral measures to prevent: (a) the inducement or coercion of a child to engage in any unlawful sexual activity; (b) the exploitative use of children in prostitution or any other

unlawful sexual practices; (c) the exploitative use of children in pornographic performances and materials." It is worth noting that this, the key provision in the Convention relating to commercial sexual exploitation, has not been the subject of a reservation by any of the States Parties.

Similarly, Article 35 obliges States Parties to 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."

Finally, Article 39 requires States Parties to "take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of... any form of ... exploitation... in an environment which fosters the health, self-respect and dignity of the child".

2. ILO INSTRUMENTS

The conclusions of the *United Nations International Seminar on the ways and means of achieving the elimination of the exploitation of child labour in all parts of the world* (28 October-8 November 1985) include the following reference: "the exploitation of child labour takes many forms, and certain types of exploitation, for example child prostitution [...], are particularly abhorrent". Thus, the interpretation is clearly that child prostitution at least is considered, at the international level, to be a form of exploitative child labour. Whilst ILO treaties were not drawn up with the phenomenon of sexual exploitation in mind - no more than they were drafted as a means of combating the participation of children in armed conflict - certain ILO standards can nonetheless be deemed of relevance in these regards.

2.1. ILO Conventions 29 (Forced labour, 1930) and 105 (Abolition of Forced Labour, 1957)

ILO Conventions 29 and 105 were explicitly referred to in an amendment proposed by Nigeria to the chapter on "implementation of existing instruments" of the revised French proposal for an optional protocol on the subject at hand (see E.2. below). Whilst they do not seem to be of significant direct value as a legal tool for combating commercial sexual exploitation of children on the threshold of the third millennium, Convention 29 (ratified by 136 countries as at 1 June 1995) at least lends weight to the thesis that any form of forced or compulsory labour undertaken by children has long been the target of prohibition. This Convention sets out a number of conditions under which forced or compulsory labour may be exacted - such as compulsory military service, normal civic obligations, as a consequence of conviction in a court of law, emergency situations, etc. - but in so doing it anyway restricts such labour to "able-bodied males who are of an apparent age of not less than 18 and not more than 45 years..." (Art. 11).

2.2. ILO Convention 138 (Minimum Age, 1973) and Recommendation 146 (Minimum Age, 1973)

ILO Convention 138, currently the flagship treaty on child labour, is reflected, and implicitly referred to, in CRC Article 32 (see 1.5. above). However, it suffers from a relatively poor

ratification record: just 46 countries as at 1 June 1995. The thrust of the Convention is the regulation of admission to employment in "branches of economic activity or... undertakings" listed in its Art. 5, para. 3. Not unnaturally, these are all sectors of formal and recognised enterprise, and the treaty deals with neither self-employment or "non-lucrative" work. As a result, it has no direct application in the field of commercial sexual exploitation. It does serve, however, as a further indication of the international community's attitude towards activities that jeopardise the health and development of children. Also, presuming that applicants for admission to employment take that step of their own free will, the fact that the treaty requires that a 16-year-old be denied access to employment reserved for those over 18 is a further demonstration of the irrelevance of consent as a factor in determining exploitation.

The Minimum Age Recommendation of 1973 supplements Convention 138 by giving more precise policy guidelines for optimal implementation of the treaty at national level.

3. REFUGEE LAW

3.1. 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

The number of States Parties to one or both instruments was 130 as at 20 October 1995. Whilst the instruments contain no special provision on protection from sexual exploitation, Article 24 of the 1951 Convention is potentially relevant to the present paper in that it reaffirms obligations regarding child labour, stating that "[t]he Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of (...) minimum age of employment (...) and the work of young persons...".

The United Nations High Commissioner for Refugees (UNHCR) has a general supervisory function under Art. 35 of the 1951 Convention in addition to its mandate to provide international protection to refugees contained in the Statute of the Office.

3.2. Executive Committee of the High Commissioner's Programme: Conclusion No. 47 (XXXVIII) of 1987 on Refugee Children

Although not, of course, binding law, this Conclusion is of interest in that it specifies UNHCR's concern about sexual exploitation of children, condemning "the exposure of refugee children to physical violence and other violations of their basic rights, including through sexual abuse, trade in children [...]" and calling for "national and international action to prevent such violations and assist the victims".

4. INTERNATIONAL HUMANITARIAN LAW

Humanitarian law determines what acts are lawful in the course of an armed conflict. The applicable rules depend on whether the conflict is considered international (e.g. an inter-State conflict) or non-international (e.g. a civil war).

■ *International armed conflicts*

4.1. Regulations Respecting the Laws and Customs of War on Land Annexed to the 1907 Hague Convention IV ("The Hague Regulations")

All prisoners of war, including children, "must be humanely treated" (article 2). Rape or sexual abuse of the inhabitants of a territory under occupation is prohibited under Article 46: "Family honor and rights [...] must be respected." As affirmed in the judgement of the International Military Tribunal at Nuremberg, the Hague Regulations represent customary international law and as such are binding on all States whether or not they have adhered to the Convention itself.

4.2. 1949 Geneva Convention III Relative to the Treatment of Prisoners of War ("The 1949 POW Convention")

The 1949 POW Convention developed protection afforded by the 1929 Geneva Convention on POWs based on the experiences of the Second World War. A POW includes all members of the armed forces; the civilians accompanying those forces, and civilians spontaneously taking up arms to resist an invader. Article 14 of the Convention provides that "Prisoners of war are entitled in all circumstances to respect for their persons and their honour. Women shall be treated with all the regard due to their sex...". Under Article 52, except for volunteers, no prisoner of war may be employed in labour which is of an unhealthy or dangerous nature. The Convention had been ratified by 186 countries as at 24 April 1996.

4.3. 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War

The 1949 Geneva Convention IV was the first international agreement addressing exclusively the treatment of civilians in armed conflict, although there had been certain provisions to protect civilians included in the Hague Regulations of 1907. It is mainly confined to the protection of civilians in occupied territory or in internment and its provisions have been extensively supplemented by Additional Protocol I of 1977. Article 27 of Geneva Convention IV states: "Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights... Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Furthermore, under Article 51, an Occupying Power may not compel protected persons to work unless they are over 18 years of age. Children are considered protected persons if they are civilians in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State not bound by the Convention are not protected persons nor are nationals of a neutral state or co-belligerent State as long as normal diplomatic representation exists in the State in whose hands they are.

The Convention had been ratified by 186 countries as at 24 April 1996, and many of its provisions represent customary international law.

4.4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)

Under article 75, all children who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions of the Protocol shall be treated humanely in all circumstances. Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault are prohibited. Article 77 provides that "[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault."

This Protocol had been ratified by 143 countries as at 24 April 1996 and many of its provisions represent customary international law.

■ *Non-international armed conflicts*

4.5. Article 3 Common to the Four Geneva Conventions of 1949 ("Common Article 3")

In an internal armed conflict, each party to the conflict is obliged to treat humanely all persons taking no active part in hostilities. Outrages upon their personal dignity, in particular humiliating and degrading treatment are prohibited as are violence to life and person. The International Court of Justice affirmed in the Nicaragua case that Common Article 3 represents customary international law.

4.6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Under the fundamental guarantees in Article 4, all persons not taking a direct part in hostilities or who have ceased to take part in hostilities are entitled to respect for their person and honour and must be protected from "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" and "slavery and the slave trade in all their forms". The threshold for applicability of Protocol II is often deemed to be higher than for Common Article 3. This Protocol had been ratified by 135 countries as at 24 April 1996.

■ *Enforcement*

In *international* armed conflicts, rape and sexual abuse of protected persons as far as they involve "wilfully causing great suffering or serious injury to body or health" constitute grave breaches of the 1949 Geneva Conventions. States Parties are obliged to prosecute, or extradite for prosecution, anyone suspected of committing grave breaches. In relation to all other breaches of the Conventions and Protocols including in *internal* armed conflicts, governments are obliged to "take measures necessary for the suppression" of these breaches.

5. INTERNATIONAL INSTRUMENTS IN PREPARATION

5.1. Revised 1961 (Hague) Convention on the Protection of Children

The second reading of the draft revised text of this private international law treaty was effected in September 1995. The final revision should be ready for approval at the Diplomatic Conference scheduled for October 1996. This instrument will deal with the attribution of jurisdiction, the determination of applicable law, and the establishment of a system of international cooperation to provide protection for children who are not in their "country of habitual residence". In particular, and in somewhat simplified form, it will mean that a child in need of protective measures while outside that country - such as in the case of a child taken abroad for the purposes of commercial sexual exploitation - may benefit from appropriate measures at the initiative of the authorities of the country where he or she is present, whether or not the authorities of the country of habitual residence request this and whether or not he or she is a national of either country concerned.

5.2. Proposed Optional Protocol to the Convention on the Rights of the Child

By its resolution of 8 March 1995, the Commission on Human Rights decided that "the open-ended inter-sessional working group of the Commission [...] for the elaboration of guidelines on a possible optional protocol on the sale of children, child prostitution and child pornography, shall elaborate [...] a draft optional protocol" on these issues. Proposed drafts already exist, but it is currently difficult to estimate the likely timescale for the formulation and approval of a final text. The protocol will almost certainly deal only with national obligations within the framework of international cooperation to implement relevant rights in the Convention; it will not comprise substantive standard-setting.

6. REGIONAL TREATIES

6.1. 1981 African Charter on Human and Peoples' Rights

The treaty entered into force in 1986, and as of 1 January 1996, had been ratified by 50 States. Article 5 prohibits "all forms of exploitation and degradation", including in particular slavery and the slave trade.

In addition, Article 18.2 obliges States Parties to "ensure the elimination of every discrimination against women and... the protection of the rights of the woman and the child as stipulated in international declarations and conventions." The implication here is that States that are also parties to the Convention on the Rights of the Child would be obliged to implement the provisions of CRC Article 34 as part of their obligations under the Charter.

6.2. 1990 African Charter on the Rights and Welfare of the Child

The Charter, having been ratified to date by only six Member States of the OAU, has not yet entered into force (15 ratifications are required for this). It contains provisions on exploitation of child labour, sexual exploitation and sale and trafficking. They are essentially similar in effect to their counterparts in the CRC, but contain a number of additional facets.

The Charter's Article XV (Child labour) specifies that the provision "covers both the formal and informal sectors of employment" and makes explicit rather than implicit reference to "the International Labour Organisation's instruments relating to children" as a consideration in establishing "minimum ages for admission to *every* employment" (our italics).

Article XXVII of the Charter, in addition to requiring States Parties to "protect the child from all forms of sexual exploitation and sexual abuse", obliges them to "take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials". In comparison with the counterpart provision in the Convention on the Rights of the Child, therefore, the Charter adds "encouragement" under sub-paragraph (a), removes the qualification of "unlawful" sexual activity or practices in sub-paragraphs (a) and (b), adds pornographic "activities" in sub-paragraph (c), and removes the word "exploitative" before "use" in sub-paragraphs (b) and (c), presuming that any "use" of the child will in itself be exploitative. In principle, therefore, and subject to interpretation, the Charter provides for protection from a somewhat wider range of acts than does the Convention.

Finally, Article XXIX specifies that States are to combat sale and trafficking "by any person including parents or legal guardians of the child".

6.3. 1969 American Convention on Human Rights

This Convention entered into force in 1978, and as at 1 January 1996 had been ratified by 25 States. Article 5 stipulates that "[e]very person has the right to have his physical, mental and moral integrity respected." Article 6 specifies that "[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women." The Convention further provides (Article 19) that "every minor child has the right to the measures of protection required by his condition as a minor, on the part of his family, society and the state."

In the 1988 Protocol to this Convention (not in force by January 1996), all work which "jeopardizes health, safety or morals" is prohibited for persons under 18 years of age.

6.4. 1994 Inter-American Convention on International Traffic in Minors

This treaty was adopted at the Fifth Inter-American Specialised Conference on Private International Law convened by the Organization of American States (OAS). It is designed to regulate civil and penal aspects of the international traffic in minors through international cooperation. It covers "any human being below the age of eighteen" who is the victim of "abduction, removal or retention, or attempted abduction, removal or retention [...] for unlawful purposes or by unlawful means". The term "unlawful purposes" is then defined to include "prostitution, sexual exploitation, servitude...". It is as yet too early to foresee the impact of this treaty whose ratification will necessarily be limited to OAS members.

6.5. 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms

This Convention was the first regional agreement on human rights to be adopted after the Universal Declaration of Human Rights, and has been in force since 1953. It had been ratified by 31 countries as at 1 January 1996. Its main relevant provision is Article 4 which declares that "[n]o-one shall be held in slavery or servitude" and "no-one shall be required to perform forced or compulsory labour".

6.6. 1961 European Social Charter

The Charter, covering the development and protection of social and economic rights, is a complementary instrument to the European Convention on Human Rights. It came into force in 1965, and had been ratified by 20 countries as at 24 April 1996.

States Parties to the Charter accept as the aim of their policies the attainment of conditions in which certain rights and principles may be effectively realised. These include (Part I, 7): "Children and young persons have the right to special protection against the physical and moral hazards to which they are exposed." States further undertake to be bound by certain obligations, including (Part II, Art. 7[10]): "To ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting... from their work."

6.7. 1991 Recommendation No. R(91)11 of the Committee of Ministers to Member States of the Council of Europe

This Recommendation, made under Article 15(b) of the Statute of the Council of Europe, is worth highlighting because it emanates from an organ of the Council which specifically addresses "Sexual Exploitation, Pornography and Prostitution of, and Trafficking in, Children and Young Adults". It urges Member States to review legislation and practice with a view to implementing a comprehensive programme of measures to combat the sexual exploitation of children.

7. COMMENTS BY THE COMMITTEE ON THE RIGHTS OF THE CHILD

As its contribution to the Open-ended Working Group of the 52nd Session of the Commission on Human Rights concerning the question of the drafting of an Optional Protocol to the Convention on the Rights of the Child (cf. 5.2. above), the Committee on the Rights of the Child submitted a paper from which the following elements are extracted:

"[T]he importance of [the issues of child prostitution and child pornography and the sale of children for these purposes] as well as the need to draw urgent attention and encourage concerted action to prevent and combat them, are illustrated by the attention paid to them in the course of the dialogue held with States parties on the implementation of the Convention, as well as the decision of the Committee to devote, in 1993, its second thematic debate to the topic 'economic exploitation of children'.

"But it is important to stress that the Convention has not only identified such situations in an autonomous manner, it has further set up a holistic approach for the consideration of the human rights of children. In the light of such an approach, all rights are recognised as inherent to the human dignity of the child, and the implementation of one right will only be effective when taking into consideration the implementation of, and respect for, all the other rights of the child. In a word, the Convention reaffirms the indivisibility and interdependence of human rights.

"The protection of the child from all forms of exploitation, including from sale, prostitution or pornography should therefore not be seen simply in isolation but in the broader context of the realisation of children's rights and taking in due consideration the international obligations arising from the Convention.

"These [obligations] show the decisive importance attached by the Convention, as a human rights instrument, to the national process of implementation of children's rights. It further stresses the special responsibility of States in this regard. These realities were in fact also emphasised by the final document of the World Conference on Human Rights, which called on States to integrate the Convention on the Rights of the Child into their national action plans.

"[T]he reporting system established by the Convention is an essential tool for States parties to ensure a periodic assessment and evaluation of progress achieved in its implementation. It further allows for the improvement of the situation of children and the prevention of violation of their fundamental rights. At the same time, the dialogue held between States and the Committee on the Rights of the Child plays an important catalytic role in this regard, allowing for the formulation of specific suggestions and recommendations to States parties, identifying priority areas for action and encouraging programmes of technical assistance or advice in cooperation with United Nations and other competent bodies.

"[T]hrough the activities of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and of its Working Group on Contemporary Forms of Slavery, important and comprehensive strategies have been envisaged to ensure the implementation of the different existing legal instruments and to give guidance in relation to specific areas where action should be undertaken, such as legal reform, information, education, social assistance, reintegration and international cooperation. Special reference should be made in this regard to the two programmes of action adopted by the Commission on Human Rights for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and for the Elimination of Child Labour. Presently under preparation is a new Programme of Action on the Prevention of Traffic in Persons and the Exploitation of the Prostitution of Others.

"The progress achieved in the implementation of these programmes of action is periodically evaluated both by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Commission on Human Rights. The Commission further considers the important activities of thematic Rapporteurs, as the Special Rapporteur on Violence against Women or the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography who has adopted important recommendations on ways to address the areas covered by her mandate.

"It is also interesting to note that the issues of sale and trafficking in children, child prostitution and child pornography deserve a special attention within the United Nations system-wide action. Mention could be made in this regard to ILO [...] or to the activities developed by UNICEF in the framework of the implementation of the Declaration and Plan of Action adopted by the World Summit for Children.

"At the same time, in the area of crime prevention and criminal justice, important steps have also been taken. In fact, the Ninth Congress on Crime Prevention and Criminal Justice, held last year [1995] in Cairo, called on States to adopt necessary measures aiming at the prevention, protection and rehabilitation of children victims of any form of violence, including sexual violence and sexual exploitation. It further invited the Commission on Crime Prevention and Criminal Justice to consider drafting an international convention on the illicit traffic in children which may embody the necessary elements to effectively combat this form of transnational organised crime.

"The Commission soon ensured a follow-up to this invitation and at its fourth session requested the Secretary-General to initiate the process of requesting views of Member States on the elaboration of such an international convention [...]. An important standard-setting activity is therefore already under way within the United Nations system in this area.

"It is interesting to note that the Commission further decided to request the Secretary-General to organise a meeting of an expert group on the prevention of the sexual exploitation of children for commercial purposes within the context of international travel (sex tourism)."

8. COMMENTARY

The review of the main international instruments covering commercial sexual exploitation of children reveals that, whilst State obligations to combat the phenomenon are relatively clear, it may be useful to make a certain number of comments and clarifications.

- a) Article 34 of the Convention on the Rights of the Child, the provision central to the present discussion, firstly provides for protection from "unlawful" sexual activity; in so doing, it deliberately leaves each State to enact legislation determining what kinds of activity are to be outlawed and, where appropriate, until what age. The absence of the word "exploitation" in sub-paragraph (a) of this article reflects the fact that the focus in this case is more especially "abuse", and in this context the age of consent is clearly of major significance. It would mean that, in a country where age of consent is 16 years, a girl of 17 who is induced (though presumably not "coerced", to the extent that this involves obtaining consent by force or manipulation) into sexual intercourse will not be the subject of protection under this article, whereas a girl of 15 will be. In other words, this provision derogates, by implication, from the overall definition of a "child" for the purposes of this Convention. Sub-paragraphs (b) and (c), on the other hand, are dealing explicitly with "exploitative use". If we recall the 1949 Convention which provides for protection against *exploitation* through prostitution *regardless of whether or not consent has been given*, and the 1956 Supplementary Convention which sets a flat age of 18 years, it seems clear that in the cases of these

two sub-paragraphs, the general definition of the child holds and the question of consent is of no relevance in determining whether or not exploitation has taken place and whether or not the child concerned is covered by these provisions.

- b) International law provides no definition of the term "pornography" (the same applies to "prostitution" but the meaning of this term is more generally accepted and is more amenable to the application of objective and factual criteria and verification).
- c) Pornography has not received the level of attention that international legislators have accorded to protection from prostitution. The amended 1923 Convention covers all obscene or pornographic materials but has been virtually dormant for the past two decades at least. Current national legislation, practice and attitudes towards adult pornography in many countries mean that it is unlikely to receive significant additional support in the foreseeable future. It is in fact surprising that more countries have not followed the example of the Netherlands and denounced it. The explanation perhaps lies in the *de facto* lack of reference that is made to obligations under the treaty and/or the development of a more restrictive view of what constitutes "obscenity" and could therefore be deemed to be covered by the treaty. Thus, the international legal framework provides only a crude basis for taking initiatives to combat the distribution of child pornography, whether in the form of publications or via new technology.

PART II: NATIONAL LEGISLATIVE AND ENFORCEMENT RESPONSES

Introduction

The international norms which emerge from the Conventions and other international instruments described in Part I of this paper establish the obligations under international law on States parties in relation to the protection of children from commercial sexual exploitation. These obligations then have to be translated into national legislation and into the enforcement mechanisms in each country. Article 34 of the Convention on the Rights of the Child ('the CRC'), for example, as has been pointed out in Part I, provides for protection from "unlawful" sexual activity, leaving it to each State to enact legislation determining what kinds of activity are to be outlawed.

Part II of this paper examines specific national legislative and procedural provisions by which some countries have sought to protect children. Such provisions do not exist in a vacuum, but depend for their efficacy on the capacity and will of the executive and of the law enforcement personnel in each jurisdiction to implement them. This Part will therefore also point to problems of enforcement and some solutions. Finally, commercial sexual exploitation of children is part of a complex web of factors. A major part takes place on the national scene. Increasingly it is flourishing in the context of tourism and trans-border activities. It calls for multidisciplinary solutions and cooperation between agencies at the national and international levels. The nature and effectiveness of such cooperation is, therefore, an important issue of concern and discussion in this paper and for follow-up on the national level of the work at the World Congress.

1. NATIONAL LEGISLATIVE AND PROCEDURAL PROVISIONS

Domestic legislation protective of children may be found in a wide variety of instruments, such as provisions for health care, social welfare, housing, obscenity laws, guardianship and custody. The CRC now provides, for the first time, a comprehensive set of international legal norms for the protection and well-being of children. Ratifying States may have to initiate new legislation or revise existing legislation to achieve these norms and comply with their obligations. It would appear that the Convention has encouraged States to examine their protective provisions in a more comprehensive manner than before, but their responses towards enforcement of its provisions will inevitably depend on the maturity of their existing domestic provisions vis-à-vis child care, their own stage of economic development, and the cultural and economic criteria which inform their approach to the care of the nation's children.

1.1. Offences Involving Children

In the Philippines, Republic Act 7610, which came into force in 1992, specifically addresses the "Special Protection of Children against Child Abuse, Exploitation and Discrimination" including Child Prostitution and other Sexual Abuse (Art.III), Child Trafficking (Art.IV) and Obscene Publications and Indecent Shows (Art.V). The Act also requires the formulation,

by the Departments of Justice and of Social Welfare and Development, of a comprehensive programme to protect children against commercial sexual exploitation. Regulations under the Act provide for the reporting and investigation of child abuse cases, and for measures to prevent the trafficking of children. What is highly significant about this legislation is that it was originally prepared by a non-governmental group consisting of child protection experts and activists. Through their grass-roots experience, they were able to address the specific problems of Filipino children in the overall context of the government's obligations under the CRC. The Philippine government, having requested non-governmental assistance, and having enacted the legislation, achieved as a result concrete legislative provisions and a national policy for the protection of children against commercial sexual exploitation.

On the other hand, Brazil's Law No. 8069 of 13 July 1990 entitled "Statute of the Child and Adolescent", which is intended to provide for the "full protection of the child and adolescent", has no specific provisions for addressing the commercial sexual exploitation of children. Rather the Act is like a Charter for children, outlining fundamental rights and duties, with policies for enforcement and guidelines for their implementation. It is a matter for the individual State governments to translate the charter into regulations at local State level.

In Sri Lanka, ratification of the CRC engendered the formulation of a policy document in 1992 on the rights of children, intended to lead to comprehensive legislation protective of children. A Technical Committee, appointed to consider legislation directed at child abuse, identified certain areas for reform. However, rather than suggesting a separate Act dealing with sexual offences against children, the Committee recommended amendments to the existing Penal Code and to the Code of Criminal Procedure. Thus, the age of consent was raised from 12 to 16 years, new offences of sexual exploitation of children and of trafficking as well as new offences relating to the use of children in pornography were created. Significantly, here again, the Technical Committee had included non-governmental representatives who had been actively engaged in combatting the sexual exploitation of children in Sri Lanka. Through the amendments to the Penal Code, their concerns have been legislatively addressed in a pragmatic and comprehensive manner.

In Thailand, the approach to protective legislation has also involved amendments to the Penal Code. There has been a firm governmental commitment since 1993 to eliminate child sexual exploitation. Amendments to the Code at that time provided serious penalties for those who engaged in the sexual abuse of children and updated the laws on pornography. New amendments this year (1996) will mean that while prostitution *per se* will no longer be a crime in Thailand, soliciting and publicising for the purposes of prostitution will be punishable. Engaging in prostitution with a person under the age of 18 will be punishable if the act takes place "in a place of prostitution". However, if the act takes place elsewhere, the age of consent is 15. Boy children continue to lack adequate protection in that rape and unlawful sexual intercourse cannot be committed against male children, by virtue of a judicial interpretation of the provisions of the Code.

1.2. Pornography

The relevance of pornography to the protection of children against commercial sexual exploitation is not always recognised in legislation despite the specific injunction of Art.34(c) of the CRC that States must take measures to prevent the exploitative use of children in pornographic performances and materials. New technologies being used for the production and transmission of pornography have been so rapid in development, and sometimes so difficult to penetrate, that the law has not been able to keep up with them. The experience of police officers in this area has led the Standing Working Party on Offences Against Minors of INTERPOL ('the SWP') to recommend (1995/96) that member countries enact legislation which would make it an offence to produce, distribute or possess child pornography in its present and potential future forms. In January 1995 the Netherlands government passed legislation, amending the Penal Code (Art.240b), and making it an offence to distribute, make, import or possess pornographic material depicting children manifestly under the age of 16; transfer or possession of such material on a data carrier is included in the offence. In July 1994 the Austrian parliament passed an amendment (section 207a) to the Penal Code to outlaw the trade in child pornography and sanction even the possession of such material. Possession of child pornography is also an offence in Canada, in Germany and in the United States. In 1994 the US Penal Code was amended to allow federal authorities to prosecute persons involved in the production overseas of child pornography, if that pornography is intended for importation into the United States. In many countries, however, the penalties for offences relating to child pornography are not severe and do not reflect the fact that such pornography is a manifestation of the sexual exploitation of a minor.

