

REPORT

I. Introduction

Following six years of negotiations, on May 25, 2000 the United Nations adopted an Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol:

- (a) defines and prohibits the sale of children, child prostitution, and child pornography;
- (b) requires that certain proscribed acts be covered under a state's criminal or penal law,
- (c) sets forth various bases for asserting jurisdiction and extradition; and
- (d) provides for protection of children victimized by the prohibited practices.

The United States is a signatory to the Convention on the Rights of the Child (the "CRC"), although it has not ratified that Convention. The Optional Protocol expressly permits signatories to the CRC to sign and ratify the Optional Protocol even though they have not ratified the underlying Convention.¹ The ABA has urged U.S. ratification of the CRC and has offered suggestions for accompanying reservations, understandings and declarations.²

This report, undertaken by the International Human Rights Committee through its Subcommittee on the Rights of the Child, is intended to provide a basis for consideration and adoption of an ABA resolution supporting U.S. ratification of the Optional Protocol.

This report:

- (a) Briefly describes the global issue of trafficking in children, child prostitution, and child pornography;
- (b) Traces the international legal context of the Optional Protocol;
- (c) Explains the negotiating history of the Optional Protocol, and
- (d) Summarizes its principle provisions.

¹ See art. 13.

² See ABA Recommendation and Report to the House of Delegates, adopted Feb. 1991; ABA Recommendation and Report to the House of Delegates, adopted Feb. 1994.

The ABA has long supported U.S. actions to enhance legal protections to children throughout the world. For example, the House of Delegates has called on the U.S. to ratify the Hague Convention on Civil Aspects of International Child Abduction (August 1980); the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (February 1994); and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect to Parental Responsibility and Measures for the Protection of Children (August 1997). The House has also called for the United States to work with the United Nations and the International Labor Organization to promote the abolition of the economic exploitation of persons under eighteen years of age by the adoption and enforcement of child labor law protections (August 1996) as well as the protection, within the U.S., of the legal rights of immigrant children (February 1985).

The Association's work has also included special attention to the issue of child victims of sexual exploitation. Since 1979, the ABA Center on Children and the Law has worked to improve laws addressing child sexual abuse and exploitation. Since 1979, the ABA Center on Children and the Law has worked to improve laws addressing child sexual abuse and exploitation, with a focus on the education of lawyers and judges in this area. In 1999, the Center produced, on behalf of the National Center for Missing and Exploited Children, the publication *Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses*. Work is underway at the Center on a companion publication addressing legal issues related to child pornography.

A. Sale of Children, Child Prostitution and Child Pornography

Throughout the world, children are bought and sold, i.e., "trafficked," for a number of purposes, including sexual exploitation, forced labor, adoption, participation in armed conflicts, marriage, organ trade and other reasons. The thrust of the Optional Protocol is the sexual abuse and exploitation of children, a complex topic that ranges from intrafamilial to commercial sexual exploitation. The sexual exploitation of children is pervasive, occurring across international borders or within the boundaries of a single country. Trafficking, especially for commercial sexual exploitation, has become a worldwide, multi-billion-dollar industry.

Although the true magnitude of the problem is difficult to ascertain, the United Nations Children's Fund ("UNICEF") estimates that one million children are trafficked into prostitution per year in Southeast Asia alone, and another million worldwide. Non-governmental organizations ("NGOs") estimate that between five to seven thousand Nepali girls are trafficked every year to India.³ NGOs in Bangkok report at least 10,000 girls and women entering Thailand from poorer neighboring countries and entering commercial sex work.⁴ In the former Soviet states and Eastern European countries, there are job placement agencies or marriage bureaus which serve as fronts for prostitution rings. Girls as young as 13 (mainly from Asia and Eastern Europe) are trafficked as "mail-order brides." Large numbers of

³ See, e.g., HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 230-56 (1995).

⁴ See, e.g., *id.* at 205-30.

children are being trafficked in West and Central Africa, mainly for domestic work but also for sexual exploitation, to work in shops or on farms, to be scavengers or street hawkers. Nearly 90 percent of these trafficked domestic workers are girls. Illicit traffic is expanding through the use of child pornography on the Internet, and low cost Internet advertising of the commercial sex trade, attracting sex tourists and pedophiles.

Sex trafficking is an insidious and hidden, but highly-organized phenomenon. Boys and girls are favored targets for sexual exploitation and groups with low social standing are often the most vulnerable, such as minorities, refugees, street children, poor children, juveniles from broken homes, and disabled minors. Efforts by the United States and other countries, international organizations and concerned activists to stop these abhorrent practices have thus far proved unsuccessful. Indeed, the evidence suggests that instances of forcible and/or fraudulent sex trafficking are rapidly escalating.

The United States is certainly not immune to the trafficking and exploitation of children for sexual purposes or forced labor. It is reported that approximately 50,000 women and children are trafficked into the United States each year, primarily from the former Soviet Union and Southeast Asia. In some parts of the United States, there are prostitutes whose average age is 14—and many prostitutes are even younger. In most countries, girls represent the vast majority of those involved in the sex trade, but in the United States, the number of sexually exploited boys might be nearly equal to the number of sexually exploited girls. Typically, the commercial sexual exploitation of children in the United States relates either to runaway children who use sex as a means of survival; drug addiction; or organized, adult-run businesses that control and manipulate children for profit.

The sale of children, child prostitution, and child pornography are contemporary forms of slavery and are clear violations of children’s rights. Children that are sold or “trafficked” into sexual servitude often suffer extreme physical and mental abuse, including rape, torture, starvation, imprisonment, death threats and physical brutality. They are continually exposed to deadly diseases, including HIV/AIDS, and experience stigmatization, depression and posttraumatic shock. Children sold into domestic servitude, bonded sweatshop labor and other industries are subjected to violence and may be literally worked to death. The mockery of children’s rights made by these practices, coupled with the untold costs to families, judicial systems and society at large, demands coordinated and effective international, national and local action to eliminate all forms of sexual and other slavery-like practices.

B. Principle International Legal Framework Concerning Sale of Children, Child Prostitution and Child Pornography

There exists a fairly extensive international legal framework for dealing with the sale of children, child prostitution and child pornography.⁵ This framework consists of treaties,

⁵ See “Protection of Children from Sexual Exploitation,” UNICEF, Evaluation, Policy and Planning (1999); “Prostitution of Children and Child-Sex Tourism: An Analysis of Domestic and International Responses, report by the ABA Center on Children and the Law for the National Center for Missing and Exploited Children (April 1999); and “The International Legal Framework and Current National Legislative and Enforcement Responses,” ECPAT working paper for World Congress Against Commercial Sexual Exploitation of Children” (1996).

international conventions and covenants, and U.N. charter-based mechanisms.⁶ The more significant and relevant of these instruments are briefly discussed below.

1. 1989 U.N. Convention on the Rights of the Child

Among the international instruments discussed in this report, the U.N. Convention on the Rights of the Child (“CRC”) extends the foremost protections to children victimized by trafficking, sexual abuse, or exploitation.⁷ The CRC 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.”⁸ 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 physical or mental violence, injury or abuse, neglect or negligent treatment, 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.”⁹

Under Article 32, “States Parties recognise the right of the child to be protected from economic exploitation and 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,”¹⁰ and requires setting of a minimum age or ages for employment.¹¹ States are bound to “[p]rovide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.”¹²