1.3. Reporting

An issue for national legislatures concerned with child sexual abuse, whether commercial or otherwise, is that of reporting. The Philippine Regulations under Republic Act 7610 encourage the reporting of cases of sexual abuse, and impose mandatory reporting provisions on hospitals, doctors, nurses, teachers and law enforcement officials. In some countries there is a reluctance to impose mandatory reporting duties; experience in the United States showed that a high percentage of cases reported on foot of an imposed duty were unfounded. The SWP, however, has urged the implementation of legislation which would require individuals and specifically professionals and others having the care, custody or control of children to report suspected abuse to the relevant investigative authorities.

1.4. Extraterritorial Legislation

While domestic legislation on child commercial sexual exploitation is normally directed to the protection of the State's own children against abuse by nationals, this type of abuse has international aspects. Sexual exploitation resulting from tourism and foreign visitors, trafficking of young people across borders to supply brothels in other countries, abductions from one country to another, abuses of intercountry adoption, and even the transfer of pornography via computer networks or simply across borders are all issues which involve other jurisdictions. Responses within national legislatures are varied, depending on how the specific problems affect each jurisdiction. Several countries from which large numbers of

tourists are believed to travel to exploit children abroad have responded by introducing legislation to give their domestic courts extraterritorial jurisdiction in respect of offences committed against children abroad. In New Zealand, the Crimes Amendment Act which came into force in April 1995 makes it an offence for a New Zealand citizen or permanent resident to engage in conduct outside of New Zealand with a child under the age of 16 if such conduct would be an offence in New Zealand. Australia's Crimes (Child Sex Tourism) Amendment Act of 1994 specifies (in section 50BA) that "a person must not, while outside Australia, engage in sexual intercourse with a person who is under 16". In March 1996 an Australian was convicted under the new legislation of offences committed against children in the Philippines. Extraterritorial jurisdiction for offences committed against children abroad became law in Belgium (April 1995), in France (February 1994) and in Germany (September 1993), all by amendments to each country's Penal Code. The Australian Act and the French and German amendments enable prosecutions to be taken against nationals of those countries even if the crime alleged is not a crime in the jurisdiction in which it was committed; thus, there is no double criminality requirement - the national legislative provisions will protect foreign children.

The Penal Codes in the Scandinavian countries already enabled citizens of those countries to be prosecuted at home for crimes committed abroad, without specifying the crimes in detail. Under such provisions, three men were convicted in August 1990 in Norway for sexual abuse of boys in the Philippines and in Thailand, and a Swedish national was convicted in Stockholm in June 1995 for offences committed in Thailand.

The Penal Code in Japan has extraterritorial effect in relation to certain crimes including sexual crimes with violence against children under the age of 13 or persons unable to resist such an attack.

1.5. Sex Tourism Legislation

Tourism for the purposes of sex with minors has been dealt with by legislative changes in several countries. In the United States, the 1994 Violent Crime Control and Law Enforcement Act criminalises domestic or foreign travel with intent to engage in sexual acts with a juvenile. The 1994 Australian legislation creates the offence of benefitting from or encouraging such travel; the 1995 New Zealand legislation makes similar provisions.

A different approach is offered in the United Kingdom where a Sexual Offences (Conspiracy and Incitement) Bill was referred in February 1996 by Parliament to a Standing Committee for consideration. The proposed legislation would make it an offence to conspire with or to incite a person to commit certain sexual offences abroad.

1.6. Trafficking or Sale of Children

The issue of child trafficking has been addressed in the Philippines in Republic Act 7610 (Art.IV) by provisions which control foreign travel by children and the adoption of children in return for a consideration, as well as any acts of trading and dealing with children for money. In Thailand, proposed amendments to the Penal Code will penalise guardians who sell children in their care. Selling, buying, transporting of persons under the age of 18 years

for the purposes of unlawful sexual gratification will be criminalised by an update to an Act of 1928 (the Trafficking of Women and Girls Act), even if the young person has consented. A feature of the new provisions is that the trafficked person is recognised as a victim and not as an offender. In Sri Lanka, recent amendments to the Penal Code create the offence of "trafficking" in section 360c in terms very similar to those of the Philippine legislation.

In the industrialised countries, the issue of trafficking is addressed often in the context of immigration. Intercountry adoptions, intercountry marriages, entry of foreign workers, all may involve trafficking. The Council of Europe has suggested¹ that the activities of artistic, marriage and adoption agencies be supervised, that travel abroad by children be the subject of surveillance by immigration authorities and that young victims of trafficking be assisted and protected. In recent changes to Belgium's Penal Code (April 1995), the traffic in human beings was criminalised. The European Union has responded to the problem of trafficking by expanding the mandate of its Drug Unit (March 1995) to enable that unit to monitor traffic in human beings. The SWP has made several relevant recommendations designed to protect children from being trafficked. These include a recommendation that member countries impose greater supervision and control on intercountry adoptions, and that a data base be established with records of persons and organisations who have been found to be involved in the traffic of children. Reflecting the Council of Europe Recommendation, the SWP also recommends increased surveillance by immigration authorities and assistance to the victims of trafficking.

1.7. Procedures and the Child Witness

It is generally accepted that there is considerable difficulty in prosecuting cases with an international dimension. Differences in language, legal systems, procedural requirements, and the expense of bringing witnesses from abroad are some of the problems. In the context of legislating to protect children against sexual exploitation by nationals abroad, these difficulties have been relied upon by the British government in refusing to accept a Bill which would give UK courts extraterritorial jurisdiction for offences committed against children abroad. On the other hand, certain governments have adopted creative responses to the difficulties, such as the Australian government. The Australian courts are empowered under the Crimes (Child Sex Tourism) Amendment Act 1994 to take evidence by video link, and can even administer oaths and affirmations by video link.

Procedural difficulties are endemic in any case involving sexual exploitation of a child, and not only those with an international dimension. The Children in Trouble: Expert Group Meeting² in November 1994 in Vienna addressed some of the issues, and particularly in Part V of its report, dealing with the Exploitation of Children, urged that sanctions for sexual exploitation of children be applied against the adults rather than the child victims, and that sexually exploited children be given access to the mechanisms of justice, such as legal aid, safe housing and support services. In Canada, reforms in the criminal law have recognised that children can be just as credible and reliable witnesses as adults; the special needs of child victims/witnesses have also been accommodated in the criminal justice system. Delays

¹ Recommendation R(91)11 of the Committee of Ministers

² Under the auspices of the UN Crime Prevention and Criminal Justice Branch

in getting a case to trial, the lack of family or institutional support, the age of the child and his or her lack of education may all conspire to undermine the quality of a child's evidence. The provision of a guardian *ad litem* for a child witness could ease the burden on the child and protect his or her interests. In the Philippines, under the Rules and Regulations on the Reporting and Investigation of Child Abuse cases, a guardian *ad litem* must be appointed by the court as soon as a complaint of child abuse has been filed.

Some interesting changes are envisaged in the Thai Criminal Procedure Code which would ease the burden on the child of giving evidence. The proposed changes include the video-taping of a child's statement to police officers and the use of that video as evidence in court. Cross-examination of the child on the contents of the video will only be allowed through a psychiatrist. Provision is also proposed for pre-trial depositions by victims who may be vulnerable to delays in the proceedings, such as street children. Once the deposition has been taken, and the alleged offender has had an opportunity to confront the witness, the deposition can be used in court. The problems of undue influence on the child and of detaining the child until the trial may thus be avoided.

The Evidence Act in New Zealand was amended in 1989 to provide some flexibility to judges in the taking of evidence in child sex abuse cases. The judge can take the advice of relevant qualified persons as to the effect on the child of giving evidence, and can direct the admission of video-tape evidence, or the giving of evidence by closed-circuit television. Other jurisdictions have similar provisions; it appears to be generally accepted that child witnesses need to be protected from the trauma of court proceedings and of confronting their abuser. Where the abused child is a street child or a trafficked child, the proof of his or her age can be a problem. The Australian Crimes (Child Sex Tourism) Act 1994 makes provision for alternative methods of proving the age of a person under the age of 16, such as by appearance or from medical opinion.

1.8. Rights of the Accused

There are difficulties in reconciling the rights of the accused with the rights of the child to protection. In relation to bail, for example, it has been seen that child exploiters arrested in a foreign jurisdiction are very likely to jump bail; yet to refuse them bail would be to infringe their basic right to be presumed innocent until proved guilty. Either the offence has to be categorised as serious enough to automatically deprive the accused of bail, or the prosecution has to oppose bail on the grounds that the accused is foreign and therefore very likely to leave the jurisdiction. In relation to proof of an offence, and given the difficulty of actually finding a criminal in the very act of abusing a child, there appears to be merit in shifting the burden of proof when the protection of a child is at issue, and in so framing the laws that the onus is on the accused to justify his being in the company of a child who is not a relative. Thus in the Philippines, under the provisions of Republic Act 7610, merely to be found alone with a child who is not a relative inside a hotel or vehicle or other place constitutes an attempt to commit prostitution, and an offence under Article III, section 6. Under section 5(a), the mere verbal offer of a child for the purposes of prostitution constitutes the offence of sexual abuse.

2. ENFORCEMENT AND PREVENTION ON THE NATIONAL LEVEL

Legislation and procedural measures are not enough in themselves to protect children from commercial sexual exploitation. The laws must be enforced. The principal agencies for their enforcement will be the police and immigration officials, and the prosecution and judicial authorities. How effectively these authorities function will depend not only on the resources made available to them, but also on the extent to which the society in which they carry out their duties regards the protection of children as important. Why is it, for example, that many child exploiters will travel to another country and feel themselves immune from prosecution for acts which they would be afraid to commit in their own jurisdictions? Why is it that in some societies there is a high level of tolerance of adults securing sexual gratification from children? Why is it that in some countries the police seem not even to know that there are laws against sexual exploitation of children, or do not know what those laws say? In some countries, children are available to be exploited by foreigners because they are already abused on a massive scale by their own nationals. If society does not place a high value on the nation's children and demand that the law is enforced in their interests, then public officials will not be effective.

There follow a number of suggestions arising from the experiences in various countries of enforcing the law to protect children from sexual exploitation which point to ways in which enforcement could be improved.

2.1. Central Authority

In the Philippines there is an inter-agency Task Force against Child Abuse under the Department of Justice with responsibility for the prosecution of child abuse cases. As a result, there have been a number of successful prosecutions, and this has in turn increased public confidence in the office and has increased the level of reporting. In Thailand, a Child Rights Protection Division has been established within the office of the Attorney General to monitor child sexual abuse cases.

2.2. Special Child Care Units in the Police Force

In the United Kingdom, a special Paedophile Unit at New Scotland Yard tracks down offenders against children. It has a mandate to be proactive for the protection of children, and therefore has a considerable amount of flexibility in finding ways to prevent abuse, rather than only reacting to actual complaints. Unfortunately, it is the only unit for the entire country.

In this context, it can be noted that the Beijing Rules³ recommend specialisation within national police forces of police officers who frequently or exclusively deal with juveniles, and that the Economic and Social Council requested the Secretary General of the United Nations (Res. 1989/66) in May 1989 to "ensure effective programme interlinkages within the United Nations system between juvenile justice, within the framework of the Beijing Rules,

³ UN Standard Minimum Rules for the Administration of Juvenile Justice. General Assembly Resolution 40/33 of 29 November 1985.

and situations of 'social risk', especially.....child abuse, child sale and trafficking, child prostitution and street children."

2.3. Status, Training and Resources of Police Authorities

In many countries the laws cannot be effectively enforced because the police forces are corrupt. The reasons for this may be partly to do with a society which places a low value on respect for the law, but they are also to do with poor pay, poor working conditions and promotional structures which are not based on merit or ability. In Sri Lanka, the emphasis by the government on economic development through tourism is said to have made the police reluctant to implement the laws against child abusers in case this would have a negative impact on the country's economy and thus weaken their chances of promotion. In the Philippines, child abusers have "escaped" from police custody in circumstances which indicate that bribery of police officials had occurred. There are many such reports about many countries. Sexual offences against children must be treated as serious crimes, and police officers must be recognised and rewarded for detection of such crimes in the same manner as they would be for the detection of any other serious crimes.

Adequate training of police and prosecuting officers is essential for the handling of child sexual abuse cases. Some industrialised countries such as the United Kingdom, Sweden, Australia and New Zealand have given overseas aid to developing countries in the form of training for police officers.

Finally, the police must be adequately resourced in terms of manpower, equipment and back-up services to enable them to do their job properly. They will not be encouraged to rescue children from brothels if they have nowhere to bring them or no means to return them to their families; they cannot track down exploiters unless they have adequate means of transport and communication.

2.4. Missing Children Registries

Missing children may not always be identified as the possible victims of sexual exploitation. The role of the police forces has been to find such children and restore them to their families. However, it is now being recognised that such children may have been running away from abuse or exploitation, and that they should not be returned without some investigation of the reasons for their disappearance. The SWP has recommended the establishment of specialised centres in every country where such children may be de-briefed and cared for before the question of return to their families is settled. The SWP has also recommended that children missing for more than 6 months should be made the subject of international Missing Persons Notices at INTERPOL headquarters.

2.5. Customs Surveillance

The valuable role which the Customs Services can provide in detecting and preventing child exploitation is gaining recognition. In cases in which the customs services have worked with the police in following up on a seizure of illegally imported pornographic material, important finds have been made, even leading to the cracking of whole paedophile networks. In New

Zealand, a Customs Child Pornography Project was established in 1992. The work of the Project involves the interception of child pornography or other child exploiter-related intelligence in the process of normal customs' surveillance, and then following up on those interceptions in cooperation with the police. The US Customs Service has a Child Pornography and Protection Unit which has been operating effectively for many years. The Paedophile Unit in the UK police force works in close cooperation with the customs authorities.

2.6. Telephone Help Lines

Telephone Help Lines for children are increasingly recognised as a valuable way in which children can seek help against sexual abuse and exploitation. The SWP has recommended that all member countries institute such Help Lines.

2.7. Interdisciplinary Approach to Law Enforcement

It is not unusual for several government agencies to become involved with an exploited or abused child. Police, social welfare, education and health authorities may all have a responsibility, and liaison between them would occur. In Britain, liaison between such bodies is mandatory. What is not the norm, however, is cooperation between official bodies and NGOs. Thailand is experimenting with such cooperation through its Child Rights Division in the Attorney General's office, which has developed a network that includes non-governmental representatives. In Canada, provincial/territorial governments, police and non-governmental organisations have been working on improving the sharing of information between the authorities and NGOs in relation to child sexual abuse. (This was particularly aimed at enabling NGOs, and other employers who hire people to care for children, to screen out known sex offenders.)

Experience has shown that state authorities have neither the resources nor the time to monitor situations in which there may be sexual exploitation of children. While they should in no way replace the national law enforcement authorities, child-care NGOs are uniquely capable not only of caring for abused children, but also of detecting abuse and of gathering evidence on which an offence may be successfully prosecuted. Several successful prosecutions in the Philippines and in Thailand have been based on evidence gathered or detected by NGOs. Unfortunately, in most cases, the financial resources of NGOs caring for sexually abused and exploited children are woefully inadequate.

The UN Expert Group Meeting developed a series of recommendations to combat the use of children for criminal activities and the exploitation of children which went beyond law enforcement. Among these recommendations are suggestions for engaging the mass media in awareness-raising activities, the development of educational programmes and multi-disciplinary training programmes, the development of "community watch" programmes, and the engagement of the tourist industry and the business sector in protecting the rights of children. In Australia and New Zealand, the tourist industry has participated in the distribution of information leaflets which warn travellers that sexual exploitation of children abroad is a serious offence.

3. PUNISHMENT AND DETERRENCE

The penalties for child sexual abuse and exploitation are quite severe in most countries. In cases involving extraterritorial jurisdiction there is a question of whether the crimes should be classified as minor, thereby making them more susceptible to being successfully prosecuted, or as serious, thereby making them more susceptible to the imposition of a heavy penalty. In France, in February 1994, extraterritorial jurisdiction was extended to the offence of engaging in sexual conduct with a person under the age of 15 by an amendment to the French Penal Code; it is the only offence which can be tried as a misdemeanour under France's extraterritorial jurisdiction. As a misdemeanour, successful prosecution is likely to be easier than for an act classified as a serious offence.

On the other hand, there is a risk that offences against foreign children will be seen as less serious than the same offences committed against nationals if the penalties are less severe for a crime committed abroad. In Norway, three men convicted in 1990 of offences committed against foreign children received custodial sentences; the Supreme Court of Norway rejected a defence argument that the punishment should be less severe than it would be for crimes against Norwegian children. In Sweden in 1995, a man received a custodial sentence of 3 months and had to pay compensation to the foreign child he had abused; it has been suggested in relation to that case that the penalty would have been greater if the abused child had been Swedish. In the same year, in Thailand, a British Guyana citizen was sentenced to a total of 50 years in prison for offences committed against 5 Thai boys.

The degree of injury to the child would normally be a consideration for any court which prepares to sentence a convicted offender. But does a court have to be actually presented with evidence of physical or psychological injury - a requirement with which it would be difficult to comply if the child is a foreigner? Should there instead be a judicial presumption that all sexual exploitation of a child is damaging to the child? If the abuse has resulted in a child being infected with the HIV or AIDS virus, should this be an additional aggravating circumstance justifying increased penalties? The payment of financial compensation to a child victim has the positive advantage of permitting the child a fresh start in life, particularly if the child has been driven by poverty into prostitution.

There is a serious problem of recidivism particularly in relation to offenders who could be classified as paedophiles (i.e. persons for whom children are the preferred sexual partner). When discussing penalties for such offenders, the question arises as to whether penalties on them should continue after the service of their sentence and/or the payment of their fines. The SWP has recommended that countries consider whether persons who have been convicted of sexual offences against minors should be subjected to registration and restriction of their activities if the latter place them in contact with children. It is a matter of concern that paedophile abusers will often insert themselves in employment or social situations which allow them to have access to children. In Canada, amendments to the Criminal Code (section 161) in August 1993 enable a court to impose a prohibition order on a convicted sex offender which will prohibit him from attending places where children congregate, or from seeking employment which involves being in a position of trust or authority towards children.

Indeed, paedophiles have even been known to establish their own "child care" organisations as a front for their unlawful activities. It is therefore important that institutions which care for children should themselves require to be registered and supervised by a competent authority. Furthermore, it has been suggested that persons applying for positions of employment in institutions which are responsible for the care of children should be required to produce a clean police record as part of their job application. Volunteers for work with child-care agencies in developing countries should be required to produce references which can be checked with domestic agencies in their countries of origin.

4. ENFORCEMENT AND PREVENTION THROUGH INTERNATIONAL COOPERATION

Given the international dimensions of sexual exploitation of children in today's world, cooperation between governmental law enforcement agencies and cooperation through the inter-governmental police agency INTERPOL, is vitally important. Such cooperation should develop simplified procedures so that the problems of language and differing legal systems can be minimised.

4.1. Information Sharing via INTERPOL and Bilateral Contacts

INTERPOL already maintains a database of criminals, and the SWP has recommended increased and improved sharing of information for the database in respect of individuals and organisations involved in the traffic of children, child pornography and the sexual exploitation of children.

The extent to which extraterritorial legislation is being extended to cover sexual offences against children committed in another country has been detailed above. Its effective application requires cooperation between prosecuting authorities in relation to the gathering and presentation of evidence.

Bilateral contacts between police forces and customs authorities have already proved effective in identifying paedophile networks with worldwide connections.

4.2. Mutual Assistance Treaties

Mutual assistance treaties are a vehicle for more formal methods of communication. By reducing into the form of a written agreement the rules which will be observed for such things as the taking of statements from witnesses, the provision of records and other evidence, the service of documents etc., the evidential quality of the material is assured, and the delays inherent in diplomatic channels of communication are avoided. The UN Crime Prevention and Criminal Justice Branch has drafted a Model Treaty on Mutual Assistance which was adopted by the General Assembly in December 1990⁴ and is available as a resource to all states. National laws can also provide unilaterally for the conditions under which mutual assistance will be extended to other states in criminal matters. Thai Law

⁴ GA 45/117

BE2535 entitled 'The Act on Mutual Assistance in Criminal Matters' sets out the conditions under which assistance may be extended to requesting states, even without a treaty.

4.3. Extradition

Extradition is another vehicle for international cooperation in criminal matters. Some countries would prefer to extradite a child exploiter back to the country in which the offence was committed. It is generally believed that a treaty is necessary between two countries before a national of one can be extradited to the other. However, this is not the case for many European states which have national laws determining the conditions under which nationals will be extradited to face charges in another State. A Model Treaty on Extradition, again drafted by the UN Crime Prevention and Criminal Justice Branch and also adopted by the General Assembly in December 1990⁵, is available as a resource to all States. In Germany, extradition to States with which there is no bilateral extradition treaty is streamlined by the use of "agreements" which require only a fraction of the input necessary in the negotiation of a treaty. For each individual case it is then only necessary to refer to the terms of the agreed arrangements.

4.4. Police Liaison Officers

A cooperative method of preventing or assisting in the detection of crimes of sexual exploitation of children is the placement by States of Police Liaison Officers in countries to which their nationals travel in large numbers. Liaison officers have been used in the fight against drug trafficking for some time, and there is a strong demand from the non-governmental sector that such officers be placed for the purposes of combatting child sexual exploitation. There is a view that officers placed to combat child sexual exploitation must be specialised for that field of enquiry, and should not be also combatting the drugs trade or other serious crime. The UK National Crime Intelligence Service (NCIS) has suggested that "Crime" Liaison Officers be placed in certain countries, available for all criminal investigations. The SWP has, however, recommended the posting of specialised officers.

4.5. Development Aid

International cooperation via development aid to promote child protection has also already been mentioned. Such assistance, if used for training, can have long-term effects on the capacity and understanding of law enforcement officials in combatting sexual crimes against children.

5. CONCLUSION

It must be realised that the legal environment reflects the political environment, and that unless a State and its society give priority to the protection of children, the laws will not protect them. The will to protect children must first be there.

⁵ GA 45/116

This Paper has attempted to identify the legal norms which have set the standards to be observed, and to look in a general way at the responses from national legislatures, also taking into account the enforcement and implementation mechanisms which are available.

It is hoped that States, in formulating their own national plans, will be able to draw on the experiences outlined in this paper and find solutions in the interests of their own and the world's children.

In order to foster the most effective implementation of the CRC in this sphere, the following proposals are made:

It is suggested that the reporting obligations in Article 44 of the CRC be used by States, not just to fulfill their legal obligations under the Convention, but as an opportunity for a thorough analysis and review of their national legislative provisions for the protection of children. This work should be done with the active participation of non-governmental organisations who are involved in the care of children, as well as with those departments of state which have responsibilities affecting children, and those that ensure compliance with international treaty obligations. Through such an interdisciplinary review, legislative gaps in child protection could be identified. A national plan could then be prepared to address in a comprehensive way, through legislation, the needs of children in each State.

Secondly, it is suggested that a Task Group, again including NGOs as well as law enforcement personnel and child care authorities, be established in each State to identify or propose effective mechanisms within the jurisdiction to monitor and combat sexual exploitation of children. Monitoring of children at risk, care of abused children, evidence-gathering against child abusers, protection of child witnesses - all these are tasks for which mechanisms must be devised to respond to local problems and local needs.

Finally, it is suggested that in each State, an Ombudsman for children, or an institution or body fulfilling similar functions, be appointed with responsibility not only to receive and deal with complaints from children, but also to advise the government on problems affecting children in general within the jurisdiction and to recommend solutions.

These are some ways by which a practical start could be made in securing better implementation of the provisions of the Convention on the Rights of the Child.

ANNEX 1

INTERPOL STANDING WORKING PARTY ON

OFFENCES AGAINST MINORS

Recommendations on law enforcement

Introduction:

It is agreed that a statement of recommendations is to be prepared for submission to the World Congress Against Commercial Sexual exploitation of Children which is to be held in Stockholm (Sweden) in August 1996. It will be appended to the background paper entitled <International Legal Framework and the Current National Legislative and Enforcement Responses relating to the Commercial Sexual Exploitation of Children>. This statement will also be submitted to the next Interpol General Assembly which will be held in Antalya (Turkey) in October 1996 for formal approval and adoption.

These recommendations update and expand those detailed in the Interpol resolution adopted by the 61st General Assembly in Dakar in 1992.

Recommendations on law enforcement measures:

A - Child pornography

Child pornography is created as a consequence of the sexual exploitation or abuse of a child. It can be defined as any means of depicting or promoting the sexual exploitation of a child, including written or audio material, which focuses on the child's sexual behaviour or genitals.

Countries which have not yet done so should enact legislation making the production, importation, possession and distribution of pornography showing children, a criminal offence.

The legislation should take account of the types of support currently used for such material, but also leave room for development of future forms of support such as computers, data carriers and other virtual representations in order to eliminate legal loopholes from which criminals could benefit.

B - International adoption

In the context of The Hague International Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993, adopted by Interpol in the form of Resolution AGN/62/RES/4 during the 62nd General Assembly in Aruba, it is recommended that Interpol member countries take necessary measures to set up greater

supervision and control of intercountry adoption, in order to protect children thus adopted from all forms of exploitation and abuse.

C - Sex tourism and child prostitution

Interpol should urge member countries to introduce meaningful national and extra-territorial legislations relating to the sexual exploitation of children in addition to the enhancement of extradition procedures and arrangements.

They should also study the possibility of establishing bilateral agreements between countries in order to facilitate legal proceedings and the gathering of evidence. Thereby making it easier to detect tourism centred on the sexual exploitation and prostitution of children so that measures to put an end to such practices can be taken.

Member countries should notify the diplomatic representatives concerned of any offences committed by their nationals abroad in a foreign country, so as to allow legal proceedings to be commenced in the context of extra-territorial legislation.