⁶ In addition to the instruments discussed herein that relate to trafficking, we note the following treaties that have addressed this or related issues: (1) 1904 International Agreement for the Suppression of the White Slave Traffic (amended by Protocol 3 of December 1948); (2) 1910 International Convention for the Suppression of the White Slave Traffic (amended by Protocol 3 of December 1948); (3) 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); (4) 1921 International Convention for the Suppression of the Traffic in Women and Children (amended by protocol of 20 October 1947); (5) 1923 Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications (amended by protocol of 12 November 1947); (6) 1926 Slavery Convention (amended by protocol of 23 October 1953); (7) 1933 International Convention for the Suppression of the Traffic in Women of Full Age (amended by Protocol of 20 October 1947); (8) 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others; and (9) 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. In addition, Principle 9 of the 1959 Declaration of the Rights of the Child stated that the child “shall not be the subject of traffic, in any form.”

⁷ G.A. Res. 44/25, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). The text of the Convention is reprinted in many sources. *See, e.g.*, FRANK NEWMAN AND DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 80 (1996).

⁸ *Id.* art. 1.

⁹ *Id.* art. 19(1).

¹⁰ *Id.* art. 32(1).

¹¹ *Id.* art. 32(2)(a).

¹² *Id.* art. 32(2)(c).

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; [and]
- (c) The exploitative use of children in pornographic performances and materials.”¹³

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.”¹⁴

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 neglect, exploitation, or abuse . . . in an environment which fosters the health, self-respect and dignity of the child.”¹⁵

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography that is the subject of this report is an optional protocol to the CRC.

2. ILO Convention (No. 182) on the Worst Forms of Child Labor

The International Labor Organization (“ILO”) Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor was adopted unanimously by the 174 member states of the ILO in June 1999.¹⁶ This Convention (No. 182) requires member states to take immediate steps to prevent, prohibit and eliminate the “worst forms of child labor.” The prohibition is broadly defined to encompass the sale and trafficking of children, debt bondage, forced or compulsory labor, using children for prostitution or production of pornography, using children for illegal activities, particularly drug trafficking, and other work likely to “harm the health, safety or morals of children.” Convention No. 182 defines a child as any person under the age of 18.

¹³ *Id.* art. 34.

¹⁴ *Id.* art. 35.

¹⁵ *Id.* art 39.

¹⁶ On June 17, 1999, delegates to the 87th International Labor Conference voted unanimously to approve the Convention on the Worst Forms of Child Labor (No. 182). President Clinton addressed the ILO Conference, endorsed the new convention, and submitted it to the United States Senate for its advice and consent. See Andrew J. Samet, *Child Labor and the New Millennium*, 21 WHITTIER L. REV. 69, 69 (1999); see also Angela R. Broughton, Donald C. Dowling, Jr., David Larson, Holly M. Robbins, and James M. Zimmerman, *International Employment*, 33 INT’L LAW. 291, 309 (1999).

3. 1949 Universal Declaration of Human Rights

The Universal Declaration of Human Rights¹⁷ has been described as “the fundamental document of international human rights, and has claim to be one of the most important international instruments of the Twentieth Century.”¹⁸ The Declaration states in article 4 that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”¹⁹ Article 5 specifies that “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”²⁰ Article 13 states that “Everyone has the right to freedom of movement and residence within the borders of each state.”²¹ It also provides that: “Everyone has the right to leave any country, including his own, and return to his country.”²² Other articles also address human rights relating to employment,²³ health,²⁴ and education.²⁵

4. 1966 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was concluded in 1966, entered into force ten years later in 1976, and was ratified by the United States in 1992.²⁶ The ICCPR provides in part that: “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”²⁷ Article 8 states that “No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.”²⁸ It also provides that “No one shall be held in servitude”²⁹ and that “No one shall be required to perform forced or compulsory labour.”³⁰

¹⁷ G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). The text of the Declaration is reprinted in many sources. *See, e.g.*, FRANK NEWMAN AND DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 22 (1996).

¹⁸ LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER, AND DAVID W. LEEBRON, HUMAN RIGHTS 286 (1999).

¹⁹ Universal Declaration of Human Rights, art. 4.