In particular, member countries should consider the possibility of posting liaison officers or identifying such an officer in situ, in countries particularly exposed to this kind of criminality with the aim of ensuring the effective use of territorial legislation or of new extra-territorial legislation. The network of existing Interpol Specialist Liaison Officers should not be overlooked.

Interpol should urge member countries which have not yet done so, to adopt legislations prohibiting child prostitution and/or effectively implement them.

D - International co-operation

It is recommended that Interpol member countries increase and improve the sharing of information via the General Secretariat, by a better use of the Interpol data base. This will enable a record to be created which will assist to identify and prosecute individuals or organisations involved in traffic of children, child pornography and sexual exploitation of children.

E - Telephone Help lines

It is recommended that member countries which have not yet done so, institute a toll free telephone number for the reporting of criminal offences committed against minors allowing callers to remain anonymous if they wish.

F - Legislation and enforcement

All Interpol member countries are urged to review, and where necessary, improve or implement guidelines that assist all individuals, specifically all professionals, and other persons who have care, custody or control of children, to forward information about any suspected abuse of, and/or criminal offences against, children to an appropriate identified agency.

Within the fundamental principles of Human Rights and national and international law, and with a view to protecting children from sexual exploitation and the prevention of recurring offences, it is recommended that member countries should examine the feasibility of introducing legislation requiring the registration of, and the restriction in the activities, of persons convicted of sex offences against or involving children. The requirement for registration involves notification to the local police of the home address of the convicted person and movements thereafter. The restriction in activities is aimed at preventing a convicted person from involvement with children in employment or in social or voluntary capacities. To ensure the effectiveness of such legislation and in the wider context of protection of children generally, systems should be developed which enable any reasonable person or authority (in considering the suitability of a person who it is proposed will have unsupervised access to children), to obtain details of any relevant previous convictions, or indeed any other relevant information concerning that individual.

G - Missing children

It is recommended to all member countries that all international cases of missing children and all cases of children reported missing for more than six months, which have not been previously reported under other criteria, should be reported to the General Secretariat and that they could then be the subject of international missing person notices.

The General Secretariat is asked to co-operate with the United Nations and other competent bodies in determining measures for dealing with cases involving missing children.

They should consider the setting up of specialised Units to deal with cases of missing children and request assistance from centres which already exist in order to use them as examples. Multi-disciplinary co-operation has to be encouraged for the benefit of such new units.

H - Trafficking in Children

Within the concept of the United Nations Convention on the Rights of the Child, which states that the best interest of the child should prevail above all other considerations, Interpol member countries are urged to increase surveillance by immigration authorities and law enforcement in order to ensure that travel abroad by children, especially those not accompanied by their parent or guardian, is not related to trafficking in Human Beings and to prevent the possibility that they will be led into prostitution or other forms of sexual abuse.

When it is determined that illegal child trafficking is taking place, member countries should establish facilities or support those that exist, in order to protect and assist the victims of trafficking. Such support would include the sympathetic handling of the child, commensurate with the individual circumstances of each case.

April 1996

ANNEX II
Ratification Table

	1949 Convention for Suppression of Traffic in Persons and Exploitation of Prostitution of Others	1956 Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery	1989 Convention on the Rights of the Child	1930 ILO Forced Labour Convention	1957 ILO Abolition of Forced Labour Convention	1951 Convention Relating to the Status of Refugees	1977 Geneva Protocol I (Victims of International Armed Conflicts)	1977 Geneva Protocol II (Victims of Non-International Armed Conflicts)
ASIA, FAR EAST AND AUSTRALASIA GROUPING								
Afghanistan	•	•	•		•			
Australia		•	•	•	•	•	•	•
Bangladesh	•	•	•	•	•		•	•
Bhutan			•					
Cambodia		•	•	•		•		
China			•			•	•	•
India	•	•	•	•			•	•
Indonesia			•	•				
Japan	•		•	•		•		
Kazakhstan			•				•	•
Korea(Dem.People's Rep)			•				•	
Korea(Rep.)	•		•			•	•	•
Kyrgyzstan			•	•			•	•
Lao	•	•	•	•			•	•
Malaysia		•	•	•	•			
Mongolia		•	•					
Myanmar			•	•				
Nepal		•	•					
New Zealand		•	•	•	•	•	•	•
Pakistan	•	•	•	•	•			
Papua New Guinea			•	•	•	•		
Philippines	•	•	•		•	•		•
Singapore	•	•	•	•	•	•		
Sri Lanka	•	•	•	•				
Tajikistan			•	•		•	•	•
Thailand			•	•	•			
Turkmenistan			•				•	•
Uzbekistan			•				•	•
Vietnam			•				•	

	1949 Convention for Suppression of Traffic in Persons and Exploitation of Prostitution of Others	1956 Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery	1989 Convention on the Rights of the Child	1930 ILO Forced Labour Convention	1957 ILO Abolition of Forced Labour Convention	1951 Convention Relating to the Status of Refugees	1977 Geneva Protocol I (Victims of International Armed Conflicts)	1977 Geneva Protocol II (Victims of Non-International Armed Conflicts)	1969 American Convention on Human Rights
THE AMERICAS									
Argentina	•	•	•	•	•	•	•	•	•
Bolivia	•	•	•		•	•	•	•	•
Brazil	•	•	•	•	•	•	•	•	•
Canada		•	•		•	•	•	•	
Chile		•	•			•	•	•	•
Colombia			•	•	•	•	•	•	•
Costa Rica			•	•	•	•	•	•	•
Cuba	•	•	•	•	•		•		
Dominican Republic		•	•	•	•	•	•	•	•
Ecuador	•	•	•	•	•	•	•	•	•
El Salvador			•		•	•	•	•	•
Guatemala		•	•	•	•	•	•	•	•
Guyana			•	•	•		•	•	
Haiti	•	•	•	•	•	•			•
Honduras	•		•	•	•	•	•	•	•
Jamaica		•	•	•	•	•	•	•	•
Mexico	•	•	•	•	•		•		•
Nicaragua		•	•	•	•	•			•
Panama			•	•	•	•	•	•	•
Paraguay			•	•	•	•	•	•	•
Peru			•	•	•	•	•	•	•
Trinidad & Tobago		•	•	•	•				•
United States of America		•			•				
Uruguay			•		•	•	•	•	•
Venezuela	•		•	•	•				•
MIDDLE EAST GROUPING									
Iraq	•	•	•	•	•				
Iran		•	•	•	•	•			
Israel	•	•	•	•	•	•			
Jordan	•	•	•	•	•	•	•	•	
Kuwait	•	•	•	•	•		•	•	
Lebanon			•	•	•				
Saudi Arabia		•		•	•		•		
Syrian Arab Republic	•	•	•	•	•		•		
United Arab Emirates				•			•	•	
Yemen	•		•	•	•	•	•	•	

AFRICA GROUPING	1949 Convention for Suppression of Traffic in Persons and Exploitation of Prostitution of Others	1956 Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery	1989 Convention on the Rights of the Child	1930 ILO Forced Labour Convention	1957 ILO Abolition of Forced Labour Convention	1951 Convention Relating to the Status of Refugees	1977 Geneva Protocol I (Victims of International Armed Conflicts)	1977 Geneva Protocol II (Victims of Non-International Armed Conflicts)	1981 African Charter on Human and Peoples' Rights
Algeria	•	•	•	•	•	•	•	•	•
Angola			•	•	•	•	•		•
Benin			•	•	•	•	•	•	•
Botswana			•			•	•	•	•
Burkina Faso	•		•	•		•	•	•	•
Burundi			•	•	•	•	•	•	•
Cameroon	•	•	•	•	•	•	•	•	•
Central African Republic	•	•	•	•	•	•	•	•	•
Chad			•	•	•	•			•
Congo	•	•	•	•		•	•	•	•
Cote d'Ivoire		•	•	•	•	•	•	•	•
Egypt	•	•	•	•	•	•	•	•	•
Eritrea			•						
Ethiopia	•	•	•			•	•	•	
Ghana		•	•	•	•	•	•	•	•
Guinea	•	•	•	•	•	•	•	•	•
Guinea-Bissau			•	•	•	•	•	•	•
Kenya			•	•	•	•			•
Lesotho		•	•	•		•	•	•	•
Liberia			•	•	•	•	•	•	•
Libyan Arab Jamahiriya	•	•	•	•	•		•	•	•
Madagascar		•	•	•		•	•	•	•
Malawi	•	•	•			•	•	•	•
Mali	•	•	•	•	•	•	•	•	•
Mauritania	•	•	•	•		•	•	•	•
Mauritius		•	•	•	•		•	•	•
Morocco	•	•	•	•	•	•			
Mozambique			•		•	•	•		•
Namibia			•				•	•	•
Niger	•	•	•	•	•	•	•	•	•
Nigeria		•	•	•	•	•	•	•	•
Rwanda			•		•	•	•	•	•
Senegal	•	•	•	•	•	•	•	•	•
Sierra Leone		•	•	•	•	•	•	•	•
Somalia				•	•	•			•
South Africa	•		•						
Sudan		•		•	•	•			•
Tanzania		•	•	•	•	•	•	•	•
Togo	•	•	•	•		•	•	•	•
Tunisia		•	•	•	•	•	•	•	•
Uganda		•	•	•	•	•	•	•	•
Zaire		•	•	•		•	•		•
Zambia		•	•	•	•	•	•	•	•
Zimbabwe		•	•			•	•	•	•

	1949 Convention for Suppression of Traffic in Persons and Exploitation of Prostitution of Others	1956 Supplementary Convention on Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery	1989 Convention on the Rights of the Child	1930 ILO Forced Labour Convention	1957 ILO Abolition of Forced Labour Convention	1951 Convention Relating to the Status of Refugees	1977 Geneva Protocol I (Victims of International Armed Conflicts)	1977 Geneva Protocol II (Victims of Non-International Armed Conflicts)	1950 European Convention on Human Rights & Fundamental Freedoms
EUROPEAN GROUPING									
Albania	•	•	•	•		•	•	•	
Armenia			•			•	•	•	
Azerbaijan			•	•		•			
* Austria		•	•	•	•	•	•	•	•
* Belgium	•	•	•	•	•	•	•	•	•
Bosnia Herzegovina	•	•	•	•		•	•	•	
* Bulgaria	•	•	•	•		•	•	•	•
Croatia	•	•	•	•		•	•	•	
* Czech Republic	•	•	•	•		•	•	•	•
* Denmark		•	•	•	•	•	•	•	•
* Estonia			•				•	•	
* Finland	•	•	•	•	•	•	•	•	•
* France	•	•	•	•	•	•		•	•
* Georgia			•				•	•	
* Germany	•	•	•	•	•	•	•	•	•
* Greece		•	•	•	•	•	•	•	•
* Hungary	•	•	•	•	•	•	•	•	•
* Ireland		•	•	•	•	•			•
* Italy	•	•	•	•	•	•	•	•	•
* Latvia	•	•	•		•		•	•	
* Lithuania			•	•	•				•
Macedonia	•	•	•						
Moldova			•		•		•	•	
* Netherlands		•	•	•	•	•	•	•	•
* Norway	•	•	•	•	•	•	•	•	•
* Poland	•	•	•	•	•	•	•	•	•
* Portugal	•	•	•	•	•	•	•	•	•
* Romania	•	•	•	•		•	•	•	•
Russian Federation	•	•	•	•		•	•	•	
* Slovakia	•	•	•	•		•	•	•	•
* Slovenia	•	•	•	•		•	•	•	•
* Spain	•	•	•	•	•	•	•	•	•
* Sweden		•	•	•	•	•	•	•	•
* Switzerland		•		•	•	•	•	•	•
* Turkey		•	•		•	•			•
Ukraine	•	•	•	•			•	•	
* United Kingdom		•	•	•	•	•			•
Yugoslavia	•	•	•	•		•	•	•	
* Member States of the Council of Europe									

COMBATING VIOLENCE AGAINST WOMEN: THE COMMONWEALTH SECRETARIAT EXPERIENCE

Paper by the Commonwealth Secretariat

Introduction

Eliminating violence against women continues to be a major challenge in the Commonwealth's efforts to promote and protect the human rights of women and children. In spite of international, regional, national and local efforts to address gender-based violence, many women and children are still being physically, psychologically and sexually abused in both the private and public spheres (in the family and at school, on the streets and at places of work, and in refugees and displaced persons' camps). To date domestic violence, sexual assault, sexual harassment and traditional and dowry-related violence continue to occur in varying degrees in many countries.

2. Gender based violence was recognised as a violation of the human rights of women at the World Human Rights Conference in Vienna in 1993. The Vienna Declaration on Human Rights emphasises the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice, and the eradication of all conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.¹ Prior to the World Conference on Human Rights, the United Nations Committee on the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) had adopted General Recommendation 19 to specifically address violence against women. CEDAW

General Recommendation 19² and the United Nations Declaration on Elimination of Violence Against Women³ adopted by the United Nations General Assembly in December 1993, stress due diligence of state parties to prevent, prosecute and punish perpetrations of violence against women, whether those acts are perpetrated by the state or private individuals.

3. Strategic objective D⁴ of the Beijing Platform for Action urges governments to take integrated measures to prevent and eliminate violence against women; to study the causes and consequences of violence against women and the effectiveness of the preventative measures; and to eliminate trafficking in women and assist victims of violence due to prostitution and trafficking. The Beijing Platform for Action emphasises that developing a holistic and multi-disciplinary approach to the challenging task of promoting families, communities and states free of violence against women is necessary and achievable.

4. This paper focuses on the work of the Commonwealth Secretariat on violence against women. It presents the 1995 Commonwealth Plan of Action on Gender

² General Recommendation No. 19 (Eleventh session, 1992), para. 9 contained in document A/47/38

³ 48/104 Declaration on the Elimination of Violence Against Women, Article 4 (c), Resolution adopted by the General Assembly, United Nations on report of the Third Committee (A/48/629). Forty-eighth session. Agenda item 111

⁴ UN Fourth World Conference on Women, Beijing, China, 1995, Platform for Action and the Beijing Declaration, p.73-81.

¹ Vienna Declaration and Programme for Action, 25 June 1993, para. 3, p.23.

and Development as a framework which identifies violence against women as a priority area for action by Commonwealth governments. The paper then goes on to discuss a number of activities/approaches implemented by the Commonwealth Secretariat based on the mandate of the Plan of Action. Finally the paper makes a number of recommendations for consideration by Law Ministers.

The 1995 Commonwealth Plan of Action on Gender and Development⁵

5. The promotion and protection of women's rights as human rights and as an integral part of the Commonwealth's fundamental values is one of the key issues being addressed by the Commonwealth Secretariat. The 1995 Commonwealth Plan of Action on Gender and Development identifies the promotion of women's human rights as one of the 15 critical areas for action by Commonwealth governments, and promotes the elimination of violence against women, protection of the girl-child and outlawing all forms of trafficking in women and children. The Plan of Action encourages all member governments to ratify and implement CEDAW, the Convention on the Rights of the Child (CRC), and the United Nations Declaration on the Elimination of Violence Against Women.

Meetings of Commonwealth Ministers Responsible for Women's Affairs

6. Violence against women has been an area of critical concern for Commonwealth Ministers Responsible for Women's Affairs since their first meeting in 1985. Ministers have discussed violence against women as a matter of the gravest concern at each of their five meetings held to date. At their fourth meeting in 1993, Ministers demonstrated their concern for violence against women by requesting that the Commonwealth Secretary-General write to the United

Nations Secretary-General supporting the United Nations Declaration on Violence against Women which was adopted by the United Nations General Assembly in the same year.

7. At their Meeting in Edinburgh in October 1997, Commonwealth Heads of Government endorsed the recommendations made by Ministers Responsible for Women's Affairs at their meeting in Trinidad and Tobago in 1996. The Ministers' recommendations⁶ urged member governments to effectively implement the CEDAW and General Recommendation 19 on violence against women, and to develop an integrated approach towards the elimination of violence against women. Governments were encouraged to adopt and promote effective implementation of the Declaration and Programme for Action of the World Congress on the Commercial Sexual Exploitation of Children, Sweden, August 1996. Furthermore, governments (working with the Secretariat) were encouraged to strengthen the capacity of the judiciary and other legal professionals and the police to respond to violence against women and girls, and to protect the human rights of women and girls.

8. The Gender and Youth Affairs Division (GYAD) in response to the Ministers' recommendations has developed a model framework for an integrated approach to combat violence against women using a Gender Management Systems methodology. The objective of a model framework is to promote the design and implementation of holistic/multidisciplinary programmes and projects on violence against women by member governments. This will involve the creation of an enabling environment and the setting up of structures and mechanisms which will promote as far as possible the collaboration of various organisations working on the different

⁵ Commonwealth Secretariat, The 1995 Commonwealth Plan of Action on Gender and Development, p.19.

⁶ Commonwealth Secretariat, 5th Meeting of Commonwealth Ministers Responsible for Women's Affairs, Trinidad and Tobago, 25-28 November 1996: Conclusions and Recommendation, p. 22-23

aspects of gender-based violence including governmental, intergovernmental and non-governmental organisations. The first Commonwealth country in which the model framework will be piloted is Mauritius.

9. Violence against women will also be discussed at the sixth meeting of Commonwealth Ministers Responsible for Women's Affairs which will take place in India in August 1999. Discussions will focus on appropriate policies, legislation and administrative processes to promote the human rights of women and to eliminate violence against women.

Gender Equality and the Judiciary

10. Four regional Judicial Colloquia on the domestic application of international human rights norms of particular relevance to the human rights of women and the girl child, were organised between 1994 and 1997 by GYAD in collaboration with the Legal and Constitutional Affairs Division (LCAD), the Commonwealth Magistrates and Judges Association (CMJA), and the Commonwealth Foundation. The colloquia also focused on violence against women and the girl-child. The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, the Hong Kong Conclusions and the Guyana Recommendations and Strategies for the Promotion of the Human Rights of Women and the Girl-Child, outcomes of these judicial colloquia, contain principles relating to eradication of violence against women in the Commonwealth. These are annexed to this paper.

11. Judges expressed their deep concern at the large scale violence against women and the girl-child taking place in various forms in most countries of the Commonwealth. They expressed particular concern at the many forms of violence against women in the family⁷. Judges urged all Commonwealth countries to subscribe to

the principles contained in the Declaration on Violence against Women.⁸ They identified a need for gender-sensitive training and information about women's human rights to be provided to the judiciary, lawyers, law enforcement agencies, court personnel, law students and community leaders.⁹

12. Another significant outcome of the colloquia was the establishment of a Commonwealth Reference Group on the Promotion of the Human Rights of Women through the Judiciary comprising Chief Justices and Senior Judges from all the regions to monitor the implementation of the recommendations and strategies adopted by participants at the judicial colloquia. In addition, a publication entitled *Advancing the Human Rights of Women: Using International Standards in Domestic Litigation, 1997*, comprising papers presented and statements made at the Asian/South Pacific colloquium held in Hong Kong in May 1996 has been produced and has been so in demand that it is now being sold. It was widely disseminated to Ministers of Law, Ministers Responsible for Women's Affairs, Attorneys-General, Chief Justices, Human Rights Commissions, Law Reform Commissions, NGOs and other regional and international agencies working in the area of women's human rights. Additionally the following publications are being finalised: *Gender Equality and the Judiciary* consisting of papers presented and statements made at the Caribbean Regional Judicial Colloquium; and *Gender Equality and the Judiciary: Case Materials*. The case laws which were compiled as resource materials for the colloquia demonstrate how international human rights norms relevant to the human rights of women have been used in national courts.

⁷ Hong Kong Conclusions 1996, para. 2 and 3.

⁸ Victoria Falls Declaration of Principles for Promoting the Human Rights of Women, 1994, para. 13.

⁹ The Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child, 1997, para. 23.

13. Overall these colloquia have increased awareness of this vital issue and have allowed for useful exchange of information and sharing of experiences. As follow-up to the regional judicial colloquia organised by the Commonwealth Secretariat some participants have since held national and regional colloquia for judges and magistrates. These include: a national colloquium for judges and magistrates in Namibia which was organised by the Commonwealth Judicial Education Institute in 1995; a South Pacific colloquium for judges organised by the Human Resource Training Team of the British Department for International Development in 1997; and two workshops for judges in the Eastern Caribbean States held in St Lucia in 1997.

Development of Training and Resource Materials

14. Since 1985, when Commonwealth Ministers Responsible for Women's Affairs identified a need for the Secretariat to initiate programmes on confronting violence against women, the Gender Affairs Department has developed training materials on a range of issues and also organised training programmes on promoting the human rights of women for officials from Ministries of Foreign Affairs and Women's Affairs, the judiciary, police, academics, lawyers, health and media professionals and other officials from governments and NGOs. Through these programmes the Commonwealth Secretariat has provided support for governments, trainers and NGOs as they implement principles adopted in major international human rights instruments which address the human rights of women and children. The main focus has been on relevant articles in CEDAW, the United Nations Declaration on Elimination of Violence against Women, and the CRC, particularly the commercial sexual exploitation and abuse of children.

15. The following training/resource materials on violence against women have been published and disseminated throughout the Commonwealth:

- *Confronting Violence - A Manual for Commonwealth Action*, focuses on domestic violence, sexual assault, sexual harassment and child sexual abuse, violence related to custom, tradition and the media. It provides definitions of the various types of violence, examines the legal approaches operating in the Commonwealth, and explores positive mechanisms which provide support for victims or which can be used to bring about changes in public attitudes.
- *Violence Against Women - Curriculum Materials for Legal Studies* comprises two seminar packages on domestic violence and sexual assault. The packages themselves comprise a combination of legislation, case law and other relevant materials. The materials are readily adaptable for teaching about violence against women in different countries and cultural contexts.
- *Guidelines for Police Training on Violence Against Women and Child Sexual Abuse*. This manual which has been revised in 1999, addresses six issues relating to violence against women and child sexual abuse namely: police attitudes and sensitisation; perspectives on offender profiling; evidence and investigation techniques; medical and forensic evidence procedures; liaison with non-police organisations and referral agencies; statistics, data collection and case management. It is based on the recommendations of a workshop attended by senior police officers from Commonwealth countries. This extensive revision of the first edition introduces two new chapters, one on gender, human rights and the law, and the other on crime prevention approaches to repeated victimisation. It also includes a new overview on violence against women, and contains new training modules and country reports.

- A *Commonwealth Annotated Bibliography on Violence Against Women* provides information on books, articles and journals on violence against women. It is presented in three parts. Part one deals with private violence against women and girl children including domestic violence; female foeticide and infanticide; dowry assault and *sati*. Part two deals with public violence against women and children, whilst Part three deals with strategies employed by governmental, intergovernmental and non-governmental organisations to combat violence against women.

16. The Economic and Legal Affairs Services Division in collaboration with GYAD and the CARICOM Secretariat developed *CARICOM Model Legislation* on eight areas of women's human rights and violence against women namely: domestic violence, sexual offences, sexual harassment, equal pay, inheritance, equality for women in employment, citizenship, and maintenance and maintenance orders. The model legislation on domestic violence, sexual offences, and sexual harassment has been adapted to suit national circumstances by a number of countries in the Caribbean region.

The Convention on the Elimination of All Forms of Discrimination Against Women

17. GYAD has also addressed the problem of violence against women including the sexual exploitation of women and children by working with governments in their implementation of the CEDAW and General Recommendations 12 and 19 on violence against women. The Gender Affairs Department developed a training manual on *The Convention on Elimination of All Forms of Discrimination against Women: The Reporting Process - A Manual for Commonwealth Jurisdictions* in order to assist governments and women's bureaux in implementing, monitoring and reporting on CEDAW. The second edition of the manual,

Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination Against Women was published in 1995 by GYAD in collaboration with the International Women's Rights Action Watch. This edition is designed to serve as a framework for monitoring implementation of CEDAW. It makes suggestions about possible measures to implement CEDAW, and gives guidance to governments and NGOs with regard to the reporting process. The Gender Affairs Department has used the CEDAW training manual and other resources at training workshops for officials from Ministries of Justice, Foreign Affairs and Women's Affairs in the African and Caribbean regions. The manual together with other training resources has provided useful guidelines on reporting on and implementing CEDAW. It has also promoted co-ordination and co-operation among relevant ministries involved in the preparation of country reports on implementation of this convention.

The Commercial Sexual Exploitation and Abuse of Children

18. The Gender Affairs Department in 1996 added another dimension to its work by commissioning two regional studies on the Commercial Sexual Exploitation of the Girl-Child in Africa and Asia. The findings of these studies revealed the magnitude of the problem as well as the sensitivities associated with commercial sexual exploitation of children. These findings pointed to a need for urgent action to be undertaken by the relevant authorities. Six in-depth country studies on the commercial sexual exploitation of children were therefore undertaken in the following countries: India, Jamaica, Kenya, Sri Lanka, South Africa and Trinidad and Tobago, and will be available in July 1999. Further, GYAD in collaboration with the LCAD is developing an administrative and legislative guide on the commercial sexual exploitation and abuse of children.

Conclusion

19. Violence against women is a complex and multidimensional issue which cannot be resolved by a single organisation or institution. It therefore calls for collaboration and the building of workable partnerships between government departments and institutions, NGOs, regional and international organisations working on this issue. There is a strong need to promote an integrated approach and create effective mechanisms to address violence against women in Commonwealth countries. This approach might lead to the strengthening of current efforts and implementation of coherent and comprehensive programmes to eliminate violence against women.

Recommendations

20. Law Ministers may wish to endorse the holistic framework provided by the Gender Management System methodology applied to violence against women in an effort to provide a systematic approach to addressing this issue at national level.

21. Law Ministers may wish to consider the value of other regions developing model legislation for Commonwealth countries on women's human rights and violence against

women, taking into account the CARICOM Model Legislation.

22. Law Ministers may wish to discuss practical strategies for promoting the human rights of women through national human rights institutions, justice institutes and the criminal justice system. They may wish particularly to consider organising training and awareness-raising programmes for national prosecutors on the human rights of women including violence against women, building on the Commonwealth judicial colloquia experience.

23. Law Ministers may wish to recommend how best to target and disseminate the above-described materials on violence against women so as to maximise impact in "sharing of experience". They may wish to consider bringing to the attention of other partners in the criminal justice system the availability of these resource materials.

March 1999

Judicial Colloquia Declarations and Strategies for Action on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary

Introduction

In 1988, the Commonwealth Secretariat initiated a series of Judicial Colloquia to promote the domestic application of internationally and regionally agreed human rights norms. Judges at the first Colloquium in Bangalore in 1988, adopted the Bangalore Principles which call for the creative and consistent development of human rights jurisprudence throughout the Commonwealth. The Principles emphasise the need for practical measures to ensure that international and regional human rights norms, to which many member countries are state parties, are given full effect in national courts. The Bangalore Principles were reaffirmed at six subsequent Judicial Colloquia which focused on different aspects of the issue. Although these colloquia have been effective, domestic application of international human rights norms from a gender perspective still requires exploration. Additionally, little attention had, to-date been paid to the advancement of the rights of children through these colloquia.

Since 1994, the Gender and Youth Affairs Division in collaboration with the Legal and Constitutional Affairs Division, the Commonwealth Magistrates and Judges Association and the Commonwealth Foundation, have organised three Regional Judicial Colloquia focusing specifically on the promotion of the human rights of women and the girl-child through the judiciary. These were held in Zimbabwe in 1994, for Africa; Hong Kong in 1996, for Asia and the South Pacific; and Guyana in 1997, for the Caribbean region. Another colloquium was held at the NGO Forum during the United Nations Fourth World Conference on Women in Beijing in 1995. The colloquia were attended by male and female Chief Justices, Judges of the Supreme Courts, Courts of Appeal, High Courts and District

Courts; judicial officers; lawyers; academics; researchers; representatives of United Nations agencies and regional organisations; and NGOs. These colloquia have encouraged the wider recognition and application of international and regional human rights norms relevant to the human rights of women and the girl-child by member countries.

The Africa colloquium issued the Victoria Falls Declaration of Principles for Promoting the Human Rights of Women. Subsequently, the Declaration was endorsed by the Commonwealth Magistrates and Judges Association, and it was reaffirmed by judges at the second, third and fourth judicial colloquia on the human rights of women and the girl-child. The Asia and South Pacific Judicial Colloquium issued the Hong Kong Conclusions. The Colloquium in the Caribbean region adopted the Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child. Participants in this colloquium came from the Caribbean as well as the African, Asian and the South Pacific regions. A significant outcome of the colloquium was the setting up of a Commonwealth Reference Group comprising of Chief Justices and senior judges from the four regions of Africa, Asia, the Caribbean and the South Pacific to follow-up on the implementation of the Georgetown Recommendations.

The Victoria Falls Declaration of Principles for the Promotion of the Human Rights of Women, 1994.¹⁰

1. The participants reaffirmed the principles stated in Bangalore, amplified in Harare, affirmed in Banjul, confirmed in

¹⁰ Agreed by senior judges at the African Regional Judicial Colloquium held in Victoria Falls, Zimbabwe, 19-20 August, 1994

Abuja, reaffirmed at Balliol, Oxford and reinforced at Bloemfontein. These principles reflect the universality of human rights - inherent in men and women - and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ.

2. The participants noted that all too often universal human rights are wrongly perceived as confined to civil and political rights and not extending to economic and social rights, which may be of more importance to women. They stressed that civil and political rights and economic and social rights are integral and complementary parts of one coherent system of global human rights.

3. The participants were aware that universal human rights, are usually interpreted as applying to regulate the public sphere. Violations of human rights in the private sphere, including the family - the site of much of women's experience of violations - are usually perceived to be outside the reach of the human rights. The participants noted that although the state does not usually directly violate women's rights in the private sphere, it often supports or condones an exploitative family structure through various laws and rules of behaviour which legitimised the authority of male members over the lives of female members of the family and, in any event, often fails to act to protect women from private violations or tolerates or, indeed, encourages, a structure wherein private violations occur all too frequently.

4. The participants recognised that many of the existing international and regional human rights standards were formulated within a primarily male perspective and with insufficient gender sensitivity and sometimes failed to provide protection for the gender specific interests of women. The participants emphasised the urgent need for the formulation of further

specific rights for women, particularly in the economic and social field. The participants stressed the vital need for women to be centrally involved in decision making at all levels.

5. The participants recognised that discrimination against women can be direct or indirect. They noted that indirect discrimination required particular scrutiny by the judiciary. The participants, further, emphasised the need to ensure not only formal, but also substantive equality for women and, for that purposes, affirmative action may be adopted if necessary.

6. The participants noted that although international human rights were inherent in all human kind, very often such rights were perceived to be owned, only or largely, by men. The participants emphasised, as did the 1993 United Nations World Conference on Human Rights, that the human rights of women are as valuable as the human rights of men.

7. The participants recognised that international human rights instruments, both generally and particularly with reference to women, and their developing jurisprudence enshrine values and principles long recognised as essential to the happiness of humankind. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. These constitutional guarantees should be interpreted with the generosity appropriate to charters of freedom. Particularly the known discrimination guarantee should be construed purposively and with a special measure of generosity.

8. The participants agreed that it is essential to promote a culture of respect for internationally and regionally stated human rights norms and particularly those affecting women. Such norms should be applied in the domestic courts of all nations and given full effect. They ought not to be considered as alien to domestic law in national courts.

9. All Commonwealth governments should be encouraged to ratify the Convention on the Elimination of All Forms of Discrimination Against Women before the Fourth United Nations World Conference on Women to be held in Beijing in 1995. Those governments which have ratified the Convention with reservations, should examine the content of those reservations, with a view to their withdrawal.

10. All Commonwealth governments should ensure that domestic laws are enacted or adjusted to conform with the international and regional human rights standards.

11. The judicial officers in Commonwealth jurisdictions should be guided by the Convention on the Elimination of All Forms of Discrimination Against Women when interpreting and applying the provisions of national constitutions and laws, including the common law and customary law, when making decisions.

12. The participants agreed with the views expressed in the Vienna Declaration and Programme of Action encouraging the speedy preparation of an optional protocol to enable individual petition under the Convention on the Elimination of All Forms of Discrimination Against Women.

13. All Commonwealth governments should subscribe to the principles contained in the Declaration on Violence Against Women, adopted by the United Nations General Assembly in December 1993. The participants agreed with the Declaration's classification of violence against women as a form of discrimination and violation of human rights.

14. All Commonwealth governments should offer appropriate assistance to the United Nations special rapporteur on violence against women.

15. There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional

instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women.

16. The participants recognised and recommended that gender sensitised new initiatives in legal education, provision of material for libraries, programmes of continuing judicial discussion and professional training to lawyers and other interest groups in the protection of the human rights of women and better dissemination of information about developments in this field to judges and lawyers should be undertaken for effective implementation of these principles.

17. The participants emphasised the need to translate the international human rights instruments and the African Charter of Human and Peoples' Rights into local languages, in a form accessible to the people and urged governments to undertake or support that task.

18. The participants were of the view that governments should mount extensive awareness campaigns through diverse means to disseminate and impart human rights education and encourage and support efforts by non-governmental organisations in this context.

19. The participants acknowledged the important contribution of non-governmental organisations in the dissemination of information about women's human rights and making women aware of those rights. The participants called upon governments to acknowledge and support the work of non-governmental organisations in the promotion of the human rights of women.

20. The participants emphasised the need to enable non-governmental organisations to provide *amicus curae* briefs and other legal advice, assistance and representation to women in cases involving human rights issues. The participants also stressed the need to provide free legal aid

and advice to women at state cost for enforcement of their human rights.

21. Public interest litigation and other means of access to justice for litigants, especially women, who wish to complain of violations of their rights should be developed. Non-governmental organisations involved in women's issues should also be permitted to bring violations of human rights of women before the courts for redress.

22. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women.

23. Closer links and co-operation across national frontiers by the judiciary on the interpretation and application of human rights law should be encouraged.

24. Law schools should be encouraged to develop courses in human rights, which must include a module on the human rights of women.

The Hong Kong Conclusions, 1996¹¹

1. Having regard to the central place of the Victoria Falls Declaration in the recognition and enforcement of the human rights of women, the participants in the Hong Kong colloquium of judges, lawyers and law academics from Commonwealth countries of the Asia/Pacific region, reaffirmed the principles of the Victoria Falls Declaration and expressed their commitment to uphold and implement those principles.

2. Recalling the Declaration on the Elimination of Violence against Women, the

discussions at the Commonwealth Heads of Government Meeting in New Zealand in 1995, the Beijing Declaration and Platform for Action and the conclusions of the meeting of Commonwealth Law Ministers in April 1996, the participants expressed their deep concern at the large scale violence against women and the girl-child which is taking place in various forms in most countries of the Commonwealth. Violence against women is a manifestation of historical unequal power relations between women and men which have led to domination over and discrimination against women and is a social mechanism by which the subordinate position of women is sought to be perpetuated. All Commonwealth governments should condemn violence against women and girls as a violation of fundamental human rights, including the right to personal security and the right to be free from discrimination on the basis of sex. No law, custom, tradition, culture or religious consideration should be invoked to excuse violence against women. Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women against violence through a proactive interpretation of the law.

3. The participants expressed particular concern at the many forms of violence against women in the family. This violence is widespread, but frequently goes unnoticed and unrestrained because of oppressive social, cultural or religious traditions and values. These factors have led to the subordination of women and continue to dominate social attitudes because of lack of awareness of the basic human rights of women, as well as their economic dependence on men. It is incumbent on law enforcement agencies, the legal profession and the courts to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response.

4. Participants recognised the importance of custom, tradition, culture and religion as a part of individual and group identity. They recognised that these concepts

¹¹ Issued by Senior Judges in the Asia and South Pacific region at their Judicial Colloquium on the Domestic Application of International Human Rights Norms relevant to the Human Rights of Women, Hong Kong, 20-22 May, 1996.

were sometimes interpreted so as to be oppressive to women. They stressed the need to preserve and enhance worthy customs, while at the same time discouraging those that have an adverse impact on women and girls.

5. Participants recognised that a majority of the world's refugees and internally displaced persons are women and children and that these persons are an especially vulnerable group who are frequently denied their basic human rights and subjected to violence and sexual exploitation. The importance of judicial sensitivity to gender specific violations of human rights in dealing with cases relating to physical or mental abuse and/or claims to refugee status was underlined.

6. Recalling that the 1995 Meeting of Commonwealth Heads of Government at Auckland urged all Commonwealth governments to ratify the Convention on the Elimination of All Forms of Discrimination against Women and underlining the importance of accession, ratification and implementation of this Convention and other human rights treaties to the advancement at the national level of the human rights of women and the girl child, the participants noted that it would be desirable if all states in the region became parties to and implemented the Convention.

7. The participants noted that many opportunities exist for judges and other judicial officers to draw on the Convention on the Elimination of All Forms of Discrimination against Women and other international human rights instruments so as to interpret and apply creatively constitutional provisions, legislation, the common law and customary law. In so doing, they drew attention to the wealth of decisions from countries with shared jurisprudential traditions where judges had engaged in such creative interpretation and application. The importance of educating the judiciary and the legal profession with respect to international human rights standards and principles relevant to gender issues was stressed, as well as the need for

national judiciaries to carry out studies on gender bias in the judicial process.

8. Participants noted that it was important that the judiciary reflect the population it serves. Accordingly, it encouraged the exploration of ways to ensure a gender balance in the judicial system.

9. Participants identified a number of areas where there are clear violations of the human rights of women which might be addressed by the utilisation of international norms in domestic decision making. These included, in particular, discrimination in matters of nationality, citizenship, property and inheritance, which has serious implications for the exercise and enjoyment by women of other fundamental human rights. Participants also encouraged the review of legislation to ensure its consistency with international human rights obligations undertaken by individual countries.

10. Noting the complementarity between the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, participants drew attention to the special vulnerability of the girl-child to violations of human rights and identified this as a matter requiring particular judicial attention. They noted that the principle of the best interests of the child could be used to promote the full enjoyment by the girl-child of her rights.

11. Participants noted that litigation to advance the human rights of women was limited at both the national and international levels. They emphasised women's limited access to the judicial process to enforce their rights and they proposed the further development of a number of measures to increase women's access to justice, including legal literacy programmes and assisted legal advice and representation. Participants drew attention to the important role that the media could play in creating an awareness of the human rights of women. They suggested that consideration might also be given to encouragement of representative actions and relaxing traditional limitations on *locus*

standi. They also supported the adoption of an optional complaints mechanism for the Women's Convention.

The Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child, 1997¹²

1. The participants reaffirmed the Victoria Falls Declaration of Principles for the promotion of the Human Rights of Women (1994) and the Hong Kong Conclusions (1996) and commended these to states for acceptance and implementation.

2. The Colloquium welcomed the adoption of the Charter of Civil Society for the Caribbean Community by the Conference of Heads of Government at its 8th inter-sessional meeting in Antigua and Barbuda in February 1997.

3. The Colloquium underlined the fact that the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights, and they must be taken as forming part of mainstream human rights.

4. The Colloquium expressed concern that civil and political rights have received extensive attention within the mainstream human rights discourse while economic, social and cultural rights have been neglected. This has adversely affected women's concerns.

5. Traditional human rights theory primarily focuses on violations perpetrated

by the state. This distinction between state responsibility in relation to public and private acts has contributed to a failure to recognise many violations of women's rights as human rights violations.

6. The Colloquium recognised that the fundamental duty of judges to ensure the fair and due administration of justice requires judges to be alert to manifestations of gender discrimination in the law and in the administration of justice, and to take such measures as lay within their power to redress or eliminate any such discrimination. The Colloquium also recognised that the community's understandings of fairness and equality may evolve over time and that judges had both the power and responsibility to adapt the common law or interpretations of constitutional provisions to meet the changing circumstances of society. The full enjoyment by women of their human rights could only be realised through the creative interpretation and effective enforcement of these rights by the courts. This can only occur if there is an independent and competent judiciary which enjoys the confidence of the people it serves.

7. The Colloquium noted with concern that some states in the Commonwealth support or condone an exploitative family structure through various laws and rules of behaviour which legitimise the authority of the male over the female and fail to protect women from private violations of their rights.

8. The Colloquium emphasised that culture, customary and traditional practices or religion should not be invoked as justification for violations of the fundamental rights and freedoms of women.

9. The Colloquium emphasised the goal of universal ratification of international human rights instruments and relevant international labour conventions, in particular the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. It underlined the obligation of

¹² Issued by Commonwealth judges at the Judicial Colloquium on the Promotion of the Human Rights of Women and the Girl-Child through the Judiciary, Georgetown, Guyana, 14-17 April, 1997. The Commonwealth Strategies for Action for advancing the human rights of women and the girl-child through the judiciary provides the basis for setting up a Commonwealth Reference Group to follow-up their implementation.

states parties fully and effectively to implement their treaty obligations by bringing their Constitutions and domestic law and practice into conformity with these human rights commitments. It also urged those states parties which had entered reservations to conventions to consider their withdrawal.

10. The Colloquium emphasised the utility of international human rights norms to domestic litigation, noting that in general there was no constitutional or other bar to referring to international human rights treaties. Among other uses, these norms might in appropriate cases provide a standard that could be used in order to elucidate the meaning of constitutional guarantees.

11. Both the United Nations Declaration on the Elimination of Violence against Women and General recommendation 19 of the Committee on the Elimination of Discrimination against Women recognised that violence against women takes many forms. These include domestic violence, rape (including rape within marriage), exploitation of girl children (including the disadvantaged), trafficking in women and girls, violence associated with prostitution and with pornography, dowry deaths, violence in the work place and sexual harassment. The personal, economic and social costs of this violence are enormous. States must take effective measures in accordance with the Convention on the Elimination of All Forms of Discrimination Against Women, the Declaration on the Elimination of Violence Against Women, and, where applicable, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence. States parties should fulfil their obligations to prevent and eradicate these and other forms of violence against women, as an indispensable part of the process of eliminating gender discrimination.

12. The Colloquium noted with satisfaction that some countries had enacted legislation addressing domestic violence and

other forms of violence against women. The Colloquium recommended that other states in the Commonwealth consider the enactment of similar legislation, and stressed the need for such legislation to be regularly monitored and updated as appropriate.

13. The Colloquium expressed its concern in regard to the commercial sexual exploitation of women and girls, including trafficking for the purposes of prostitution. The Colloquium urged states throughout the Commonwealth to take effective measures to eradicate this phenomenon. These measures could include the enactment of legislation (including appropriate penal provisions), and administrative and other measures such as efforts to rehabilitate and reintegrate into society those subjected to these violations.

14. The Colloquium acknowledged the work that the Commonwealth Secretariat has done in developing publications and training materials relating to human rights, including the human rights of women, and urged the organisation to continue this work.

15. Judges participating in the Colloquium expressed their appreciation for the informative and constructive contribution made to the discussions by representatives of non-governmental organisations and noted the recommendations proposed by them.

Recommendations and Strategies for Action

Colloquium adopted the following recommendations and strategies for action:

Information and publicity activities

16. States that become parties to international human rights treaties should publicise that fact widely among their community and ensure that copies of the treaties, reports of the country under the treaty and other relevant documentation (where possible in local languages) are made widely available.

17. The Gender and Youth Affairs Division of the Commonwealth Secretariat should ensure that copies of the Convention on the Elimination of All Forms of Discrimination against Women and *Assessing the Status of Women: A Guide to Reporting under the Convention on the Elimination of All Forms of Discrimination against Women* (2nd ed. 1996) are made available to the judiciary and to the Bar Association in each state of the Commonwealth.

Access to information and exchange of information

18. The Commonwealth Secretariat, the United Nations and its agencies, and other bodies should explore ways of making available to judges, judicial officers and practitioners access to electronic sources of information on human rights, in particular relating to the human rights of women, and should ensure the availability of basic international and comparative materials in libraries accessible to the judiciary and the profession.

19. Judges in Caribbean and other Commonwealth countries who render decisions in constitutional human rights cases, in cases in which international instruments are invoked or which significantly advance the rights of women under domestic legislation should, as far as possible, send copies of those decisions to:

- ♦ the Commonwealth Secretariat, for inclusion in the *Commonwealth Law Bulletin*
- ♦ Interights, for inclusion, as appropriate, in the *Commonwealth Human Rights Law Digest*
- ♦ in the Caribbean, to the CARICOM Secretariat and universities in the region for appropriate publication.

20. The Commonwealth Secretariat and the CARICOM Secretariat should endeavour to ensure that all judges in the Caribbean as well as in other regions are provided with

access, either in electronic or hard copy format, to the *Commonwealth Human Rights Law Digest*, the *Commonwealth Judicial Journal*, the *Commonwealth Law Bulletin*, and the *Law Reports of the Commonwealth* and regional publications.

21. Judges, practitioners and academics should be encouraged to submit articles and other material for publication in the *Commonwealth Law Bulletin* and *Commonwealth Judicial Journal* and regional publications.

22. The Commonwealth Secretariat and the CARICOM Secretariat should explore ways of developing, either on their own or in conjunction with other suitable bodies or NGOs, a world wide web (www) site which would contain human rights and related materials, including material on the gender dimensions of human rights, and which would complement the existing work in this area of bodies such as the United Nations, the ILO and the United Nations High Commissioner for Human Rights.

Judicial studies programmes and continuing legal education on gender issues

23. Gender-sensitive training and information about women's human rights should be provided to the judiciary, lawyers, law-enforcement agencies, court personnel, law students and community leaders. Legal literacy programmes to raise public awareness should also be undertaken.

24. Those bodies involved in judicial education seminars at the international, regional and national level should co-operate in and co-ordinate their activities in order to make best use of limited resources.

25. The Commonwealth Secretariat should explore ways in which the experiences of the two series of Judicial Colloquia on human rights which it had organised might be drawn on in order to ensure that gender issues are fully integrated

in any future judicial training in which the Secretariat was involved.

26. The Commonwealth Secretariat, in liaison with the CMJA and other organisations with expertise in the area, should explore the need for the development of further training materials on international human rights, generally and as they relate specifically to women.

The operation of the legal system and reform of the law

27. The language used in human rights instruments, national legislation and in court proceedings and judgements should be non-sexist, and, as appropriate, gender-neutral language should be employed.

28. Where general or specific reviews of the law are undertaken by Law Reform Commissions or other bodies, the terms of reference of such reviews should ensure that the impact of existing and proposed laws on the human rights of women is fully taken into account in the process of review and reform of the law.

Operation of the courts and the court system

29. States should, where possible, put in place information systems for the production of gender disaggregated data on the operation of the courts for research, policy formulation and for planning timely interventions.

30. Notwithstanding the obligation to ensure a fair trial for all, judges and prosecutors are encouraged to be vigilant about the withdrawal of cases in order to ensure that the legal system fully protects the rights of women and girls.

Support services and programmes

31. States should, where possible, establish a comprehensive legal aid programme to ensure the availability of legal aid or *pro bono* legal assistance for court and administrative proceedings in which redress

for violations of human rights, including those suffered by women and girls, is sought. States should also establish programmes for counselling of women and girls who have suffered violations of rights, as well as special programmes for offenders.

32. States should establish specially trained units in the police force for the investigation of offences by and against women and girls, the functions of which should include counselling for those who have been subject to abuse.

The use of international and regional human rights procedures

33. Lawyers should consider whether more effective use could be made of applicable international and regional complaint procedures to advance women's human rights, in cases in which a remedy was not available within the domestic system. These procedures included the procedures of the Organisation of American States, including those of the Inter-American Commission under the American Declaration of the Rights of Man, the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará), the procedures of the Council of Europe under the European Convention on Human Rights, and the procedure under the First Optional Protocol to the International Covenant on Civil and Political Rights, as well as applicable complaints procedures relating to the implementation of international labour conventions.

Enhancement of regional co-operation and exchange of information

34. The Commonwealth Secretariat, the CMJA, and other responsible international, regional or sub-regional agencies, should explore, in close collaboration with the judges of each region and taking into account existing institutions and programmes, the desirability of the establishment of a regional

judicial studies institute or programme to facilitate continuing judicial education and the exchange of legal material among the judges of the region.

Follow up

35. The Colloquium recommended that a Reference Group be constituted for follow-up of the recommendations contained in this document, as well as assessing the impact of previous Judicial Colloquia on the domestic enforcement of international human rights norms through national courts.

36. The Colloquium recommended broad dissemination of the Victoria Falls Declaration, the Hong Kong Conclusions and the Georgetown Recommendations and

Strategies for Action, as well as the reports of those Judicial Colloquia.

37. The Colloquium requested the Commonwealth Secretariat to transmit the Georgetown Recommendations and Strategies for Action to:

- ♦ the Commonwealth Heads of Government Meeting to be held in Edinburgh in October 1997
- ♦ the triennial meeting of the CMJA to be held in Capetown in October 1997
- ♦ and the next meeting of Commonwealth Law Ministers.

VIOLENCE AGAINST WOMEN

Paper by the Department of Justice, Canada

1. Violence against women has been a major concern for Commonwealth Ministers Responsible for Women's Affairs since their First Meeting in Nairobi in 1985. When they met in Cyprus in 1993, Ministers requested the Commonwealth Secretariat to continue its work as a clearing house on information concerning violence against women and girls, and to disseminate materials and manuals on women's rights as human rights to Commonwealth governments and non-governmental organisations (NGOs).

2. The Commonwealth Plan of Action on Gender and Development, which was fully endorsed by Heads of Government in Auckland in November 1995, has as one of its key strategic objectives for governments, "to promote and defend women's rights as human rights and outlaw all violence against women and girls". Specific measures for governments under the new Plan of Action relate to "women's rights as human rights, the elimination of violence against women, the protection of the girl child and the outlawing of all forms of trafficking in women and girls".

3. On the part of the Gender and Youth Affairs Division (GYAD) of the Secretariat, a number of training and resource materials on violence against women have been developed, including three manuals which have been widely disseminated and used. These are *Confronting Violence: A manual for Commonwealth Action*, *Guidelines for Police Training on Violence against Women and Child Sexual Abuse*, and

Violence Against Women: Curriculum Materials for Legal Studies. A *Commonwealth Annotated Bibliography on Violence against Women* was also published for use in training and public awareness programmes and information on measures being taken by governments, NGOs and other organisations to combat violence against women in the Commonwealth. The paper, *Combating Violence Against Women: A Commonwealth Experience*, distributed at this meeting, contains more interesting information on activities/approaches implemented by the Commonwealth Secretariat.

4. At their 1996 Meeting in Kuala Lumpur, Commonwealth Law Ministers gave special attention to the human rights of women in the context of their discussion of Commonwealth fundamental values. Ministers acknowledged that violence undermines women's fundamental human rights and freedoms and that no matter what the context, violence against women is unacceptable. At that Meeting, they supported the need for more work to be undertaken at both the national and international levels to address the issue of violence against women and welcomed proposals setting out a range of practical measures, including a comprehensive review of the criminal justice system, designed to achieve the elimination of violence against women.

5. The issue of the elimination of violence against women had never been substantially addressed in the criminal law context, until recently when the United Nations Commission on Crime Prevention and Criminal Justice

included it as a priority item on its work agenda and invited the 9th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1995) to consider this matter. As one of the two principal sponsors that introduced the resolution concerning the elimination of violence against women at the 9th Congress, Canada wholeheartedly supported the need for more work to be undertaken at the international level to address the issue of violence against women. However, the multifaceted nature of violence against women suggested that different strategies were required to deal with different manifestations of violence and the various contexts in which it occurs.