²⁰ *Id.* art. 5.

²¹ *Id.* art. 13(1).

²² *Id.* art. 13(2).

²³ *Id.* arts. 23 and 24.

²⁴ *Id.* art. 25.

²⁵ *Id.* art. 26.

²⁶ *See, e.g.*, UNITED STATES DEPARTMENT OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (July 1994).

²⁷ ICCPR, art. 7.

²⁸ *Id.* art. 8(1).

²⁹ *Id.* art. 8(2).

³⁰ *Id.* art. 8(3)(a). An exception permits states to impose compulsory labor in certain limited circumstances, such as with punishment for a crime. *See id.* art. 8(3)(b) and (c).

5. 1966 International Covenant on Economic, Social, and Cultural Rights

Together with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights³¹ “represents the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II.”³² Among its many provisions, the Covenant recognizes the right to “[s]afe and healthy working conditions.”³³

6. 1979 U.N. Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)³⁴ directs States Parties to “take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”³⁵

7. 1993 Hague Convention on the Protection of Children and Cooperation with Respect to Intercountry Adoption

Article 8 of the Hague Convention on the Protection of Children and Cooperation with Respect to Intercountry Adoption³⁶ requires States Parties to “take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.” Article 32(1) states that “No one shall derive improper financial or other gain from an activity related to an intercountry adoption.”

³¹ 999 U.N.T.S. 3, 6 I.L.M. 360. The text of this Convention is reprinted in many sources. *See, e.g.*, FRANK NEWMAN AND DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 26 (1996). The Convention was adopted on December 16, 1966 and entered into force on January 3, 1976.

³² UNITED STATES DEPARTMENT OF STATE, CIVIL AND POLITICAL RIGHTS IN THE UNITED STATES: INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. HUMAN RIGHTS COMMITTEE UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (July 1994).

³³ ICESCR art. 7(b).

³⁴ G.A. Res. 34/180, U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/180. The text of CEDAW is reprinted in many sources. *See, e.g.*, FRANK NEWMAN AND DAVID WEISSBRODT, SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW 62 (1996). CEDAW entered into force on September 3, 1981. The House of Delegates of the American Bar Association voted in 1984 to recommend that the U.S. Senate give its advice and consent to ratification, a position it reaffirmed in 1995. *See Report No. 2 of the Section of International Law and Practice* (1984); Report to the House of Delegates of the ABA Section of International Law and Practice Standing Committee on World Order Under Law (1995). *See generally* ABA SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, WOMEN’S RIGHTS ARE HUMAN RIGHTS: STRATEGIES FOR SECURING HUMAN RIGHTS FOR WOMEN IN THE U.S. AND ABROAD (1999).

³⁵ CEDAW art. 6.

³⁶ President Clinton submitted the convention to the Senate in 1998 for advice and consent. *See Rhonda McMillion, “Save the Children” More Urgent: U.S. Delays in Ratifying Accord Could Jeopardize Adoptions by American Citizens*, 86 A.B.A. J. 94 (Jan. 2000).

C. Brief Negotiating History of Optional Protocol

In 1990, in recognition of an alarming increase in the global trafficking of children for sexual exploitation, child prostitution and child pornography, the U.N. Commission on Human Rights appointed a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography to monitor and assess the current status of nations regarding these matters worldwide, and to make specific recommendations for action. These efforts culminated in a comprehensive international approach to child-sex tourism through the “Program for Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography,” adopted by the U.N. Commission on Human Rights in 1992.

Two years later, in paragraph 17 of its resolution 1994/90, the U.N. Commission on Human Rights formed an open-ended inter-sessional working group to establish an Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography. The working group was to undertake its mission in collaboration with the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography and the Committee on the Rights of the Child.

From the outset, however, the negotiations proceeded slowly, at least in part due to a widespread view that a separate protocol was, in fact, unnecessary and that instead, greater efforts should be made to implement existing protections in the CRC. As the talks continued, a lingering concern among a number of countries and NGOs was that any protocol must build upon, rather than weaken, CRC provisions.