6. Therefore, at the Kuala Lumpur Meeting, Canada submitted a document concerning practical-oriented measures, strategies and activities that could be introduced in the field of crime prevention and criminal justice to address the problem of violence against women, in order to facilitate discussion on this issue. The document had also been submitted to the Secretary-General of the United Nations as a Canadian proposal to be discussed within the United Nations Commission on Crime Prevention and Criminal Justice.

7. In April 1997, Canada succeeded in having the Commission adopt the Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice. The Model Strategies are annexed to a resolution concerning "Crime prevention and criminal justice measures to eliminate violence against women", which was adopted as Resolution 52/86 by the General Assembly on 12 December 1997.

8. The Model Strategies are a model of guidelines to be used by governments and other entities in their

efforts to address, within the criminal justice system, the various manifestations of violence against women. They are divided into 11 sections dealing with criminal law, criminal procedure, police, sentencing and corrections, victim support and assistance, health and social services, training, research and evaluation, crime prevention measures, international co-operation and follow-up activities.

9. Besides suggesting follow-up action on the adoption of the Model Strategies, the General Assembly Resolution also proposes that the issue of violence against women be considered at the high-level segment of one of the forthcoming sessions of the Economic and Social Council in the context of its discussion on the human rights of women. The Resolution further requests the Secretary-General to transmit the Model Strategies to other relevant United Nations organisations and bodies and to invite them to develop their own Model Strategies in their area of expertise. It also requests the Secretary-General to submit to the General Assembly at its fifty-fourth session (1999), through ECOSOC, a report on the implementation of the Resolution.

10. Because of its leadership role in raising the profile of the issue of violence against women at the international level, Canada is now being asked to collaborate with other states, United Nations institutes and NGOs in their efforts to combat violence against women in the field of crime prevention and criminal justice. Most recently, the Vancouver-based International Centre for Criminal Law Reform and Criminal Justice Policy, with the financial assistance of the Department of Justice, Canada, developed a Resource Manual, which is available to participants at this Meeting, to assist the implementation of the Model Strategies at the international level.

11. The Manual is meant to offer concise information on the experiences acquired in various countries in successfully implementing the Model Strategies. Throughout the Manual, each provision of the Model Strategies is summarised in plain language, followed by a statement of the challenges entailed, a description of initiatives from around the world which address each provision, and, where applicable, a discussion of what is known about the impact of implementation efforts. This approach has been used in an effort to make the Manual as accessible as possible.

12. The Manual was distributed at the 8th session of the United Nations Commission on Crime Prevention and Criminal Justice (Vienna, 26 April - 7 May 1999). During that meeting, Canada asked that comments be forwarded to the Vancouver Centre before September 1999 in order for the final version of the Manual to be printed and distributed in preparation for the workshop on "Women in the criminal justice system" which will be held during the 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Vienna, 10-17 April 2000).

13. Another useful and complementary tool that is presently being developed by the Vancouver Centre is the Compendium of Promising Practices on the Model Strategies. The purpose of this Compendium is to help identify and share examples of how the Model Strategies are being implemented in various social, economic and cultural contexts and legal traditions around the world. The Compendium is not intended to exhaustively survey current practices, but to disseminate criminal justice and crime prevention projects and initiatives, including resource people and organisations with their contact information, that have been compiled through a process of international

consultation and information gathering. The initial Compendium will be designed and produced in a way that will anticipate its potential growth over the years and facilitate the progressive additions of new information as it becomes available, with the ultimate objective of establishing this document as a virtual document on the Internet.

14. Upon completion of both documents, Canada would offer to make the final version of the Resource Manual, as well as the Compendium, available to the Commonwealth for distribution. These documents are useful partners to the *Strategies for Confronting Domestic Violence: A Resource Manual* that was published by the United Nations in 1993. Although these documents may have their limitations in covering the whole spectrum on what should be done to eliminate violence against women from a crime prevention and criminal justice perspective, they are a valuable starting point for policy makers in governments and criminal justice agencies that have the interest and political will to implement the Model Strategies.

15. Canada believes that the Model Strategies should be used widely, within the Commonwealth, by all those involved in the criminal justice system. Law Ministers may wish to discuss ways by which Commonwealth action and resources can be channelled to address this problem. Canada also welcomes the involvement of other Commonwealth members in funding technical co-operation projects dealing with violence against women. Both at home and within the international community, we must ensure that women's rights are recognised as human rights and that in concept and practice, these rights acknowledge the realities of women's lives and women's continuing efforts to achieve equality. By working together to achieve this goal, we might be able to better

confront violence against women and
find solutions contributing to its
elimination. April 1999

CRIMINAL JUSTICE STRATEGIES IN THE ELIMINATION OF VIOLENCE AGAINST WOMEN - *the Singapore Perspective*

Paper by the Attorney-General's Chambers, Singapore

Introduction

1. In the context of this paper, "violence" refers to the infliction of physical, sexual and psychological harm. While women and men may be equally vulnerable to crimes such as robbery and murder, there are crimes to which women are additionally vulnerable: for example, rape, sexual assault and offences relating to prostitution.

2. In Singapore, studies have shown that victims of family violence tend to be predominantly female. For example, the gender breakdown of the number of police reports made by family members in 1995 was as follows: cases of verbal threats in the home (412 women, 96 men), cases of voluntarily causing hurt in the home (2813 women, 294 men), cases of voluntarily causing grievous hurt in the home (20 women, 4 men).¹

3. The challenge to Singapore's criminal justice system has been, therefore, to develop laws and mechanisms capable of addressing the fears and concerns women have about becoming victims of violence.

The Singapore Penal Code, Protection for Domestic Maids and Nullification of a Woman's Consent

4. The Penal Code documents in Chapter XVI a lengthy list of offences affecting the human body. These include offences which involve the causing of death and the causing of hurt, as well as sexual offences such as rape and incest and lesser known offences such as the causing of miscarriage without a woman's consent.

5. In 1998, the Penal Code was amended to provide for enhanced punishment for persons who abused domestic maids. As the Minister for Home Affairs commented ²:

All employers have an obligation to treat their maids humanly and decently ...Maid abuse could be in the form of simple assault or causing serious hurt. Some employers took advantage of their maids by outraging their modesty. The number of maid abuse cases reported to the Police nearly doubled, from 105 in 1994, to 192 in 1997. Of the 192 reported cases in 1997, 157 cases were substantiated with evidence, and appropriate actions had been or are being taken against the offenders. Although the number is still small relative to the maid population in Singapore, we should curb such incidents before they get out of hand. Maid abuse runs counter to Singapore's aspiration to become a gracious and civil society.

6. As a result, s.73 of the Penal Code now provides that the maximum penalties for the offences of causing hurt or grievous hurt, assault or criminal force, wrongful confinement and insulting a woman's modesty would be 1.5 times what the offender would otherwise have been liable for, when the victim is a domestic maid, and the offender is the employer or a member of the employer's household.

7. In *PP v Kwan Kwong Weng*³ the Court of Appeal held that a women who in certain

¹ *Parliamentary Debates, Official Report*, 2 May 1996, col 121-122

² *Parliamentary Debates, Official Report*, 20 April 1998, col 1924

³ [1997] 1 SLR 697

⁴ Section 153(1) of the Women's Charter

circumstances was tricked by the accused into performing sexual acts on the latter would have her consent vitiated to the extent that there was no real consent on her part. This ruling allows prosecutions to be brought against bogus fortune tellers and medicine men who use the false pretext of healing to obtain sexual favours from their unwitting victims.

The Singapore Women's Charter

8. In addition to the Penal Code, Part XI of the Women's Charter criminalises conduct specifically targeted at women and girls: traffic in women and girls, for example; or causing or encouraging prostitution of, intercourse with, or indecent assault on, girls below the age of 16; or detaining any woman or girl against her will with intent that she may be employed or used for the purpose of prostitution or for any unlawful or immoral purpose.

9. Part XI of the Women's Charter further empowers the Director of Social Welfare to put the woman or girl in question into a place of safety until the determination of the criminal proceedings. Under section 163(1), any woman or girl may also, on her own application, be received by the Director into a place of safety if the Director is satisfied that the woman or girl is in urgent need of refuge. Under section 163(2), where the situation warrants it, the person in charge of any place of safety may receive into that place of safety any woman or girl who makes an application to him or her.

10. Part XI of the Women's Charter also contains provisions which are designed to facilitate the prosecution of offences involving women and girls as the victims of one form or another of sexual assault or sexual exploitation. There is a provision⁴ which provides, *inter alia*, that when any person is charged with having committed an offence under Part XI of the Charter (which deals mainly with prostitution-related offences), or under certain sections of the Penal Code which deal with sexual offences

against women⁵, the trial court may order all proceedings before it to be held *in camera*.

11. Furthermore, no newspaper report of any proceedings under Part XI of the Charter in any court may reveal the personal particulars of any woman or girl in respect of whom the offence is alleged to have been committed, nor may any picture be published in any newspaper of the woman or girl in question.⁶ The objective of such provisions is to ensure the security and privacy of those who have already been through traumatic experiences; and by providing such safeguards, to encourage these persons to give the authorities their fullest co-operation in the apprehension and prosecution of the relevant offenders.

Use of video-link facilities

12. In fact, for witnesses who are reluctant to give evidence inside a courtroom where they may be in some physical proximity to the accused persons charged with assaulting or abusing them, we have facilities in our courts which will allow these witnesses to give their evidence via video link, away from the courtroom. Legislation was specifically passed to recognise the use of this facility.⁷

Compensation orders

13. On the conclusion of the trial, if the accused is convicted, Singapore courts also have the power to order that he pay compensation to his victim or the victims' representatives.⁸

⁵ These are sections 354 (outrage of modesty), section 354A (aggravated outrage of modesty), section 376 (rape) and section 376B (incest)

⁶ Section 153(4) of the Women's Charter

⁷ Section 364A Criminal Procedure Code

⁸ Section 401(1) of the Singapore Criminal Procedure Code (Cap 68) Section 401(1)(b) of the Singapore Criminal Procedure Code (Cap 68) states: "The court before which a person is convicted of any crime or offence may, in its discretion, make either or both of the following orders against him: ... (b) an order for the payment

⁴ Section 153(1) of the Women's Charter

Beyond traditional criminal law remedies

14. The remedies spoken of so far are what may be described as "traditional" criminal law remedies: they rely on concepts and mechanisms already well-known in our criminal law. In our efforts to eradicate violence against women, however, these "traditional" remedies may not be enough. They do not take into consideration a major factor in many of the crimes of violence against women: namely, the fact that much of the violence against women is perpetrated by persons known to them, with whom they have some sort of relationship. A national survey conducted by the Canadian Government in 1994 revealed, for example, that almost one-half of Canadian women reported violence by men known to them, as compared to one-quarter who reported violence by strangers. One-quarter of all women had experienced violence at the hands of current or past marital partners (including common-law union). The British Crime Survey in 1992 saw women reporting the occurrence of violence in situations which one would have thought of as being familiar and unthreatening: the home, for example, or the work place. In eight out of ten domestic violence incidents reported to the survey, women were attacked by men. It is small wonder, therefore, that a legal commentator has written that "violence, for women, arises largely from familiarity."⁹

15. The statistics we have garnered at home in Singapore bear out the truth of such a remark. For example, in an article published in the *Straits Times* on 12 September 1996, it was reported that almost 3 out of 4 women who had reported rape during the first half of the year, knew their attackers: the alleged rapists were

by him of a sum to be fixed by the court by way of compensation to any person or to the representatives of any person injured in respect of this person, character or property by the crime or offence for which the sentence is passed."

⁹ Elizabeth A. Stanko, "Gendered Criminological Policies: Femininity, Masculinity and Violence" in *Crime and Public Policy: Putting Theory to Work*, edited by Hugh D. Barlow and published by Westview Press

friends, boyfriends, relatives and bosses. From 1996 to 1998, of the 7 concluded cases of culpable homicide not amounting to murder (under section 304(a) of the Penal Code) which featured female victims, 5 out of the 7 victims in question knew their assailants; and of this number, 3 were killed by their husbands, boyfriends or ex-boyfriends. During the same period, of the 21 concluded cases of voluntarily causing hurt by dangerous weapons or means (under section 324 of the Penal Code) which involved female victims, 14 out of the 21 victims knew their assailants; and of this number, 8 were attacked by their husbands, boyfriends or ex-boyfriends. Of the 48 cases of voluntarily causing hurt (under section 323 of the Penal Code) which involved female victims in the period from 1996 to date, 16 out of the 48 victims knew and/or were related to their assailants; and of these 16, 12 were assaulted by their husbands, ex-husbands, boyfriends or ex-boyfriends. Of the 7 concluded cases of voluntarily causing grievous hurt (under section 325 of the Penal Code) which involved female victims in the same period, 6 out of the 7 victims in question were related to and/or knew their assailants.¹⁰

16. It must be emphasised, moreover, that these are **concluded** cases: that is, they are cases which were reported, investigated and prosecuted in court. The number of cases of violence against women which go unreported may be far greater. One telling sign is the number of persons who suffer injuries severe enough to seek medical treatment. In 1995, for example, a total of 446 cases of spousal abuse were recorded in public hospitals in Singapore.¹¹

Violence against women in the domestic context

17. The unhappy reality is that in cases where the aggressor is related and/or known to their victims, the women are often reluctant to

¹⁰ Statistics provided by Police Intelligence Department on 9 April 1998

¹¹ *Parliamentary Debates, Official Report*, 2 May 1996, col.123

go to the authorities. This is particularly so where the violence occurs in a domestic context: the woman who is beaten up by her husband, for example, or by her son, or by some other family member.

18. The fact that many women victims of violence are related to and/or know their aggressors also raises questions about the types of conduct which may legitimately be regarded as "violence". For instance, a woman receives numerous telephone calls and letters from her former husband in which he blames her for their divorce and accuses her of all sorts of misbehaviour. He never goes so far as to physically assault her, but she is deeply disturbed by this continual, unwanted attention. Does his conduct qualify as "violence" which may in appropriate circumstances be punished by the criminal law?

19. One of the basic legal strategies that a society can adopt in controlling violence against women in the domestic context is the strategy of "compulsory intervention"¹², the legal strategy is to pursue full enforcement of the law. This is epitomised by the Family Violence Bill (Bill No. 36/95) which was introduced in Singapore's Parliament in 1995 by Dr Kanwaljit Soin, a nominated Member of Parliament. According to clause 13(2) of Dr Soin's Bill, for example, where there is sufficient evidence to prosecute the offender for family violence, the Public Prosecutor is mandated to charge him with the offence. This Family Violence Bill was defeated at its second reading largely because of concerns that it provided for an excessive degree of intervention by the criminal process which could be inimical to the resolution of family conflicts. As the Minister for Home Affairs commented in the course of the relevant Parliamentary debate:

Family disputes occur in diverse situations and the needs of the family in each situation vary because of the relationships and emotions involved. For this reason, the parties involved should be handled with

understanding and sensitivity and not always with the cold and strong arm of the law. I prefer a more mediatory and conciliatory approach which gives the family in distress a better chance of resolving its problem, with the Police intervening only in the more serious situations ...¹³

20. In the context of Singapore we have adopted the "contingent intervention strategies". With this strategy, the legal response to violence against women is generally only available if the initiative is first taken by the victim or members of the family. In our view, this represents the appropriate balance between the public's interest in regulating violent behaviour and the need to respect the privacy of the family.

The Singapore Women's Charter (Amendment) Act 1996

21. A good example of how this balance has been struck is the recent enactment of the Women's Charter (Amendment) Act 1996.

22. Prior to the enactment of this amending Act, sections 68 to 70 of the Women's Charter were the provisions dealing with violence in the domestic context. They were restricted in scope and aim, however, and for that reason, sometimes ineffectual. Thus, for example, they were concerned only with violence in the form of actual physical injury; and only parties to a marriage could apply for relief.

23. The Women's Charter (Amendment) Act 1996 brought in a far wider definition of violence. It included as violence the following acts:

- 21.1 wilfully or knowingly placing or attempting to place in fear of hurt;
- 21.2 causing hurt by such act which is known or ought to have been known would result in hurt;

¹² Franklin E. Zimring, "Legal Perspectives on Family Violence" (1987) 75 Calif L Rev 521

¹³ *Parliamentary Debates, Official Report* 1 November 1995, col 125

21.3 wrongfully confining or restraining against a person's will; or

21.4 causing continual harassment with intent to cause or knowing that it is likely to cause anguish.

24. The category of persons who may apply for relief from such violence now includes not just spouses, but also parents, children, siblings, in-laws, relatives and former spouses. The main form of relief which such a person may apply for is a protection order which restrains the person against whom the order is made from using violence against the family member. An application for a protection order may be made by the family member concerned or in the case of persons below 21 years of age or incapacitated persons, by a guardian or relative or person responsible for the care of the child or incapacitated person, as the case may be, or by any person appointed by the Minister.

25. So far as the burden of proof borne by the applicant is concerned, the court need only be satisfied "upon satisfaction on a balance of probabilities" that violence as defined by the amending Act has been committed or is likely to be committed against a family member and that a protection order is necessary for the protection of this family member.

26. Expedited protection orders may also be obtained where the court is satisfied that there is imminent danger of violence being committed against the applicant.

27. Yet another innovation is the discretion which the court now has to attach conditions to the protection orders it issues. Section 65(4) of the Women's Charter now provides that the court, in making a protection order, may include a provision that the person against whom the order is made may not incite or assist any other person to commit violence against the protected person. Section 65(5) further stipulates that a protection order may, where the court is satisfied on a balance of probabilities that it is necessary for the

protection or personal safety of the applicant, provide for such orders as the court thinks fit having regard to all the circumstances of the case, including:

25.1 the granting of the right of exclusive occupation to any protected person of the shared residence or a specified part of the shared residence by excluding the person against whom the order is made from the shared residence or specified part thereof, regardless of whether the shared residence is solely owned or leased by the person against whom the order is made or jointly made or leased by the parties; and

25.2 referring the person against whom the order is made or the protected person or both or their children to attend counselling.

28. The number of protection orders applied for under the Women's Charter has seen an increase since the enactment of the Women's Charter (Amendment) Act 1996. In 1995, a total of 1027 protection orders were successfully applied for under the Women's Charter. In 1997, following the reforms introduced by the amending Act, there were a total of 1168 protection orders successfully applied for.¹⁴ In 1998 to date, a total of 1655 protection orders were successfully applied for under the Women's Charter. It may perhaps be surmised that the reforms brought about by the Women's Charter (Amendment) Act 1996 have encouraged women to come forward and seek protection from violence in the home. The reforms are significant because they address the problems which traditional criminal law remedies cannot. Thus, for example, the woman who suffers assault by her alcoholic husband may apply for a protection order which, in addition to restraining him from perpetrating further violence on her, also

¹⁴ Statistics provided by the Singapore Subordinate Courts on 4 April 1998

directs that he attend the counselling needed to overcome his alcoholism.

29. At the same time, however, the criminal justice system is not without applicability in this new scheme. Under section 65(8), any person who wilfully contravenes a protection order or an order made by virtue of section 65(5) (save for an order made by virtue of section 65(5)(b), violation of which is punishable as a contempt of court) shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding 6 months or to both; and in the case of a second or subsequent conviction, to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months or to both. Thus the man who continually harasses his former wife and who disobeys a protection order restraining such harassment will be guilty of an offence and will be liable to the “traditional” criminal law sanctions of imprisonment and/or fines. Moreover, an offence under section 65(8) is deemed to be a seizable offence within the meaning of the Criminal Procedure Code. This is significant because under s119(1) of the Criminal Procedure Code, the police are mandated to investigate and to arrest an offender in a seizable offence, unless the case is not of a serious nature or where there appears to be no sufficient ground for proceeding in the matter.

Victim impact statements

30. Yet another area into which we have ventured is the use of victim impact statements in cases such as assault cases. Victim impact statements are designed to allow the court a better perspective into the harm suffered by the victim of a crime. This ensures that in sentencing the accused, the court keeps in mind, amongst other things, the effect which the accused’s act has had on its victim. In the context of crimes involving violence against women, use of such statements by the prosecution can be especially powerful in conveying to the court the ordeal suffered by an abused or battered woman.

31. For example, in the case of *PP v Ho Wee Fah*¹⁵, the accused pleaded guilty to a charge of attempted rape. A victim impact statement was tendered by the prosecution in court. In this statement, the victim described how her life had been completely changed as a result of the encounter with the accused. The emotional distress of the ordeal had caused her to suffer from psychiatric problems and had affected her work as a financial controller in a multinational company. She had also received threatening letters at her home advising her not to testify at the accused’s trial. The accused was sentenced to 9 years imprisonment and 16 strokes of the cane.¹⁶

Court initiatives

32. The Singaporean courts have adopted a proactive approach towards family violence such as the setting up of a Family Protection Unit which *inter alia* provided professional counsellors to victims of family violence as part of its Family Violence Policy, providing for direct link ups with hospitals and medical clinics, setting up volunteer victim support schemes and initiating outreach programmes by distribution of brochures, organising talks at community agencies, welfare organisations, law enforcement agencies and schools and extending the opening hours of the Family Courts Registry and providing night mediation.¹⁷

The road ahead

33. The above are examples of how the effort to protect women against violence may be boosted by supplementing our criminal justice system with less conventional remedies. We are conscious, of course, that we must remain vigilant in monitoring the effectiveness of the system; and to that end, we continue to

¹⁵ Criminal Case No. 12 of 1998

¹⁶ The maximum sentence for this offence is 10 years imprisonment and 24 strokes of the cane

¹⁷ “Doing More with Less: Court Initiatives, Case Reviews and Trial Management - The Singapore Experience” by District Judge Daphne Hong Fan Sin

examine other possible reforms and initiatives in our laws.

34. In undertaking such an exercise, we are encouraged by the fact that public opinion in Singapore favours greater intervention by law enforcement agencies in so far as the problem of violence against women is concerned. A survey funded by the National University of Singapore in 1992¹⁸ indicated, for example, that in respect of wife assault cases, the public was generally in favour of intervention by social workers and the police especially when the assault was serious and/or had continued over a long span of time. Members of the public were also of the opinion that the courts should treat wife assaults more seriously than other personal assaults. For recalcitrant wife abusers, it was felt that compulsory treatment should be ordered.

Conclusion

35. In grappling with the problem of violence against women, we have ultimately to address the attitudes which create a breeding ground for the violence in the first place. In the long run, it is really better education as well as careful cultivation of societal values which will profoundly reshape these attitudes. An awareness of the more fundamental situation should not blind us, however, to the importance of keeping the law available and accessible to all who need its protection. The law may not be a panacea but it can be a considerable tool in our ongoing effort to eradicate violence against women; and as such, we have the responsibility of ensuring that it remains relevant and efficacious always.

April 1999

18 Alfred Choi, "Formal Protection of Women from Wife Assaults in Singapore" [1994] 3 MLJ xli

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**STRENGTHENING INTERNATIONAL HUMANITARIAN LAW
AT THE NATIONAL LEVEL**

**Memorandum by the Commonwealth Secretariat and paper by
The ICRC Advisory Service on International Humanitarian Law**

The establishment of the International Criminal Court following the recently concluded Treaty of Rome has helped to sharpen the focus of the international community on the various Geneva Conventions and their Protocols which both complement and supplement existing national laws to ensure that certain crimes such as genocide do not go unpunished. The establishment of the Court is the end result of years of effort to galvanise international opinion behind the need to punish serious violations of international law, including crimes which are now generally recognised as crimes against humanity.

2. Under the Geneva Conventions and their Protocols, members have a duty to implement their obligations to the fullest extent possible. Generally, this requires the enactment of national legislation as well as appropriate regulations. To facilitate this process, some states have set up National Humanitarian Law Committees to advise and assist their governments in the implementation and dissemination of international humanitarian law.

3. In preparing the accompanying paper, the ICRC Advisory Service on International Humanitarian Law has provided a summary of the position of each Commonwealth member country in relation to ratification and implementation of the various Conventions.

4. Ministers may wish to take this opportunity to share views and experiences on this subject and to take stock of the state of their ratification and implementation of these Conventions.

March 1999

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW AT THE NATIONAL LEVEL

Implementation is the major challenge facing international humanitarian law today. The problem of translating States' legal obligations into action is common to all areas of international law. There is, however, a particularly acute contrast between humanitarian law's highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.

While a number of international mechanisms have been developed to promote compliance with humanitarian law, it is States themselves which have the primary responsibility for implementation. Under the 1949 Geneva Conventions and their 1977 Additional Protocols, States have clear obligations to ensure that humanitarian law is implemented and respected, and to this end to adopt a range of national legislative and administrative measures.

It is in order to help States discharge their international obligations, and to promote these national implementing measures, that the ICRC has established an Advisory Service on International Humanitarian Law. The Advisory Service was established upon the recommendation of States and National Red Cross and Red Crescent Societies at the 26th International Red Cross and Red Crescent Conference in 1995.

This year, 1999, marks the turn of the century and the fiftieth anniversary of the Geneva Conventions. The 27th International Red Cross and Red Crescent Conference will be held in 1999 (Geneva, 1-6 November). It is time for examining the level of implementation of humanitarian law. The shared legal heritage of many Commonwealth States provides a common basis on which to exchange expertise and promote the adoption of national legislation and other measures.

Document prepared by the
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Annexes:

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- 2. Map showing ratification of the Geneva Conventions and Additional Protocols world-wide.**
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- 5. Sheet showing the state of ratification and implementation for individual States.**
- 6. Background Information Note: Geneva Conventions Acts.**

1. Strengthening Implementation of International Humanitarian Law at the National Level: Introduction and Objectives

The purpose of this session and this document is to explain why States need to take measures to implement international humanitarian law, the principal implementation measures (legislative and administrative) required, the approach to implementation in common law States, and the assistance which the International Committee of the Red Cross (ICRC) – more particularly, the ICRC Advisory Service on International Humanitarian Law – may provide to States in their efforts to implement their obligations under international humanitarian law treaties.