Several concurrent initiatives helped to keep the discussions on track. In 1995, delegates to the Fourth World Conference on Women in Beijing called for a series of actions to be taken to meet two “strategic objectives:” the elimination of trafficking in women and assistance to victims of violence due to prostitution and trafficking (no. D.3) and the eradication of violence against the girl child (no. L.7).

In 1996, the World Congress against Commercial Sexual Exploitation of Children met in Stockholm, Sweden to forge a statement against the commercial sexual exploitation of children. The Congress was organized by ECPAT (End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes) and hosted by Sweden in collaboration with UNICEF and the NGO Group to the CRC.

It declared that “every child is entitled to full protection from all forms of sexual exploitation and sexual abuse,” and referencing the CRC, further declared that “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.” It made clear that the commercial sexual exploitation of children is a “fundamental violation of children’s rights,” and constitutes “a form of coercion and violence against children, and amounts to forced labor and a contemporary form of slavery.”³⁷ It called

³⁷ World Congress Against Commercial Sexual Exploitation of Children Declaration and Agenda for Action, Stockholm, Sweden (1996).

on states to criminalize the commercial sexual exploitation of children by condemning and penalizing offenders while ensuring that child victims are not penalized.

A series of reports issued by the U.N. Special Rapporteur, Ms. Ofelia Calcetas-Santos, also shed light on the underlying problem and bolstered the efforts of the working group. In her 1997 report, the Special Rapporteur offered concrete recommendations for utilizing the media and education to strengthen prevention and advocacy, response and intervention, and recovery and reintegration relating to the sexual abuse of children.³⁸ In her 1999 report, the Special Rapporteur released an extensive series of recommendations, including the unequivocal condemnation of trafficking; the need for international and regional registers for missing children; bilateral and multilateral cooperation; guarantees of freedom from prosecution and harassment for victims of trafficking; and many other issues.³⁹

Throughout the course of the negotiations and until late 1999, prospects for achieving agreement on the Optional Protocol remained in doubt. There were several reasons for this. Most fundamentally, a number of countries, the NGO Group for the CRC and UNICEF continued to express concerns that the text retreated from CRC and other existing protections. In addition, there was a significant disagreement as to whether countries that had not ratified the CRC (e.g., the United States) should be allowed to sign and ratify the Optional Protocol. (This issue was debated at the final stage of the negotiations, and was ultimately resolved in favor of the U.S. position.) Other contentious issues included whether the sale of children should be defined to reference sale for the purpose of trade in their bodily organs.

³⁸ See Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, A/52/482 (16 October 1997).

³⁹ See Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, E/CN.4/1999/71 (January 29, 1999).

The Committee on the Rights of the Child, noting the difficult negotiations and the burst of initiatives on trafficking in various international forums (particularly the work of the ILO, the U.N. Convention Against Transnational Organized Crime and an effort to negotiate a protocol to it “To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,” and a January 1999 UNESCO conference in Paris on protecting children from sexual exploitation via the Internet), even called for “reconsidering the best way of proceeding with this very important work.”⁴⁰ At the same time, though, pressure for results continued as the U.N. issued several resolutions in support of the working group’s negotiations.⁴¹

Finally, in February and March 2000, in an effort to conclude drafting the Protocol before the tenth anniversary of the CRC, and based on a revised text proposed by its Chairman-Rapporteur, the working group achieved a consensus on the text of the Protocol. Its primary provisions are summarized below. Notwithstanding this agreement, the NGO Group for the CRC and the NGO Committee on the Status of Women called for a “technical review” of the Optional Protocol to address concerns that the Optional Protocol weakened existing protections under the CRC.⁴² The working group did not take up this request.

In a speech on March 23, 2000, U.S. Secretary of State Madeleine Albright called on the U.N. Human Rights Commission to endorse the text, stating that child pornography and prostitution had “shocked the conscience of humanity.” The U.N. Human Rights Commission approved the Optional Protocol without any significant changes on April 26, 2000. The U.N. Economic and Social Council approved the Optional Protocol on May 10, 2000 and the U.N. General Assembly approved it on May 25, 2000. The Optional Protocol was then opened for early signature and ratification or accession at two U.N. special sessions in June 2000, and the Millenium Summit of the Millenium Assembly in September 2000. The Optional Protocol will go into force three months after the tenth ratification.

Due to the difficulty of the negotiations, the Optional Protocol as forged by the working group and later adopted by the U.N. General Assembly reflects the minimum level of consensus that the working group members could achieve. However, even acknowledging that certain issues that were not reflected in the text could have improved the final outcome -- particularly strong language ensuring the non-criminalization of child victims-- the overall result reflects a positive and useful extension of the CRC’s broad language relating to sex trafficking.

⁴⁰ See Committee on the Rights of the Child, Notes on the 20th Session, January 27, 1999, Statement by Mrs. Judith Karp.

⁴¹ See Resolution on the Rights of the Child (53/128), Section III, adopted by the General Assembly, 23 February 1999; Resolution on the Rights of the Child (1999/80), Section III, adopted by the Commission on Human Rights, 28 April 1999. See also, Resolution on the Traffic in Women and Girls (1999/40), adopted by the Commission on Human Rights, 26 April 1999.

⁴² For example, a number of NGOs have expressed concern that the Optional Protocol does not specify that child victims should not be criminalized as part of efforts to combat commercial sexual exploitation. In addition, in contrast to Article 1 of the CRC which defines a child as under age 18, they have noted the absence of an upper age limit in the Optional Protocol. Further, they have criticized the Optional Protocol’s several references to national laws, such as in Article 8(1)(c) and (e), as lowering the CRC obligation imposed on states under Articles 34 and 35 to take all appropriate national, bilateral and multilateral measures to prevent the sexual exploitation of children.

In this regard, the Optional Protocol features fairly expansive provisions regarding the definitions for sale of children, child prostitution and child pornography, and actionable practices relating thereto, and strengthens or clarifies the bases for jurisdiction, extradition, and international cooperation, among others. In addition, the effort to lend greater specificity to the CRC's broad terms, particularly through Art. 8, pertaining to protection of child victims within the context of the judicial process, and Art. 9, which imposes various prevention, rehabilitation and compensation measures, as well as several references to acting in accordance with national law and procedure, may well advance the CRC's practical implementation. The Optional Protocol also is welcome simply to the extent that it heightens international awareness and redress of the underlying problem.

Moreover, nothing in the Optional Protocol denies the broad obligations parties to the CRC must continue to uphold thereunder, such as under Articles 34, 35 and 39. Indeed, as is clear in its preamble, the Optional Protocol is intended "further to achieve the purposes" of the CRC. In addition, countries may adopt and enforce measures to protect children that are more stringent than the measures mandated under the Optional Protocol because a number of its principal provisions (e.g., Art. 3(1); Art 4(4); Art. 11), set minimum standards for compliance.

Finally, the Optional Protocol is laudable as an instrument that allows for U.S. participation and support to stop the sale of children, child prostitution and child pornography, a role that could be critical both in terms of resources and international cooperation.

Ultimately, the significance of the Optional Protocol will be determined by the extent to which its obligations are reflected in national laws and aggressively enforced thereunder. Our understanding is that the United States may not consider it necessary to make changes to current U.S. law to implement the Optional Protocol.