This document covers three separate topics:

- Information on international humanitarian law (IHL)

Sections 2, 3, 4 and 6 explain IHL, the crucial importance of implementation of IHL, and the measures States must take to implement IHL. Section 7 lists criteria for assessing a State's performance in implementing IHL.

- Information on the role of the ICRC and the ICRC Advisory Service on IHL

Section 5 explains the reasons prompting establishment of the ICRC Advisory Service on IHL. Sections 5, 6 and 10 outline the objectives and activities of the Advisory Service and show how the Advisory Service can assist States in adopting national measures for the implementation of IHL.

- Overview of ratification and implementation of IHL in the Commonwealth

Sections 8 and 9 summarize the state of ratification and implementation of IHL in Commonwealth Member States, with a particular focus on legislation for the punishment of grave breaches of the Geneva Conventions and their Additional Protocols, legislation to give effect to the Ottawa Convention, legislation to regulate use of the protective symbols established by the Geneva Conventions and their Additional Protocols (e.g., the red cross emblem, the red crescent emblem, the civil defence sign, electronic signals for medical transports), and national IHL committees.

2. What is international humanitarian law?

International humanitarian law is a set of rules which, for humanitarian reasons, seeks to limit the effects of armed conflict. It protects those who are not, or are no longer, taking part in fighting and restricts the means and methods of warfare. International humanitarian law ("IHL" for short) is also called the "Law of War" and the "Law of Armed Conflict".

A Fact-Sheet explaining the essential rules of IHL is attached, together with Fact-Sheets on the principal IHL treaties, that is -

- the 1949 Geneva Conventions and their 1977 Additional Protocols;
- the 1954 Hague Cultural Property Convention and its Protocol;¹
- the 1980 Conventional Weapons Convention and its four Protocols;
- the 1997 Ottawa Convention; and
- the 1998 Statute of the International Criminal Court.

3. The importance of implementation of international humanitarian law

Implementation is the major challenge facing international humanitarian law today. The problem of translating States' legal obligations into action is common to all areas of international law. There is, however, a particularly acute contrast between humanitarian law's highly developed rules, many of which enjoy nearly universal acceptance, and the repeated violations of those rules in conflicts around the world.

While a number of international mechanisms have been developed to promote compliance with humanitarian law, it is States themselves which have the primary responsibility for implementation. Under the 1949 Geneva Conventions and their 1977 Additional Protocols, States have clear obligations to ensure that humanitarian law is implemented and respected, and to this end to adopt a range of national legislative and administrative measures.

4. What is implementation of international humanitarian law?

Implementation of IHL covers all those measures which must be taken to ensure that the rules of IHL are fully respected. It is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in times of peace to ensure that -

- all people, both civilian and military, are familiar with the rules of IHL;
- the structures, administrative arrangements and personnel required for the application of IHL are in place; and
- violations of IHL are prevented and, where necessary, punished.

The principal implementation measures which States must adopt are set out in section 6 below (as well as in the Advisory Service Fact-Sheet, "Implementing International Humanitarian Law: From Law to Action", at Annex 1). Section 7 lists criteria to consider to determine how a State "performs" in the area of implementation of IHL.

¹ There is no Fact-Sheet about the 1954 Hague Cultural Property Convention.

5. The role of the International Committee of the Red Cross (ICRC) and the ICRC Advisory Service on International Humanitarian Law

In 1995, the ICRC established a special unit, the Advisory Service on IHL, to advise governments on the national measures necessary to fully implement their obligations under IHL. The creation of the Advisory Service was prompted by the recommendation of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, January 1995) – subsequently endorsed by the 26th International Conference of the Red Cross and Red Crescent (Geneva, December 1995) – that the ICRC strengthen its capacity to advise and assist States in their efforts to implement and disseminate IHL.

Since its establishment, the Advisory Service's three main priorities have been to promote ratification of IHL treaties, to promote national implementation of obligations under these treaties and to collect and facilitate the exchange of information regarding national implementation measures.

In the field of implementation of IHL, which is the focus of this document, the Advisory Service has concentrated on -

- legislation for the punishment of grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I;
- legislation to regulate use of the red cross and red crescent emblems and the other protective signs and signals provided for in the Conventions and Protocols; and
- establishment of national IHL committees to advise governments on ratification and implementation of IHL.

6. Implementation of IHL – a brief description

As indicated in section 4 above, implementation of IHL requires a variety of measures. First, IHL treaties must be incorporated into domestic or national law. In common law States, this usually requires the enactment of implementing legislation.

Second, States must ensure that their criminal law provides for punishment of –

- grave breaches of the Geneva Conventions and their Additional Protocol I;
- misuse of the emblem (the emblems, designations, signs and signals protected by the Conventions and Protocol I and the Cultural Property Convention);
- violations of the 1954 Cultural Property Convention;
- violations of the 1997 Ottawa Convention;
- wilfully killing or causing serious injury to civilians through violations of amended Protocol II (landmines) of the 1980 Conventional Weapons Convention.

Third, States must adopt a variety of other implementation measures to give effect to their obligations under IHL treaties, for example:

- translation of these texts into national languages;
- dissemination of the Conventions and Protocols within the armed forces and generally;
- identification of protected persons and places;
- protection of fundamental and procedural guarantees;
- appointment and training of persons qualified in IHL, including legal advisers within the armed forces;
- establishment of National Societies, civil defence organizations and national information bureaux.

To assist with the measures described above, many States have founded national IHL committees to advise the government on implementation and dissemination of IHL. Such committees – bringing together representatives of the various ministries concerned with the application of IHL, the National Society, civil defence organizations, academics, the health profession, etc. – are recommended as a means to further implementation of IHL. For further information on the composition and functions of these committees, see the Fact-Sheet, "National Committees for the Implementation of Implementation of Humanitarian Law" at Annex 1.

Other measures which the Advisory Service has promoted to further the implementation of IHL are:

- national implementation studies – the purpose of these studies, ordinarily undertaken by a local lawyer engaged specifically for this purpose by the ICRC, is to determine the state of implementation (legislative and administrative) in the country;
- national seminars on implementation of IHL – the purpose of these seminars, which bring together representatives of relevant ministries, the National Society, civil defence and other relevant bodies, is to consider the state of implementation and make recommendations as to what needs to be changed (and perhaps also recommendations as to ratification of IHL treaties and establishment of a national IHL committee);
- establishment of a database of implementation measures – the purpose of this database, which will appear in the ICRC's homepage, is to make information concerning national implementation readily accessible to States and others.

7. Implementation of IHL – criteria for assessment

To determine how a State "performs" in the area of implementation of IHL, the essential criteria (drawn from section 6) are the following:

1. Has it incorporated the IHL treaties to which it is a party into domestic law?
2. Is its criminal law adequate (emblem, grave breaches, mines)?
3. Has it introduced the other implementation measures required?

Additional factors which might improve the State's IHL "performance" include the following:

1. Does it have a national IHL committee?
2. Has a national implementation study been undertaken (so the State knows the current situation and the areas where improvement is required)?
3. Has there been a national seminar on implementation (so recommendations leading to an "Implementation Plan of Action" can be adopted)?

A further criterion – useful for better implementation of IHL generally, rather than implementation in a particular State – is whether information has been included in the ICRC's database on national implementation measures (soon to be included in the ICRC's website).

8. Ratification and implementation of IHL in the Commonwealth

In preparation for the Commonwealth Law Ministers' Meeting, the Advisory Service on IHL has reviewed ratification and implementation of IHL in Commonwealth Member States. The map at Annex 2 shows the level of ratification of the Geneva Conventions and Additional Protocols world-wide. The table at Annex 3 shows the level of ratification of the more important IHL treaties by Commonwealth Member States. A list of these treaties, showing the number of States party to each treaty (world-wide), appears at Annex 4.

On the basis of the information available in the Advisory Service Documentation Centre, the Advisory Service has prepared, for each State, a sheet summarizing the state of ratification and implementation of the principal IHL treaties. Each State will find, attached to this document, a copy of the ratification/implementation sheet which the Advisory Service has prepared in relation to it (Annex 5). The Advisory Service welcomes any comments which States may have on the information contained in the ratification/implementation sheet. Comments should be sent by fax or E-mail to Ms Anna Segall, Legal Adviser, Advisory Service on IHL, ICRC, at **41 22 733 2057** or **asegall.gva@icrc.org** (under the heading Commonwealth Law Ministers' Meeting).

9. Implementation of IHL in the Commonwealth – an overview

Details of the state of implementation in relation to each Commonwealth Member State are contained in the ratification/implementation sheet which has been prepared in relation to each State. It is useful, in addition, to make some general comments in relation to the state of implementation in the Commonwealth. Again, these comments are based on information presently available to the ICRC Advisory Service, and may need to be up-dated.

9.1 Incorporation of Conventions and Protocols into domestic law

In common law States, treaties do not become part of the domestic or national law until implementing legislation is enacted. Many common law States achieve this through a Geneva Conventions Act which -

- provides for punishment of grave breaches of the Geneva Conventions (and Additional Protocol I, where applicable);
- specifies trial procedures for protected persons; and
- regulates use of the red cross and red crescent emblem (and the civil defence sign and electronic signals established by Additional Protocol I, where applicable) and creates an offence of misuse of these emblems, sign and signals.

The ICRC Advisory Service has prepared a background information note on the Geneva Conventions Act approach (Annex 6).

On the basis of information available to the ICRC Advisory Service, it appears that 22 Commonwealth States have followed the Geneva Conventions Act approach.² Of these States, only five have amended their Geneva Conventions Act to give effect to their ratification of the Protocols.³

In summary then, it would appear that only 13 of the common law States in the Commonwealth have legislation which adequately incorporates the Conventions and, where applicable, the Protocols into domestic law.⁴ In relation to Cameroon and Mozambique, which do not have a system based on the common law, the ICRC Advisory Service does not have sufficient information to assess whether or not these States have incorporated these treaties into their domestic or national law.

² Australia, Botswana, Britain, Canada, India, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, the Seychelles, Singapore, Uganda, Vanuatu, Zimbabwe have adopted a Geneva Conventions Act. The UK *Geneva Conventions Act 1957* applies to Fiji, Kiribati, the Solomon Islands, Trinidad and Tobago, and Tuvalu; the New Zealand *Geneva Conventions Act 1958* applies to Samoa.

Bangladesh and Pakistan each have a *Geneva Conventions Implementing Act, 1936*, which pre-dates the Geneva Conventions and does not, therefore, incorporate the Conventions (and in the case of Bangladesh, the Additional Protocols) into domestic law. It appears that the United Kingdom Geneva Conventions Act, 1911 may continue to apply in South Africa, but this also pre-dates the Geneva Conventions and their Additional Protocols and does not, therefore, incorporate the Conventions and Protocols into domestic law.

³ Australia, Britain, Canada, New Zealand and Zimbabwe have amended their Geneva Conventions Acts to give effect to ratification of the Additional Protocols. Botswana, Malawi, Nigeria, Samoa, the Seychelles, the Solomon Islands, Uganda and Vanuatu have not yet taken this step.

⁴ Australia, Britain, Canada, Fiji, India, Kiribati, Malaysia, New Zealand, Papua New Guinea, Singapore, Trinidad and Tobago, Tuvalu and Zimbabwe.

9.2 Emblem legislation

The Advisory Service has information which shows that 50 of the Commonwealth Member States have legislation relating to the emblem.⁵ It should be noted that the mere existence of emblem legislation does not ensure the fulfilment of a State's obligations. Of the States with emblem legislation, it would appear that only 12 have adequate legislation which gives effect to their obligations under the Conventions and, where applicable, the Protocols.⁶

The remaining States have legislation which is outdated, which protects the red cross or the red crescent but not both, which protects the emblems under the Conventions but not the civil defence sign and signals of Protocol I, or, which is plainly wrong or inadequate. Further information in relation to the adequacy of the legislation in individual States is contained in the ratification/implementation sheet at Annex 5.

9.3 Legislation for the punishment of grave breaches

Of the Commonwealth Member States, only one third have adequate legislation for the punishment of grave breaches of the Geneva Conventions and, where applicable, the Additional Protocols.⁷

9.4 Legislation for the Ottawa Convention

As at 31.01.99, there are 22 Commonwealth States which are party to the Ottawa Convention; a further 22 States have signed but not yet ratified the Convention. Of the Commonwealth States party to the Convention, it appears that only Britain and Canada have adopted implementing legislation.

⁵ The ICRC Advisory Service on IHL is not aware of any legislation regulating use of the red cross and red crescent emblems in Dominica, the Maldives or Mozambique. Nauru has no emblem legislation, but it is not yet a party to the Geneva Conventions.

⁶ Australia, Britain, Fiji, India, Kiribati, Malaysia, New Zealand, Papua New Guinea, Singapore, Trinidad and Tobago, Tuvalu and Zimbabwe.

⁷ The 22 States which have adopted a Geneva Conventions Act (Australia, Botswana, Britain, Canada, Fiji, India, Kenya, Kiribati, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, Samoa, the Seychelles, Singapore, Solomon Islands, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu and Zimbabwe) provide punishment for grave breaches of the Conventions. Of these States, 13 have ratified the Additional Protocols, but only five of them have amended their legislation to provide for punishment of grave breaches of Protocol I (Australia, Britain, Canada, New Zealand and Zimbabwe). Botswana, Malawi, Nigeria, Samoa, the Seychelles, the Solomon Islands, Uganda and Vanuatu have not yet taken this step.

In Cameroon and Mozambique, which have not followed the Geneva Conventions Act approach, there are certain provisions in the criminal law which prohibit conduct which may constitute grave breaches within the meaning of the Geneva Conventions and their Additional Protocol I. The legislation has not been examined to determine whether it complies with the requirements of the Conventions and Protocols.

The ICRC is not aware of legislation providing for the punishment of grave breaches in Antigua and Barbuda, the Bahamas, Bangladesh, Barbados, Brunei Darussalam, Cyprus, Dominica, Gambia, Ghana, Grenada, Guyana, Jamaica, Lesotho, the Maldives, Malta, Mauritius, Namibia, Pakistan, South Africa, Sri Lanka, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Swaziland, Tanzania, Tonga and Zambia. Nauru has no grave breach legislation, but it is not yet a party to the Geneva Conventions.

9.5 Other implementation measures and national IHL committees

Apart from the legislative measures referred to above, States party to the Conventions and Protocols are required to disseminate the obligations under the Conventions and Protocols and undertake a variety of other administrative measures (see section 5 above). The focus of this document is on the legislative implementation measures required by IHL and on the creation of national IHL committees (see section 9.6 below)

9.6 National IHL committees

According to information in the Advisory Service, there are 5 States in the Commonwealth with relatively formal national IHL committees (Australia, Canada, Namibia, New Zealand, Zimbabwe). In Britain, the relevant authorities have *ad hoc* meetings; in South Africa, a committee was established in 1995 to prepare for the International Red Cross and Red Crescent Conference. Britain, Cameroon, Ghana, Mozambique, Sri Lanka and Zambia are considering formal establishment of a national IHL committee.

10. **Assistance from the ICRC Advisory Service on IHL and National Red Cross and Red Crescent Societies**

As can be seen from sections 8 and 9 of this document, the level of implementation of IHL treaties within the Commonwealth could be strengthened. The shared legal heritage of many Commonwealth States provides a common basis on which to exchange expertise and promote the adoption of national legislation and other measures. The ICRC Advisory Service on IHL exists to assist States in their efforts to implement IHL at the national level. In many States, the National Red Cross or Red Crescent Society is also able to provide assistance or expertise.

The ICRC Advisory Service on IHL hopes that 1999, a year which marks the turn of the century and the fiftieth anniversary of the Geneva Conventions, will see progress in the implementation of IHL treaties in Commonwealth States.

The ICRC, National Societies and their International Federation, and States party to the Geneva Conventions will be meeting in Geneva from 1 to 6 November 1999 for the 27th International Red Cross and Red Crescent Conference. At that time, States, National Societies and the ICRC will report on progress in relation to national implementation of IHL.



COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

WHAT IS INTERNATIONAL HUMANITARIAN LAW?

What is International Humanitarian Law?

International humanitarian law is a set of rules which, for humanitarian reasons, seeks to *limit the effects of armed conflict*. It protects those who are not, or are no longer, taking part in fighting and restricts the means and methods of warfare. International humanitarian law ("IHL" for short) is also called the "Law of War" and the "Law of Armed Conflict".

Where Does International Humanitarian Law come from?

International humanitarian law is part of international law. This governs relations between States. International law is found in agreements concluded between States – often called treaties or conventions – and in general principles and practices which States accept as legal obligations.

The origins of international humanitarian law can be found in the codes and rules of religions and cultures around the world. The modern development of the law began in the 19th century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare, which represent a

careful balance between humanitarian concerns and States' military requirements. As the international community has grown so has the number of States around the world who have contributed to the development of international humanitarian law. Today it may be regarded as a truly universal system of law.

Where can you find International Humanitarian Law?

A major part of international humanitarian law is found in the four Geneva Conventions of 1949. *Nearly every State in the world has agreed to be bound by the Conventions*. The Conventions have been developed and supplemented by two further agreements – the Additional Protocols of 1977.

There are also several agreements prohibiting the use of certain weapons and military tactics. These include the Hague Conventions of 1907, the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and the 1993 Chemical Weapons Convention. The 1954 Hague Convention protects cultural property during armed conflict.

Many rules of international humanitarian law are now accepted as customary law – that is, as

general rules which apply to all States.

What does International Humanitarian Law cover?

International humanitarian Law covers two areas:

- (1) The **protection** of those who are not, or are no longer, taking part in fighting.
- (2) Restrictions on the **means of warfare**, notably weapons, and the **methods of warfare**, such as military tactics.

What is Protection?

International humanitarian law **protects** those who do not take part in the fighting such as civilians and medical and religious personnel. It also protects those who no longer take part in the fighting such as those who have been wounded or shipwrecked, who are sick, or who have been taken prisoner.

Protected people must not be attacked. They must be spared from physical abuse and degrading treatment. The wounded and sick must be collected and cared for. Detailed rules, including the provision of adequate food and shelter and legal guarantees, apply to those who have been taken prisoner or detained.

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Certain places and objects, such as hospitals and ambulances, are also protected and must not be attacked. International humanitarian law sets out a number of clearly recognisable emblems and signals which can be used to identify protected people and places. These include the **red cross** and **red crescent**.

What are the restrictions on Weapons and Tactics?

International humanitarian law prohibits all **means and methods of warfare** which:

- (a) fail to discriminate between those taking part in the fighting and those, such as civilians, who are not taking part in the fighting;
- (b) cause superfluous injury or unnecessary suffering;
- (c) cause severe or long-term damage to the environment.

International humanitarian law has thus banned the use of many weapons including exploding bullets, chemical and biological weapons and laser-blinding weapons.

When does International Humanitarian Law apply?

International humanitarian law only applies to armed conflicts. It does not cover internal disturbances such as isolated acts of violence. Nor does it regulate whether a State may actually use force: this is governed by an important, but distinct, part of

international law contained in the United Nations Charter. International humanitarian law only applies once a conflict has begun and applies equally to all sides regardless of who began the fighting.

International humanitarian law distinguishes between **international armed conflict** and **internal armed conflict**. International armed conflicts are those in which at least two States are involved. They are subject to an extensive range of rules including those contained in the four Geneva Conventions and the first Additional Protocol. A more limited range of rules apply to internal armed conflicts – notably those set out in Article 3 of each of the four Geneva Conventions and in the second Additional Protocol. However in an internal armed conflict, just as in an international armed conflict, all sides must comply with international humanitarian law.

It is important to differentiate between international humanitarian law and **human rights law**. While some of their rules are similar, these two bodies of law have developed separately and are contained in different treaties. In particular, human rights law, unlike international humanitarian law, applies in peacetime and many of its provisions may be suspended during an armed conflict.

Does International Humanitarian Law actually work?

Tragically there are countless examples of violations of inter-

national humanitarian law in conflicts around the world. Ever-increasingly the victims of warfare are civilians. However, there are important cases where international humanitarian law has made a difference in protecting civilians, prisoners, the sick and wounded and in restricting the use of barbaric weapons. Given that it applies during times of extreme trauma, the application of international humanitarian law will always pose severe difficulties: its effective application remains as urgent as ever.

A number of measures have been drawn up to promote respect for international humanitarian law. States are obliged to educate their armed forces, and the general public, about the rules of international humanitarian law. They must prevent and, where necessary, punish all violations of international humanitarian law. In particular they must enact laws to punish the most serious violations of the Geneva Conventions and Additional Protocols which are regarded as **war crimes**. Measures have also been taken at the international level. Tribunals have been created to punish acts committed in two recent conflicts and consideration is now being given to a permanent international court which will be able to punish war crimes.

Whether through Governments and organizations or as individuals, we can all make an important contribution to the application of international humanitarian law.



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PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 FOR THE PROTECTION OF WAR VICTIMS

International humanitarian law protects the victims of armed conflicts and limits the choice of methods and means of warfare. It applies in situations of international and non-international armed conflict.

The main instruments of international humanitarian law are the **Geneva Conventions of 12 August 1949 for the protection of war victims**. These treaties, which are universally accepted, protect the wounded, the sick, prisoners of war and civilians in enemy hands. They also protect medical services, namely medical personnel, medical units and establishments, and medical means of transport.

Although the four Geneva Conventions of 1949 are very comprehensive, they do not cover the full range of human suffering caused by war. There are gaps in important areas, for instance in the provisions relating to the behaviour of combatants and the protection of civilians from the effects of the hostilities.

To remedy these shortcomings, two Protocols were adopted in 1977. They supplement, but do not replace, the Geneva Conventions of 1949. They are the

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I);

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

* * * * *

Why was Protocol I applicable in situations of international armed conflict adopted?

Protocol I imposes constraints on the way in which military operations may be conducted. The obligations set forth in this instrument do not ask too much of those in charge of military operations, as they do not encroach upon the right of each State to defend itself by any legitimate means.

This treaty came into being because new methods of combat had been developed and the rules applicable to the conduct of hostilities had become outdated. Civilians are now entitled to protection from the effects of war.

What new elements does Protocol I contain?

Protocol I gives a reminder that the right of the parties to a conflict to choose **methods and means of warfare** is not unlimited and that it is prohibited to

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employ weapons, projectiles and any other device that may cause superfluous injury or unnecessary suffering.

Protocol I defines legitimate targets in case of military attack. Furthermore it

a) **prohibits**

- indiscriminate attacks and attacks or reprisals against
- the civilian population and individual civilians,
- objects indispensable to the survival of the civilian population,
- cultural objects and places of worship,
- works and installations containing dangerous forces,
- the natural environment;

b) **extends**

the protection accorded under the Geneva Conventions to all medical personnel, units and means of transport, both civilian and military;

c) **establishes**

an obligation to search for missing persons;

d) **reinforces**

the provisions concerning relief supplies for the civilian population;

e) **affords**

protection for the activities of civil defence organizations;

f) **specifies**

measures to be taken by States to facilitate the implementation of humanitarian law.

Violations of the prohibitions listed in sub-paragraph a) above are deemed to be grave bre-

ches of humanitarian law and are classified as **war crimes**.

Article 90 of Protocol I provides for the establishment of an **International Fact-Finding Commission** to investigate all alleged grave breaches or other serious violations of the Conventions and of Protocol I. All States Parties may accept the competence of the Commission, which has meanwhile been set up.

Why was Protocol II applicable to non-international armed conflicts adopted?

Most conflicts since the Second World War have been non-international. The only provision in the Geneva Conventions of 1949 applicable in this type of conflict is **Article 3 common** to all four Conventions which, although very detailed, is insufficient to resolve the serious humanitarian problems caused by internal conflicts.

The humane principles already introduced by common Article 3 into non-international conflicts are reinforced by Protocol II. In so doing, it in no way restricts the right of States or the means available to them to maintain or restore law and order on their national territory. Compliance with the provisions of Protocol II therefore does not imply recognition of any status for dissident armed forces.

What new elements does Protocol I contain?

Protocol II applies only to internal armed conflicts of a cer-

tain intensity in which dissident armed forces, under responsible command, exercise control over a part of the national territory.

Protocol II

a) **sets forth**

the fundamental guarantees to which all persons not, or no longer, taking part in hostilities are entitled;

b) **establishes**

the rights of persons whose liberty has been restricted, and the judicial guarantees of a fair trial;

c) **accords**

protection to the civilian population and to civilian objects;

d) **prohibits**

intentional starvation and forced displacement.

Protocol II also stipulates that the wounded must be protected and cared for, and that medical personnel and transports must be protected and respected. The red cross and red crescent emblem must likewise be respected, and its use must be restricted to those persons duly authorized to display it.

* * * * *

Additional Protocols I and II of 1977 are binding on a large number of States, but it is essential that they attain universal recognition, for only when all States have pledged compliance with their humanitarian rules, and are clearly aware of their mutual commitments, will it be possible to ensure equal protection for all the victims of all armed conflicts.



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SUMMARY OF PROVISIONS OF THE 1980 UN CONVENTION ON CERTAIN CONVENTIONAL WEAPONS (CCW)

The 1980 CCW Convention applies two general customary rules of international humanitarian law to specific weapons. These customary rules are (1) the prohibition of the use of weapons which are by their nature indiscriminate and (2) the prohibition of the use of weapons which cause unnecessary suffering or superfluous injury. The CCW Convention is a framework to which are added individual Protocols governing the use of specific weapons. New Protocols may be added when deemed appropriate by States Parties. The CCW Convention, while applying customary rules to specific weapons, does not reduce the obligation of States to refrain from the use of weapons not mentioned which would nonetheless violate the rules of international humanitarian law.

The "framework" Convention

The official title of this legally binding international instrument is the *"Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects"*. Its primary purposes are to protect civilians from the effects of weapons and to protect combatants from the infliction of suffering which exceeds that necessary for the achievement of a legitimate military objective.

The Convention and three of its four Protocols apply in international armed conflicts. Protocol II was amended in 1996 to apply also to non-international armed conflicts. States become party to the Convention six months after adhering to at least two of its Protocols. States Parties may initiate amendments to the Convention or its Protocols and may propose the addition of new Protocols. The first Review Conference of States Parties met in late 1995 and 1996 and adopted an amended Protocol II on Mines, Booby Traps and Other Devices and a new Protocol IV on Blinding Laser Weapons. A second Review Conference is to be held not later than 2001.

Protocol I – Non-Detectable Fragments

The use of any weapon the primary effect of which is to injure by fragments which are not detectable in the human body by X-rays is prohibited.

Protocol II – Mines, Booby Traps and Other Devices

This Protocol, as amended on 3 May 1996, applies in both international and non-international armed conflicts (*art. 1*) and *restricts* the use of landmines (both anti-personnel and anti-tank), booby traps and certain other explosive devices.

In the amended Protocol II "mines" are defined as munitions which are *designed* to be exploded by the presence, proximity or contact of the victim, whether a person or vehicle. "Anti-personnel mines" are those which are specifically designed to injure or kill persons. "Booby traps" are devices which are designed or adapted to kill or injure when a person disturbs or approaches an apparently harmless object (such as a door or vehicle). Anti-tank mines are regulated under the amended Protocol

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19, AVENUE DE LA PAIX - CH-1202 GENÈVE - TÉLÉPHONE : +41(22) 734 60 01 - TÉLÉFAX : +41(22) 733 20 57 - TÉLEX : 414 226 CCR CH - <http://www.icrc.org>

It's general rules and as mines "other than anti-personnel mines". "Other devices" refers to hand-emplaced munitions, including improvised explosive devices, which are designed to kill or injure and are activated either by hand, by remote control or by a timing device. (see definitions art. 2)

1. **General rules** which apply to all mines, booby traps and other devices include the following:

- It is prohibited to "direct" these weapons against civilians or civilian objects (art. 3.7)
- The indiscriminate use of these weapons is prohibited (art. 3.8).
- The use of these weapons, if of a nature to cause unnecessary suffering or superfluous injury, is prohibited (art. 3.3).
- Precautions, including advance warning, must be taken to protect civilians from the effects of these weapons (art. 3.10 & 3.11).
- Parties which use these weapons are responsible to maintain protective measures to exclude civilians or to clear them at the end of hostilities (arts. 3.2 & 10).
- The location of these weapons must be recorded and records kept of their location (art. 9 and technical annex).

2. All **anti-personnel mines must be detectable** using commonly available mine detection equipment (art. 4), so that mined areas can be more easily cleared and returned to civilian use. To this end all such mines must contain the equivalent of 8 grams of iron¹ (technical annex).

All anti-personnel mines must (art. 5 & technical annex) either (a) be kept within marked and fenced minefields which are monitored by military personnel for the purpose of keeping civilians out, or

(b) be equipped with self-destruct and self-deactivating mechanisms to ensure they do not

pose a long-term threat to the civilian population. Such mines must be sufficiently reliable so that at least 90% will have destroyed themselves within 30 days and no more than 1 in 1000 will be capable of functioning as a mine within 120 days².

3. All **remotely-delivered anti-personnel mines** must have self-destruct and self-deactivating features of the type described above (art. 6)³.

4. To the extent feasible **remotely-delivered anti-tank or vehicle mines** must be equipped with an effective self-destruction or self-neutralisation mechanism and a back-up self-deactivation feature (art. 6).

5. **Transfers** of prohibited mines, namely non-detectable anti-personnel mines, are prohibited. No mine may be transferred to a non-State entity and anti-personnel mines may not be transferred to States which are not bound by the Protocol, unless the non-party agrees to apply the Protocol (art. 8).

6. The use and transfer of mines which explode when detected by electromagnetic detectors is prohibited (art. 3.5 and 8).

7. States parties are to facilitate the fullest possible **exchange of technology and information** required for the implementation of the Protocol including, in particular, technologies for humanitarian mine clearance (art. 11).

8. United Nations missions and peacekeeping forces, missions of the International Committee of the Red Cross and certain missions of other humanitarian agencies are to be afforded specific types of **protection from the effects of mines and minefields** (art. 12).

9. States Parties are to impose domestic **penal sanctions** on

those who violate the Protocol and in so doing cause civilian death or serious injury (art. 14).

10. From its entry into force Parties are to hold regular **annual meetings** to review the operation of the Protocol, as amended, and to consider further improvements (art. 13).

Protocol III - Incendiary Weapons

Weapons primarily designed to injure through flame or heat may not be aimed against civilians or against military objectives which are located within a concentration of civilians. Neither may such weapons be used against forests or vegetation, unless these are being used to conceal combatants or military objectives.

Protocol IV - Blinding Laser Weapons

Laser weapons specifically designed to cause permanent blindness may not be used or transferred. Precautions shall be taken when using laser systems for other purposes in order to avoid causing permanent blindness.

¹ All anti-personnel mines produced after 1 January 1997 must be detectable.

² The detectability and self-destruction/deactivation requirements under paragraphs 2 and 3 of the technical annex may be deferred for a period of up to 9 years from entry into force of the amended Protocol if such deferral is declared at the time of adherence. Use of non-compliant mines must be minimized.

³ If implementation of self-destruction/deactivation requirements is deferred, such mines must either be self-destructing or self-deactivating.



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1997 CONVENTION ON THE PROHIBITION OF ANTI-PERSONNEL MINES AND ON THEIR DESTRUCTION

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction ("The Ottawa Treaty") is part of the international response to the widespread suffering caused by anti-personnel mines. The Convention is based on customary rules of international humanitarian law applicable to all States. These rules prohibit the use of weapons which by their nature do not discriminate between civilians and combatants or cause unnecessary suffering or superfluous injury. The Convention was opened for signature in Ottawa from 3 to 4 December 1997.

Why a ban on anti-personnel mines?

Anti-personnel mines cannot distinguish between soldiers and civilians and usually kill or severely mutilate their victims. Relatively cheap, small and easy to use, they have proliferated by the tens of millions, inflicting untold suffering and wreaking social and economic havoc in dozens of countries throughout the world. Because it is far easier to lay than to remove them, it has been difficult or impossible to use this weapon in accordance with the rules of international humanitarian law in most of the conflicts where they have been employed. In December 1996, 157 States supported a United Nations General Assembly resolution calling for the urgent negotiation of a legally binding ban on these weapons.

What are the basic obligations contained in the Ottawa Treaty?

States adhering to this treaty must *never under any circumstances use, develop, produce, stockpile or transfer anti-personnel mines* or help anyone else to do so. They must also *destroy existing anti-personnel mines*, whether in stockpiles or in the ground, within

a fixed time period. A small number of these mines may be retained for the sole purpose of developing mine clearance and destruction techniques and training people in their use.

Which mines are affected by this treaty?

Anti-personnel mines are *designed to be placed on or near the ground and detonated by the presence, proximity or contact of a person*. It was the understanding of the negotiators that "improvised" devices produced by adapting other munitions to function as anti-personnel mines are also banned by the treaty. The Ottawa Treaty prohibits anti-personnel mines only. It does not affect (a) anti-tank or anti-vehicle mines (regulated by the 1980 UN Convention on Certain Conventional Weapons and the general rules of international humanitarian law); (b) "anti-handling devices" attached to an anti-vehicle mine to prevent its removal or (c) "command-detonated" munitions which can only be triggered manually by a combatant and cannot be detonated simply by the presence, proximity or contact of a person.

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When and how will existing anti-personnel mines be destroyed?

Stockpiled anti-personnel mines must be destroyed within four years of entry into force of the Convention for a particular State. As for mines in the ground, whether in minefields or elsewhere, they must be destroyed within 10 years after entry into force. Pending such destruction every effort must be made to identify mined areas and to have them marked, monitored and protected by fencing or other means to ensure the exclusion of civilians. If a State cannot complete the destruction of emplaced mines within 10 years it may request a meeting of the States Parties to extend the deadline and to assist it in fulfilling this obligation.

How will the treaty help mine victims?

The treaty is a comprehensive response to the landmines crisis. Not only are States Parties prohibited from using anti-personnel mines, but those able to do so agree to provide assistance for mine clearance, mine awareness programs and the care and rehabilitation of mine victims. Mine affected States have a right to seek and receive such assistance directly from other Parties to the treaty and through the United Nations, regional or national organizations, components of the International Red Cross and Red Crescent Movement or non-governmental organizations. These cooperative aspects of the Convention will play as great a role as the ban it imposes in providing an effective international response to the suffering caused by these weapons.

How will compliance with the treaty be monitored?

The Ottawa Treaty includes a variety of measures designed to promote confidence that its provisions are being respected and to deal with suspected violations. States are required to report annually to the United Nations Secretary-General on all stockpiled anti-personnel mines, mined areas, mines retained for training purposes, destruction of mines and measures taken to prevent civilians from entering mined areas. To facilitate mine clearance, States must also provide detailed technical information about mines they have produced in the past.

If there are concerns about a State's compliance with the treaty, clarification may be sought through the UN Secretary General and if necessary a meeting of States Parties may be held. This meeting can decide to send an obligatory fact-finding mission to relevant territory of the State concerned for up to 14 days. On the basis of the mission's report the meeting of States Parties may propose corrective actions or legal measures in accordance with the UN Charter.

What must a country do to implement the Ottawa Treaty?

Until its entry into force, States may sign the treaty in Ottawa or at UN Headquarters in New York and then express their consent to be bound by transmitting a ratification (or similar) instrument to the treaty depositary, the UN Secretary General. States which have signed the treaty must not take any action which would undermine its purpose. The treaty enters into force six months after the fortieth State has expressed its consent to be

bound. Before or after entry into force States may adhere directly to the treaty, without signing, by transmitting an instrument of accession to the depositary.

The treaty also requires governments to take national legal and administrative measures, including the imposition of penal sanctions, to ensure respect for its provisions by persons or on territory under their jurisdiction or control. This may involve the adoption of criminal legislation. It may also require administrative instructions to armed forces and changes in military planning.

Can a State ban anti-personnel mines and adhere to other agreements which permit mine use?

Earlier rules regulating the use of anti-personnel mines are contained in Protocol II to the 1980 UN Convention on Certain Conventional Weapons. This regulates the use of all types of mines and similar devices, including mines used against tanks. States which adhere to the Ottawa Treaty are advised to adhere also to the 1980 Convention. This Convention's three other Protocols provide important rules on the use or prohibition of other arms, such as blinding laser weapons. Adherence to the 1980 Convention will enable a State to invoke its provisions, such as those requiring a party which uses mines to remove them at the end of hostilities, in any conflict with a State which has adhered to the 1980 Convention but not to the Ottawa Treaty.

Ratification kits for both the Ottawa Treaty and the 1980 Convention are available from the ICRC.



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IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM LAW TO ACTION

International humanitarian law, also called the law of war, sets out detailed rules which seek to limit the effect of armed conflict. In particular, it protects those who are not, or are no longer, taking part in the fighting, and sets limits on the means and methods of warfare. Humanitarian law is a universal set of rules. Its principal instruments have been accepted by nearly every State in the world. However adhering to these instruments is only a first step. Efforts must be made to implement humanitarian law - to turn the rules into action.

What is implementation?

Implementation covers all those measures which must be taken to ensure that the rules of international humanitarian law are fully respected. However, it is not only necessary to apply these rules once fighting has begun. There are also measures which must be taken outside areas of conflict and in time of peace as much as in time of war. These measures are necessary to ensure that:

- all people, both civilian and military, are familiar with the rules of international humanitarian law;
- that the structures, administrative arrangements and personnel required for the application of humanitarian law are in place;
- that violations of humanitarian law are prevented and, where necessary, punished.

Such measures are essential to ensure the effective application of international humanitarian law.

Who should implement?

All **States** have a clear obligation to adopt and apply measures implementing humanitarian law. These measures may need to be taken by one or more government ministries, the legislature, the courts, the armed forces, or other State organs. A role may also be played by professional and educational bodies, voluntary

organizations and the National Red Cross or Red Crescent Society.

Measures have also been taken at the **international level** to deal with violations of humanitarian law. An International Fact-Finding Commission has been established, and States are encouraged to use its services. Tribunals have been set up to deal with violations in Rwanda and the former Yugoslavia and the establishment of a permanent international criminal court is under discussion. However, it is States which continue to have the primary responsibility to ensure the effective implementation of international humanitarian law, and which must first and foremost adopt measures at the **national level**.

What needs to be done?

International humanitarian law - in particular the **1949 Geneva Conventions** their **Additional Protocols of 1977** and the **1954 Hague Convention on Cultural Property** - sets out a range of measures which must be adopted. The principal measures are:

- (1) to prepare national translations of the Conventions and Protocols;
- (2) to disseminate the texts of the Conventions and Protocols as widely as possible - both within the armed forces and generally;
- (3) to suppress all violations of the Conventions and Protocols and in particular to adopt criminal legislation punishing war crimes;
- (4) to ensure that persons and places protected by the Conventions and Protocols are properly identified, located and protected;
- (5) to adopt measures to prevent the misuse of the red cross, the red crescent and other signs and emblems provided for on the Conventions and Protocols;
- (6) to ensure the protection of fundamental and procedural guarantees during time of armed conflict;
- (7) to provide for the appointment and training of persons qualified in international humanitarian law including legal advisers within the armed forces;
- (8) to provide for the establishment and/or regulation of:
 - National Red Cross and Red Crescent Societies and other voluntary aid societies,
 - civil defence organizations,
 - national Information Bureaux;
- (9) to take account of international humanitarian law in the location of military sites, and in the development and adoption of weapons and military tactics;
- (10) to provide, as necessary, for the establishment of hospital zones, neutralized zones, security zones and demilitarized zones.

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The provisions of the Conventions and Protocols covering these measures are set out in the table below.

Some of these measures will require the adoption of legislation or regulations. Others will require the development of educational programmes, the recruitment and/or training of personnel, the preparation of identity cards and other materials, the establishment of special structures or units, and the introduction of planning and administrative procedures. All the measures are essential to ensure the effective implementation of humanitarian law.

How can these measures be achieved?

Careful planning and regular consultation is the key to ensuring effective implementation. Many States have established **national international humanitarian law committees**, or similar bodies, which bring together government ministries, national organizations, professional bodies and others with responsibilities or expertise in the field of implementation. Such bodies have generally been found to be an efficient and valuable means of promoting national implementation. In

some countries, the **National Red Cross and Red Crescent Societies** may also be able to offer assistance in the field of implementation.

The **International Committee of the Red Cross**, through its **Advisory Service on International Humanitarian Law**, is available to provide advice and documentation to governments on national implementation: it can be contacted through the nearest ICRC delegation or at the address given above.

KEY ARTICLES REQUIRING THE ADOPTION OF NATIONAL IMPLEMENTATION MEASURES

	Geneva Convention				Additional Protocol		Hague Convention
	I	II	III	IV	I	II	
Translation	48	49	41, 128	99, 145	84		26
Dissemination & Training	47	48	41, 127	99, 144	80, 82-83, 87	19	25
Violations							
- General	49-54	50-53	129-132	146-149	85-91		28
- War crimes	49-50	50-51	128-129	146-147	11, 85-89		
- Compensation					91		
Protection							
- Medical and religious persons	40, 41	41, 42		20	15, 18		
- Medical transport and sites	18, 36, 39, 42-44	22, 24-27, 39, 41, 43		18, 21-22	12, 18, 23, Annex I	12	
- Procedural guarantees			5, 15-17, 41, 82-90, 95-108	31-33, 35, 37, 43, 64-78, 99-101, 117-126	11, 44-45, 75-77	4-6	
- Cultural property					53	16	3, 10, 12, 17
- Dangerous forces					56	15	
- Identity cards	40, 41, Annex II	42, Annex	17, Annex IV	20	79, Annex I		
- Other cards			70-71, 120, Annex IV	106-107, Annex III			
Use/Misuse of Emblems & signals	44, 53-54	43-45			18, 37-39, 56, 66, Annex I	12	6, 10, 17
Fundamental guarantees	3, 12	3, 12	3, 13-17	3, 27-34	11, 75-77	4-6	
Specialists & Advisers							
- Qualified persons					6		25-27
- Legal advisers					82		
Organizations							
- National Societies	26, 44			63	81	18	
- Civil Defence				63	61-67		
- Information bureaux			122-124	136-141			
- Mixed Medical Commission			112, Annex II				
Military Planning							
- Weapons/Tactics					36		
- Military sites					56, 58		
Protected Zones and Localities	23, Annex I			14, 15	60, Annex I		

In addition to ensuring compliance with the rules of international humanitarian law in areas of conflict or occupation, States are required to take a number of legislative, regulatory and administrative measures. Most of these measures must be adopted or prepared in peacetime as well as in time of conflict.



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STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The United Nations has considered the idea of establishing a permanent international criminal court at various times ever since the end of the Second World War. In 1993 and 1994, it set up two ad hoc tribunals to punish serious violations of international humanitarian law committed, respectively, in the former Yugoslavia and Rwanda. A series of negotiations to establish a permanent international criminal court that would have jurisdiction over serious international crimes regardless of where they were committed started up in 1994 and led to the adoption of the Statute of the International Criminal Court (ICC) in July 1998 in Rome. This accomplishment is the culmination of years of effort and shows the resolve of the international community to ensure that those who commit grave crimes do not go unpunished. The Statute will enter into force once it is ratified by 60 States.

Crimes within the ICC's jurisdiction

• *War crimes*

Under Article 8 of the Statute, the ICC has jurisdiction in respect of *war crimes*. These include most of the serious violations of international humanitarian law mentioned in the 1949 Geneva Conventions and their 1977 Additional Protocols, whether committed during international or non-international armed conflicts.

A number of offences are specifically identified as war crimes in the Statute, including:

- rape, sexual slavery, enforced prostitution, forced pregnancy or other forms of sexual violence;
- using children under the age of 15 to participate actively in hostilities.

Certain other serious violations of international humanitarian law, such as unjustifiable delay in the repatriation of prisoners and indiscriminate attacks affecting the civilian population or civilian objects, which are defined as grave breaches in the 1949 Geneva Conventions and 1977 Additional Protocol I, are not specifically referred to in the Statute.

There are only a few provisions concerning certain weapons whose use is prohibited under various existing treaties, and these do not apply with respect to non-international armed conflicts.

• *Genocide*

The ICC has jurisdiction over the crime of *genocide* under Article 6 of the Statute, which reiterates the terms used in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

This crime is defined in the Statute as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

- killing members of the group;
- causing serious bodily or mental harm to members of the group;
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- imposing measures intended to prevent births within the group;
- forcibly transferring children of the group to another group.

• *Crimes against humanity*

The ICC also has jurisdiction over *crimes against humanity*. Under Article 7 of the Statute, these crimes comprise any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

- murder;
- extermination;
- enslavement;
- deportation or forcible transfer of the population;
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- torture;
- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

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- enforced disappearance of persons;
- the crime of apartheid;
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

• **Aggression**

As stated in Article 5 (2) of the Statute, the ICC will have jurisdiction over the *crime of aggression* once a provision defining this crime and setting out the conditions for the exercise of such jurisdiction is adopted.

When can the ICC exercise its jurisdiction?

As soon as a State becomes a party to the Statute, it accepts the jurisdiction of the ICC in respect of the above crimes. Under Article 25 of the Statute, the Court has jurisdiction over individuals and not States.

The ICC may exercise its jurisdiction at the instigation of the Prosecutor or a State Party, providing one of the following States is bound by the Statute:

- the State on whose territory the crime was committed; or
- the State of which the person accused of the crime is a national.

A State that is not a party to the Statute may make a declaration to the effect that it accepts the Court's jurisdiction.

Under the collective security framework of Chapter VII of the UN Charter, the Security Council may refer a situation to the Prosecutor for investigation. It may also request that no investigation or prosecution commence or proceed for a renewable period of 12 months.

The exercise of jurisdiction by the ICC over war crimes is limited under Article 124 of the Statute.

This provision allows a State, on becoming a party to the Statute, to declare that it does not accept the jurisdiction of the Court for a period of seven years with respect to war crimes that have allegedly been committed by its own nationals or on its own territory.

National enforcement systems and the ICC

Under the 1949 Geneva Conventions and 1977 Additional Protocol I, States must prosecute persons accused of war crimes before their own national courts or extradite them for trial elsewhere. Nothing in the ICC Statute releases States from their obligations under existing instruments of international humanitarian law or under customary international law.

By virtue of the principle of complementarity, the jurisdiction of the ICC is intended to come into play *only* when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. To benefit from this principle, States will need to have adequate legislation enabling them to prosecute such criminals.

Furthermore, States party to other instruments of international humanitarian law are still required to enact implementing legislation giving effect to their obligations under those instruments.

What is needed to ensure the ICC's effectiveness?

- States should ratify the ICC Statute as soon as possible since universal ratification is essential to allow the Court to exercise its jurisdiction effectively and whenever necessary.
- States should refrain from making use of the opting-out clause (Article 124 of

the Statute).

- States should carry out a thorough review of their national legislation to ensure that they can take advantage of the complementarity principle on which the ICC is founded and try individuals under their own legal systems for offences that fall within the Court's jurisdiction.

- States should assist each other and the ICC in connection with proceedings relating to crimes that come within the Court's jurisdiction. This will require the enactment or amendment of legislation to ensure any necessary transfer of those accused of such crimes.

Towards a comprehensive enforcement system

National courts will continue to play an important and primary role in the prosecution of alleged war criminals. Moreover, the establishment of the ICC does not in any way prejudice the work undertaken by the aforesaid ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, which were set up to punish crimes relating to specific situations (in the first instance, those committed in the former Yugoslavia since 1991, and in the second instance, those committed in Rwanda or by Rwandan nationals in neighbouring States in 1994).

The establishment of the International Criminal Court is a further step towards the **effective punishment** of persons responsible for having committed the world's gravest crimes. States are urged to ratify the Court's Statute so that these persons cease to enjoy impunity.



COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

NATIONAL COMMITTEES FOR THE IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the principal treaties governing the care and protection of the victims of armed conflict. In order to secure the guarantees established by these instruments, it is fundamental that States implement their provisions to the fullest extent possible. Such implementation requires States to enact a number of internal laws and regulations. For example, States must adopt rules addressing the punishment of violations, the use and protection of the red cross and red crescent emblems, the fundamental rights afforded to protected persons, and other various obligations. In addition, States are bound by a duty to disseminate the Conventions and Protocols as widely as possible. Due to the broad range of issues associated with these responsibilities, comprehensive implementation of the rules of international humanitarian law (IHL) requires the co-ordination and assistance of the appropriate governmental departments and other institutions.

The Functions of a National Humanitarian Law Committee

In order to facilitate this process, some States have created interministerial working groups, often called National Interministerial Committees for the Implementation of International Humanitarian Law or National Humanitarian Law Committees. Their purpose is to advise and assist the government in the implementation and dissemination of international humanitarian law. The formation of such committees is recognised as an important step in ensuring the effective application of IHL, and has been advocated by the International Committee of the Red Cross, the Intergovernmental Group of Experts for the Protection of War Victims, and supported at the Twenty-sixth International Conference of the Red Cross and Red Crescent (Geneva, 1995).

A national committee for the implementation of IHL need not have a specific structure. Its design and objectives are to be determined by the State at the time of the committee's formation. However, since its purpose is to further the implementation and dissemination of IHL at the national level, the committee should possess the following characteristics:

- the committee should be able to evaluate existing national law in relation to the obligations created by the Conventions, Protocols, and other IHL instruments;
- the committee should be in a position to make recommendations to further implementation as well as monitor and ensure the appli-

cation of the law. This can consist of proposing new legislation or amendments to existing law, co-ordinating the adoption and content of administrative regulations, as well as providing guidance on the interpretation and application of humanitarian rules;

- the committee should play an important role in encouraging the dissemination of IHL. It should have the capacity to conduct studies, propose activities, and assist in the circulation of IHL to all segments of the population. Consequently, the committee should have an association with the instruction of IHL to the armed forces, the teaching of IHL at various levels of education, as well as the distribution of basic IHL to the population at large.

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The Composition of the Committee

In light of these functions, a national humanitarian law committee requires a wide range of expertise. Depending upon the exact role afforded by its mandate, the committee must involve representatives of the government ministries concerned with the application of humanitarian law. These may include representatives of the ministries of Defence, Foreign Affairs, Internal Affairs, Justice, Health, Finance, Education, and possibly others. In addition, representatives of legislative committees and members of the judiciary may also be of value to its work.

It is also important that such a committee include other "qualified persons." These can be individuals, not associated with government ministries, who are appointed for their legal, educational, communications, or other expertise. Thus, the committee should consider specialists with IHL knowledge from universities, especially the faculties of law, humanitarian organisations, and possibly the electronic and print medias.

The Role of the National Red Cross/Red Crescent Society

The National Red Cross/Red Crescent Society is already likely to be involved in some of the activities and functions mentioned above. Often, the National Society will possess valuable knowledge and experience which can contribute to the committee's objectives. In some States where such committees exist, the National Society requested its estab-

lishment and thus, was instrumental in its formation. Further, in several States the National Society acts as the secretariat to the committee. In light of the position and experience of the National Society, it is important that a national committee include their representative(s) among its members.

The Establishment a National Humanitarian Law Committee

The procedure for creating a national humanitarian law committee will depend upon the structure and processes of the State. Generally, the executive power of the government will have the authority to establish such a body.

Implementing International Humanitarian Law

The creation of a national committee can be a useful and important step in ensuring the comprehensive implementation of international humanitarian law. It represents a committed effort to secure the essential guarantees afforded to the victims of armed conflict. In addition, it reflects that a State has undertaken to fulfil the fundamental obligations to respect and ensure respect for IHL.