However, as indicated in a recent study on trafficking done for the U.S. Central Intelligence Agency, the United States currently does not have a comprehensive trafficking law, and law enforcement must rely upon a patchwork of criminal, labor and immigration laws to address activities involved in trafficking schemes.⁴³ In addition, penalties for sex trafficking appear light, especially relative to the gravity of the human rights offense and the much greater penalties imposed on drug dealers.⁴⁴ The study also details other problems with law enforcement efforts and assisting trafficking victims, whose status as illegal U.S. aliens often means they are detained under harsh conditions or abandoned to their captors altogether.⁴⁵

We further note that legislation on sex trafficking is advancing in Congress that would address perceived inadequacies in U.S. law and enforcement.⁴⁶

⁴³ "International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime," Center for the Study of Intelligence (Nov. 1999), at 35.

⁴⁴ *Id.* at 33.

⁴⁵ *Id.* at 36-42.

⁴⁶ H.R. 3244, The Trafficking Victims Protection Act of 1999.

The ABA believes that if the obligations under the Optional Protocol are to be fully realized in the United States, whether undertaken under existing law or new legislation, U.S. law and policy must adequately reflect the legal authority and resources necessary to aggressively implement its provisions.

D. Summary of Principal Provisions of Optional Protocol

1. Preamble

The preamble contains a number of important observations, but we would highlight particular language in view of concerns that the Optional Protocol does not reflect the full measure of protection to children reflected in the CRC.

In this regard, the Preamble states that “in order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions, especially articles 1, 11, 21, 32, 33, 34, 35 and 36, it would be appropriate to extend the measures that States Parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography.” Thus, express reference is made to the need to implement the CRC and achieve its purposes, including specific reference to those CRC articles (particularly Articles 34 and 35) whose terms offer strong broad protection against trafficking, sexual exploitation and abuse.

The Preamble further references CRC language regarding the right of the child to be protected from “economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.”

Further, it recognizes the “importance of the implementation of the provisions of the Program of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography and the Declaration and Agenda for Action of the 1996 Stockholm Congress against the Commercial Sexual Exploitation of Children” (see above).

This Preamble language thus may be instructive as a basis for interpreting and implementing the Optional Protocol in a manner that fully conforms with and builds upon CRC protections.

2. Prohibition on and Definitions of Sale of Children, Child Prostitution and Child Pornography

Article 1 requires states parties to prohibit the “sale of children, child prostitution and child pornography,” and defines those terms under Article 2. The sale of children refers to “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.” “Child prostitution” means the “use of a child in sexual activities for remuneration or any other form of consideration.” “Child pornography” is defined as “any representation, by whatever means, of a child engaged in real or simulated

explicit sexual activities or any representation of the sexual parts of a child, the dominant characteristic of which is depiction for a sexual purpose.”⁴⁷

3. Actionable Practices

Article 3 makes actionable, under a states party’s criminal or penal law, certain practices relating to the sale of children, child prostitution and child pornography, including attempts, complicity or participation relating to commission of these acts, and requires punishment by appropriate penalties that take into account the “grave nature” of the offense. With respect to the sale of children, Article 3 makes actionable the “offering, delivering, or accepting by whatever means a child” for purposes of either sexual exploitation, organ transfer for profit, or forced labor. It also covers improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.

With respect to child prostitution, Article 3 makes actionable the “offering, obtaining, procuring or providing” of a child for child prostitution. With respect to child pornography, Article 3 makes actionable the “producing, distributing, disseminating, importing, exporting, offering, selling, or possessing for the above purposes” child pornography.

Importantly, Article 3 applies both domestically and internationally, and to individuals and organizations.

4. Jurisdiction

Article 4 sets forth the bases for states parties to assert jurisdiction over actionable practices relating to the sale of children, child prostitution and child pornography. It requires each party to take necessary measures to establish its jurisdiction over such offenses when the offense is committed in its territory, and also provides for jurisdiction when either the alleged offender is a national of that state or habitually resides there, or the victim is a national of that state.⁴⁸ Article 4 also extends jurisdiction to instances where “the alleged offender is present in its territory and it does not extradite him to another state party on the ground that the offense has been committed by one of its nationals.” Finally, Article 4 does not exclude any criminal jurisdiction exercised in accordance with internal law.⁴⁹

⁴⁷ The United States and a number of other delegations expressed their understanding in the final round of negotiations that the reference to representation includes the visual representation of a child. E/CN.4/2000/WG.14/CRP.3.