The creation of such a committee is not mandated by the Geneva Conventions or their Additional Protocols. Its formation, functioning, and composition are issues deter-

mined by the establishing State. Consequently, there is considerable flexibility in the role and characteristics a committee may be granted. Some of the most important features have been outlined above. A State is free to consider other characteristics and functions to complement the committee's objectives.

It is important to emphasise that the full implementation of IHL is an ongoing process and is not completed solely by the adoption of laws and regulations. Comprehensive implementation involves monitoring the application and dissemination of the law, as well as keeping informed of and contributing to its development. In light of these observations, it is recommended that a national humanitarian law committee be a permanent body and not an *ad hoc* commission.

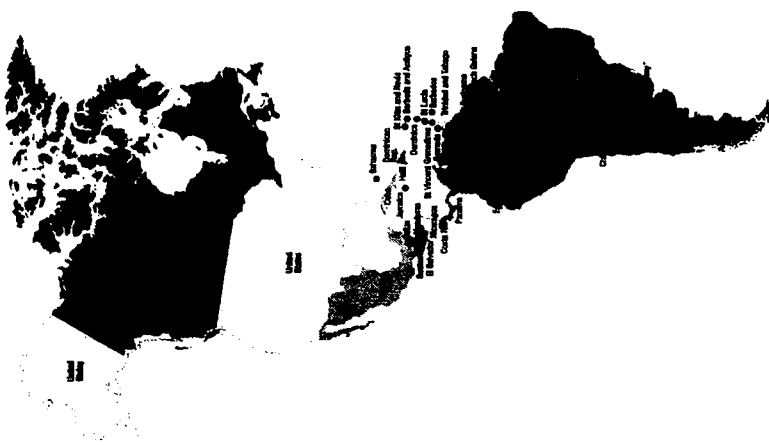
It is also recommended that, once established, a committee develop relationships with other national committees and the International Committee of the Red Cross. Representatives of the national committees should meet regularly and share information concerning current activities or past experiences. This is particularly important among States within the same geographic region or with similar political/legal systems.

For its part, the International Committee of the Red Cross plans to increase and develop its co-operation with national committees concerned with the implementation of IHL. It also stands ready to provide assistance or further information to States interested in forming such committees.

STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS

This map shows which States were party to the 1949 Geneva Conventions and to their 1977 Additional Protocols, as at 31 December 1998. It also indicates which States had made the optional declaration under Article 90 of the 1977 Additional Protocol I, recognizing the competence of the International Fact-Finding Commission.

N.B. The names of the countries given on this map may differ from their official names.



States party to the 1949 Geneva Conventions:	188
States party to the 1949 Geneva Conventions and to the 1977 Additional Protocol I:	152
States party to the 1949 Geneva Conventions and to the 1977 Additional Protocol II:	144
States party to the 1949 Geneva Conventions and to both Additional Protocols:	142
States having made the declaration under Article 90 of the 1977 Additional Protocol I:	53
States not party to the Geneva Conventions and Protocols	[]

Commonwealth Member States
IHL Treaties - participation as at 31.01.1999

	Geneva		Add.		Add.		IFFC		CCW		Hague		Hague		Ottawa		ICC	
	Conv.	Prot. I	Prot. II	Art. 90	PI-III	laser	P II	mine	Conv.	Prot.	Conv.	Prot.	Conv.	Prot.	Conv.	Prot.	Statute	1998
	1949	1977	1977	1977	1980	1980	1980	1980	1980	1980	1980	1980	1980	1980	1980	1980	1980	1980
ANTIGUA AND BARBUDA	1986	1986	1986												1997 sign.		1998 sign.	
AUSTRALIA	1958	1991	1991	1992	1983	1997	1997	1997	1984						1999		1998 sign.	
BAHAMAS	1975	1980	1980												1998			
BANGLADESH	1972	1980	1980												1998 sign.			
BARBADOS	1968	1990	1990												1999			
BELIZE	1984	1984	1984												1998			
BOTSWANA	1968	1979	1979												1997 sign.			
BRITAIN	1957	1998	1998		1995										1998		1998 sign.	
BRUNEI DARUSSALAM	1991	1991	1991												1997 sign.			
CAMEROON	1963	1984	1984						1961	1961					1997 sign.		1998 sign.	
CANADA	1965	1990	1990	1990	1994	1998	1998	1998	1998	1998					1997		1998 sign.	
CYPRUS	1962	1979	1996		1988				1964	1964					1997 sign.		1998 sign.	
DOMINICA	1981	1996	1996												1997 sign.			
FIJI	1971														1998			
GAMBIA	1966	1989	1989												1997 sign.		1998 sign.	
GHANA	1958	1978	1978						1960	1960					1997 sign.		1998 sign.	
GRENADA	1981	1998	1998												1998			
GUYANA	1968	1988	1988												1997 sign.			
INDIA	1950				1984				1958	1958								
JAMAICA	1964	1986	1986												1998			
KENYA	1966														1997 sign.			
KIRIBATI	1989																	
LESOTHO	1968	1994	1994												1998		1998 sign.	
MALAWI	1968	1991	1991												1998			
MALAYSIA	1962								1960	1960					1997 sign.			
MALDIVES	1991	1991	1991												1997 sign.			
MALTA	1968	1989	1989	1989	1995										1997 sign.		1998 sign.	

Commonwealth Member States
IHL Treaties - participation as at 31.01.1999

	Geneva	Add.	Add.	Prot. I	Prot. II	IFFC	CCW	CCW	CCW	Hague	Hague	Ottawa	ICC
	Conv.	1949	1977	1977	1977	Art. 90	PI-III	laser	mine	1954	1954	1997	Statute
													1998
MAURITIUS	1970	1982	1982	1982			1996					1997	1998 sign.
MOZAMBIQUE	1983	1983										1998	
NAMIBIA	1991	1994	1994	1994	1994							1998	1998 sign.
NAURU (special member)													
NEW ZEALAND	1959	1988	1988	1988	1988		1993	1998	1998			1999	1998 sign.
[NIGERIA]	1961	1988	1988	1988			1985			1961	1961		
PAKISTAN	1951									1959	1959		
PAPUA NEW GUINEA	1976												
SAMOA	1984	1984	1984	1984	1984							1998	1998 sign.
SEYCHELLES	1984	1984	1984	1984	1984	1992						1997 sign.	
SIERRA LEONE	1965	1986	1986	1986	1986							1998 sign.	1998 sign.
SINGAPORE	1973												
SOLOMON ISLANDS	1981	1988	1988	1988	1988							1999	1998 sign.
SOUTH AFRICA	1952	1995	1995	1995	1995		1995	1998	1998			1998	1998 sign.
SRI LANKA	1959												
ST KITTS AND NEVIS	1986	1986	1986	1986	1986							1998	
ST LUCIA	1981	1982	1982	1982	1982							1997 sign.	
ST VINCENT AND GRENADINES	1981	1983	1983	1983	1983							1997 sign.	
SWAZILAND	1973	1995	1995	1995	1995							1998	
TANZANIA	1962	1983	1983	1983	1983					1971	1971	1997 sign.	
TONGA	1978												
TRINIDAD AND TOBAGO	1963											1998	
TUVALU (special member)	1981												
UGANDA	1964	1991	1991	1991	1991		1995					1997 sign.	
VANUATU	1982	1985	1985	1985	1985							1997 sign.	
ZAMBIA	1966	1995	1995	1995	1995							1997 sign.	1998 sign.
ZIMBABWE	1983	1992	1992	1992	1992							1998	1998 sign.

Note: Each State party to the CCW (1980) is also party to the three first Protocols of 1980

**PRINCIPAL TREATIES
OF INTERNATIONAL HUMANITARIAN LAW
(and participation as at 31.01.1999)**

Geneva Conventions of 1949 and their Additional Protocols of 1977

188 States party to the Geneva Conventions
152 States party to Protocol I
144 States party to Protocol II

Additional Protocol I - International Fact-Finding Commission (IFFC)

53 States have made a declaration pursuant to Article 90 of
Additional Protocol I recognizing the competence of the IFFC

1954 Hague Cultural Property Convention and its Protocol

95 States party to the Convention
79 States party to the Protocol

1980 Conventional Weapons Convention and its four Protocols

73 States party to the Convention
31 States party to amended Protocol II (landmines)
34 States party to new Protocol IV (blinding laser weapons)

1997 Ottawa Convention

64 States party to the Convention (131 signatures)

1998 Statute of the International Criminal Court

74 States have signed the ICC Statute
(first ratification on 02.02.99)



COMITÉ INTERNATIONAL DE LA CROIX-ROUGE

GENEVA CONVENTIONS ACTS: BACKGROUND INFORMATION NOTE

ADVISORY SERVICE

on international humanitarian law

GENEVA CONVENTIONS ACTS: BACKGROUND INFORMATION NOTE

1. Introduction

All States who are party to the four 1949 Geneva Conventions must adopt a range of national implementation measures. In particular they must ensure that their national laws provide for the punishment of grave breaches of the Conventions, regulation of the use of the red cross, red crescent and other emblems, and the protection of the fundamental guarantees. States who are also parties to the two 1977 Additional Protocols must, in addition, take account of similar obligations arising under these treaties in their national legislation.

Most countries need to introduce specific legislation, or amendments to existing legislation, to ensure that they have complied with their obligations under the Conventions and Protocols. Even where international law is directly applied as part of the legal system, it is usually necessary to adopt implementing legislation to establish, for example, clear legal procedures and penalties for violations.

2. Geneva Conventions Acts

Many countries with a **common law** tradition have adopted a Geneva Conventions Act to provide for the implementation of their obligations under the Geneva Conventions and Additional Protocols. Over 20 countries have adopted such legislation including: Australia, Botswana, Canada, India, Ireland, Kenya, Malawi, Malaysia, New Zealand, Nigeria, Papua New Guinea, Seychelles, Singapore, Uganda, the United Kingdom and Zimbabwe. The wording and structure of each country's Geneva Conventions Act is generally similar.

Some countries, have amended their Geneva Convention Act, through a Geneva Conventions (Amendment) Act, to provide in addition for implementation of the Additional Protocols. These include: Australia, Canada, New Zealand and the United Kingdom. Countries which have adopted a Geneva Conventions Act and subsequently adhere to the Additional Protocols will need to adopt a Geneva Conventions (Amendment) Act to provide for implementation of the Protocols. Countries which are party to both the Conventions and the Protocols and have not yet adopted any legislation will need to adopt a consolidated version of the Geneva Conventions Act which includes provisions implementing the Protocols.

Attached, as examples, are Australia's original Geneva Conventions Act 1957, Geneva Conventions (Amendment) Act 1991 (providing for implementation of Additional Protocol I) and the consolidated version of the 1957 Act which takes account of the 1991 amendments and provides for implementation of both the Conventions and Additional Protocol I.

3. Provisions of the Geneva Conventions Acts

The following outline of the provisions of a typical Geneva Conventions Act refers to the consolidated version of the Australian legislation. It sets out some explanatory remarks, together with references to the relevant provisions of the Geneva Conventions ("GCI", "GCII" etc.) and the Additional Protocols ("PI", "PII"). National references in the text will clearly need to be modified as necessary if adapting the text for use in another country.

It should be stressed that it is for each State party to ensure that it has fully implemented its obligations under the Geneva Conventions and Additional Protocols, having regard to its legal system, constitution, and other legislative provisions. The attached texts of the Australian legislation and the following comments are for general guidance only. They do not indicate an endorsement of the approach followed as the most suitable means of implementing the Conventions and Protocols or an evaluation of the adequacy of the legislation in giving effect to all the relevant obligations. It should also be recalled that there are other obligations arising under the Conventions and Protocols which require implementation through administrative action.

* * *

LONG TITLE

The title refers to all four Geneva Conventions of 1949 but only to the first of the two Additional Protocols of 1977. The long titles of the Acts of a number of countries (e.g. Canada, New Zealand and United Kingdom) refer to both the First and Second Additional Protocols. While States may not always require primary legislation to implement the Second Additional Protocol, the inclusion of its name in the long title (and of its text in the schedules to the Act) is encouraged: see discussion of the Schedules at pg. 8 below.

PART I: PRELIMINARY

Section 1: Title of the act

Section 2: Date of entry into force

Where a State has become a party to the Conventions (and Protocols) it is already obliged to enact implementing legislation: the Act should therefore enter into force as soon as possible. Where a State is amending its existing Geneva Conventions Act, prior to adherence to the Additional Protocols, the amendments should enter into force as soon as the State becomes bound by the Protocols i.e. six months after depositing its instrument of ratification or accession (see PI, Article 95(2)).

Sections 3, 4 : Repealed in the Australian legislation

Section 5: Interpretation

This includes definitions of terms used in the Act including the full official titles of the Conventions and Protocol set out in the schedule. It also defines "protected prisoner of war", "protected internee" and "protecting power". These terms, which are relevant to Part III of the Act, refer in particular to GCIII Articles 4 (prisoners of war), Articles 8 and 10 (protecting powers and substitutes); GC IV Article 4 (protected persons), Articles 9 and 11 (protecting powers and substitutes); PI Article 5 (protecting powers and substitutes), Articles 44, 45 (prisoners of war).

The section also provides for the Conventions and Protocol I to be construed in accordance with any reservations and declarations made by the State at the time of ratification/accession. Where declarations or reservations are made, it is important to ensure that the court is able to take them into account in interpreting the State's obligations.

Section 6: Application

It is important to ensure that the Act applies to a State's entire territory. In relation to punishment of grave breaches it must also have extraterritorial effect (see section 7 below).

PART II: PUNISHMENT OF OFFENDERS

Section 7: Punishment of Grave Breaches

The four Geneva Conventions and their First Additional Protocol define certain serious violations, committed in relation to persons or property protected by the Conventions and Protocol, as "grave breaches". See GCI Article 50; GCII Article 51; GCIII Article 130; GCIV Article 147; PI Articles 11 (4) and 85.

States are obliged to enact criminal legislation punishing those who have committed, or ordered to be committed, grave breaches. States must search for all persons alleged to have committed such violations and either bring them for trial before their own courts or extradite them to another State party. They must do so on the basis of universal jurisdiction - that is, regardless of the nationality of the offender, or the place of the offence. See GCI Article 49; GCII Article 50; GCIII Article 129; GCIV Article 146.

The grave breaches regime is a key element in deterring and punishing serious violations of international humanitarian law. Its legislative implementation is an important obligation for all State Parties.

In many States there is a presumption that the criminal law only applies to acts committed in the territory of that State. It is therefore important to provide expressly for universal jurisdiction, making clear that the section applies both within and outside the territory (subsection 1) and regardless of nationality or citizenship (subsection 3).

Rather than setting out its own definition of grave breaches, subsection 2 refers to the definitions in the Conventions and Protocol I (as set out in the Schedules to the Act). In addition to defining the *actus reus*, these treaty provisions also refer to a *mens rea* of "wilfulness" (although there is some question as to whether this *mens rea* applies to all grave breaches).

There does not yet appear to be any case law arising under a Geneva Conventions Act as to how "wilfulness" is to be construed. Given that the term is used in an international agreement it is not clear that it should have the same meaning as in other domestic statutes or case law. The ICRC commentary on Additional Protocol I defines "wilfully" as meaning that *"the accused must have acted consciously and with intent, i.e. with his mind on the act and its consequences, and willing them ("criminal intent" or "malice aforethought"); this encompasses the concepts of "wrongful intent" or "recklessness", viz. the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered"*.

It is important to ensure that the scope of offences also applies to those who order the commission of grave breaches. Subsection (1) refers to a person who "aids, abets or procures the commission by another person" of a grave breach. Under Protocol I certain omissions also constitute grave breaches and this is specified in subsection 2(e)(i).

Subsection 4 stipulates the applicable penalties. These should reflect the seriousness of the offences.

Subsection 5 has been deleted in the Australian legislation.

Subsection 6 provides that the indictment must be in the name of the Attorney General or Director of Public Prosecutions. Other Geneva Conventions Acts impose similar requirements. It should be stressed that there is a clear obligation to search for, and try or extradite, those alleged to have committed grave breaches. The requirement of the consent of the Attorney General, Director of Public Prosecutions or equivalent officer may avoid vexatious prosecutions or the bringing of actions which are not founded in law. It must not however lead to the intrusion of political considerations or a failure to comply with the obligation to search for and try or extradite an alleged offender.

Subsection 7 provides for the application of various legal safeguards set out in section 12 of the Act. This is intended to give effect to the requirement (see, e.g., GCI Article 49, paragraph 4), that those tried for grave breaches must at least have the same safeguards of proper trial and representation as are provided for prisoners of war in the Third Geneva Convention.

Internal Armed Conflicts:

The four Geneva Conventions and the First Additional Protocol regulate **international** armed conflicts and the grave breaches regimes therefore only apply to acts committed in such conflicts. **Internal** armed conflicts are regulated by Article 3 common to each Convention and Additional Protocol II. States must repress violations of these provisions but there is no obligation to enact criminal law or to do so on the basis of universal jurisdiction (i.e. regardless of the place of the offence or nationality of the offender).

Today the majority of serious violations of international humanitarian law are committed in internal conflicts. Moreover it is now accepted that States may exercise universal jurisdiction over serious violations committed in internal armed conflict. While some violations of Common Article 3 or Protocol II may be covered by general criminal law, this will usually only apply to acts committed by a national or on the State's territory; moreover general criminal law may not cover all violations. The ICRC therefore urges States to extend the scope of their Geneva Conventions Acts to cover, on the basis of universal jurisdiction, serious violations of Common Article 3 and Protocol II. Guidance on the drafting of such a provision can be provided by the ICRC's Advisory Service.

Other Violations

It has also been proposed that the following violations of Additional Protocol I should be treated as if they were grave breaches and covered in the legislation: Article 37(1) (perfidy), Article 40 (denial of quarter), and Articles 42(1) and (2) (attacks on persons parachuting from aircraft in distress or where such a person has not been given the opportunity to surrender). The violations of these prohibitions, which largely protect combatants rather than protected persons such as civilians, are not grave breaches and there is no obligation to enact legislation punishing them. However serious consideration should be given to whether they are adequately punished under other legislation or military regulations and, if not, whether they should also be covered. For further guidance, please contact the ICRC's Advisory Service. [See Meyer and Rowe: *The Geneva Conventions (Amendment) Act 1995: A Generally Minimalist Approach, International and Comparative Law Quarterly, Vol. 45 at pg. 476*].

Section 8: Proof of Application of Convention or Protocol I

In order to constitute a grave breach, an act must be committed in a situation covered by the Geneva Conventions and/or Additional Protocol I, as defined in Article 2 of each Convention and Article 1 of Protocol I. The issue of the

application of the Conventions and Protocol I may require an evaluation of international events and in particular whether there is an international armed conflict. The Geneva Conventions Acts therefore provide for the Minister of Foreign Affairs, or equivalent, to submit a certificate on matters relevant to these provisions.

Section 9: Repealed in the Australian legislation

Section 10: Jurisdiction of the Courts

This provision defines the courts which are to have jurisdiction to try the above offences. This will clearly vary from country to country but it is important to ensure that the court is of a sufficient level to treat the difficult legal and political issues which may arise and to impose penalties reflecting the seriousness of the offences.

While some acts committed by a State's military personnel may be tried by courts martial as violations of military law, most States appear to retain the option of trying the most serious offences before its ordinary courts as an alternative to court martial. It should be noted that the definition of "court" under the Act expressly excludes a court martial or service court (see section 5).

PART III: LEGAL PROCEEDINGS IN RESPECT OF PROTECTED PERSONS

Section 10A: Status as Protected Prisoner of War

Section 11: Notice of Trial of Protected Prisoner of War/Internee

Section 12: Legal Representation of Prisoners of War

Section 13: Appeals by Protected Prisoners of War/Internees

Section 14: Reducing Sentence of Protected Prisoners of War/Internees

The above five sections set out in detail the safeguards which are to apply in relation to the trial and sentencing of prisoners of war (under the Third Geneva Convention) and civilian internees (under the Fourth Geneva Convention). References to the Supreme Court, Defence Force, Commonwealth (i.e. Australia), Attorney General, solicitor or counsel will need to be modified as appropriate.

Section 10A provides for the determination of whether someone is entitled to prisoner of war status (PI, Article 45). Section 11 provides for the service of the notice of trial of a prisoner of war (GC III, Article 104) or internee (GC IV, Article 71). Section 12 sets out arrangements for the legal representation of prisoners of war (GCIII, Article 105). Consideration should be given to extending the scope of this provision to internees (see GCIV, Article 72). Section 13 set out the procedures for appeals by prisoners of war (GC III, Articles 106, 107) and

internees (GC IV, Article 73). Section 14 regulates the reduction of sentences or custody imposed on prisoners of war and internees.

PART IV: ABUSE OF THE RED CROSS AND OTHER EMBLEMS ETC.

Section 15: Use of Red Cross and other Emblems etc.

The Geneva Conventions provide for the use of the emblem of the red cross, red crescent and red lion and sun to identify protected persons, places and transports (such as medical personnel, hospitals and ambulances). The use of these emblems and their names (as well as markings or wording which may be confused with the emblems) is strictly controlled (GCI, Articles 38-44; GCII, Articles 41-44; PI, Article 38). States are obliged to take measures to prohibit and prevent any misuse (GCI, Article 53; GCII, Article 54).

Protocol I provides for the use of other protective emblems and signals (Annex I). It prohibits the misuse of all internationally recognised protective emblems, signs and signals (Article 38(1)), the protective emblem of cultural property (Article 38(1)), the UN emblem (Article 38(2)), the civil defence emblem (Article 66(8)), and the insignia and uniforms of neutral States (Article 39(1)).

Having regards to these provisions, the Geneva Conventions Act makes the misuse of the above emblems, signs, etc. a **criminal offence**.

Subsection 1 prohibits (unless there is consent of the Minister) the use of the emblem and name of the red cross, red crescent, red lion and sun, the Swiss flag, and designs or wording which may be confused with these emblems and names. It similarly prohibits the use of emblems, identity cards, signs, signals and uniforms as necessary to give effect to Protocol I.

Given the complexity of monitoring and enforcing correct use of the emblem and other signs, it is important to identify clearly the authority responsible for regulating its use. It may therefore be advisable, in the Act or in secondary legislation, to designate a specific Minister to oversee these matters.

Subsection 2 limits the Minister's right to refuse the use of the emblem or other signs to cases required under the Conventions and Protocol I. It is clearly essential to ensure that the responsible Minister or authority is familiar with the full range of restrictions under the Conventions and Protocols.

Subsections 3 and 5 deal with limited cases where rights to use the emblems and names, or other similar markings, may have been acquired before the entry into force of the Act. The application of these Sections must be in conformity with the Conventions and Protocols and in particular GCI Article 53.

It is also important that an adequate fine is imposed. To prevent misuse for commercial purposes, or repeated misuse, it is advisable, as in subsection 4 to

provide for forfeiture of goods used in the commission of the offence. It is also advisable, as in subsection 6, to enable adequate action to be taken against companies and other bodies corporate.

Subsection 7 extends the scope of the section extraterritorially to use on any ship or aircraft registered in Australia. This is strongly advised given the need to ensure comprehensive protection of the emblem.

Subsection 8 makes the institution of criminal proceedings dependent on the consent of the Attorney General. While there is no *obligation* to prosecute misuses of the emblems and other signs, it is important to ensure that adequate action is taken against violations. In some countries the National Red Cross or Red Crescent Society plays an important role in monitoring use of the emblem and other signs and informing the responsible authority when a misuse should be investigated and, if necessary, prosecuted.

PART V: REGULATIONS

Section 16: Making of Regulations

This is a general enabling provision under which regulations may be made to implement the provisions of the Act. Some countries have found it necessary or helpful to supplement the provisions of their Geneva Conventions Act with detailed regulations on the use of the emblem or the disciplinary regime applicable to prisoners of war. Where such regulations facilitate the full and proper implementation of the Conventions and Protocols they are of course to be encouraged. It is therefore advised that a such a provision providing for the making of regulations should be included.

SCHEDULES

These are the complete texts of the four Geneva Conventions and Additional Protocol I. These instruments are cited in certain sections of the Act (e.g. in sections 7 and 8) and reference to the schedules is clearly necessary in applying these provisions. In some versions of the Act, e.g. the United Kingdom's Geneva Conventions Act, the text of Protocol II is also scheduled. Given the general obligation to disseminate the Conventions and Protocols as widely as possible (GCI: Art. 47; GCII: Art. 48; GC III: Art. 127; GC IV: Art. 144; PI: Art. 83; PII: Art. 19) the publication of the texts as schedules to the Act is helpful, and the inclusion of all the Conventions and Protocols is therefore encouraged. It also ensures that the national court has before for it the entire scheme of the Conventions and Protocols in applying the Act. In some cases, it may also be necessary to refer to Protocol II in drawing up regulations on the use of the emblem (see section 16 above). Where the Act also provides for punishment of violations of Protocol II (see discussion of Internal Armed Conflicts under section 7 above) it is clearly essential to schedule the text of the Protocol.

There has been some discussion as to whether the entire texts of the Conventions and Protocols, as schedules to the Act, may be considered to be part of national law and therefore directly invoked before the courts. This will depend on the approach to legislative interpretation followed in the country concerned. It should be noted however that Geneva Conventions Acts usually only refer to certain provisions of the Conventions and Protocols (as in section 7 above) - they do not expressly provide that the entire texts are to be part of domestic law. The only judicial authority on this point is the 1967 English High Court case, Cheney v Conn [1968] 1 All ER 779 which held that the United Kingdom Geneva Conventions Act did not make the scheduled Geneva Conventions parts of domestic law.

Ref. : Geneva Conventions Act 1957 (Australia)
 Geneva Conventions (Amendment) Act 1991 (Australia)
 Geneva Conventions Act (Australia) (consolidated version, i.e. 1957 Act as amended)

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