⁴⁸ Jurisdiction may also be asserted by a state party when offenses are committed on board a ship or aircraft registered in its state.

⁴⁹ In the final round of working group negotiations, the United States expressed its view that the jurisdiction and extradition provisions would ensure that offenders could be prosecuted, regardless of where they were found. E/CN.4/2000/WG.14/CRP.3.

5. Extradition

Article 5 strengthens the ability of states parties to pursue extradition of those who commit offenses under the Optional Protocol. It provides that such offenses are deemed to be included as extraditable offenses in any extradition treaty existing between states parties, and shall be included as extraditable offences in every extradition treaty subsequently concluded between them. It further provides that, where a state party that makes extradition conditional on the existence of a treaty receives a request for extradition from another state party with which it has no extradition treaty, the Optional Protocol may serve as a legal basis for extradition, subject to the conditions provided by the law of the requested state. Actionable offenses are to be treated for extradition purposes as if they had been committed not only in the place in which they occurred, but also in the territories of the states required to establish their jurisdiction in accordance with article 4.

6. Protection of and Assistance to Child Victims

Articles 8 and 9 set forth various provisions relating to protecting and assisting child victims. Article 8(1) requires states parties to adopt “appropriate measures” to protect the rights and interests of child victims of the practices prohibited under the Optional Protocol at all stages of the criminal justice process. In particular it calls on states parties to:

- recognize the vulnerability of child victims and adapt procedures to recognize their special needs, including their special needs as witnesses;
- inform child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- allow the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, subject to national rules of judicial procedure;
- provide appropriate support services to child victims throughout the legal process;
- protect “as appropriate” the privacy and identity of child victims and take measures “in accordance with national law” to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- provide, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and
- avoid unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

Article 8(3) requires states parties to ensure that in the judicial treatment of child victims, the best interest of the child shall be a primary consideration.

Article 9 states that in taking steps to prevent the offenses covered by the Optional Protocol, particular attention must be paid to protecting those children who are especially vulnerable to the practices it makes actionable. It requires “all feasible measures” be pursued to give appropriate assistance to victims of such offences, including their “full social reintegration, and their full physical and psychological recovery.” Importantly, it also requires that child victims have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.

7. International Cooperation and Reporting

Article 10 call for all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those that commit acts involving the sale of children, child prostitution, child pornography and child sex tourism. Article 12 of the Protocol requires state parties to submit a report to the Committee on the Rights of the Child within two years of ratifying the protocol, providing comprehensive information on the measures it has taken to implement the protocol. Thereafter, follow-up reports are made every five years.

8. Ratification

Under the Optional Protocol, countries that have not ratified the Convention on the Rights of the Child may nonetheless sign and ratify the Optional Protocol. Article 13(1) states that “The present protocol is open for signature by any State which is a party to the Convention or has signed it.” This language was agreed to at the behest of the United States, which has not yet ratified the Convention, and over the objection of France and a number of other countries.

Although the United States signed the Convention on the Rights of the Child, it has not yet ratified it (as the American Bar Association had previously urged in 1991⁵⁰ and 1994⁵¹). The ability to now sign and ratify the Optional Protocol presents an important opportunity to achieve a concerted global effort towards eradication of the sale of children, child prostitution, and child pornography. We respectfully urge the United States to do so at its earliest opportunity.

Respectfully submitted,

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⁵⁰ See ABA Recommendation and Report to the House of Delegates, adopted Feb. 1991.

⁵¹ See ABA Recommendation and Report to the House of Delegates, adopted Feb. 1994.