that the United States will promptly ratify the Protocol and lend its support to elimination of direct use of children under 18 in armed conflict, to elimination of conscription of children under 18, and to elimination of the unconscionable and sometimes unspeakable practices which often follow.

Further speakers in support of the resolution waived their rights to speak, and without further debate, the revised recommendation was approved by voice vote as follows:

**RESOLVED,** That the American Bar Association urges that the United States expeditiously ratify the Optional Protocol to the U.N. Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts.

Chair Grey called upon James R. Silkenat of New York, Delegate from the Section of International Law, to move the second revised joint recommendation, supporting U.N. adoption and U.S. ratification of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Mr. Silkenat stated that the Protocol adds to the Convention’s coverage, to strengthen laws protecting children against the worst abuses imaginable. He asked for support for the resolution.

By unanimous voice vote, the revised recommendation was approved as follows:


Standing Committee on Judicial Independence, Section of Business Law, Coalition for Justice, Judicial Division, Senior Lawyers Division. The Chair recognized Alfred P. Carlton, Jr. of North Carolina, former Chair of the House, who moved adoption of the joint report, urging adoption of the black letter “Standards on State Judicial Selection,” dated July 2000. Mr. Carlton asked for the recommendation of the Board of Governors, and Secretary Middleton reported that the Board transmitted the report with a recommendation for approval. Mr. Carlton stated that he came before the House as Chair of the Standing Committee on Judicial Independence. He reminded Delegates that the House had conferred Standing Committee status because of the strong commitment of the Association to supporting the judges of the country. It also reflected, he said, in the exemplary work of state and local bars, which have worked to ensure that judges are capable of exercising their constitutional responsibilities and obligations to protect the rights and freedoms of the citizens. He urged adoption of the Standards in order to reinvigorate the effort for merit selection and to bring the elements of merit selection to the election process.

Further speakers in support of the resolution waived their right to speak, and without further debate the House adopted the resolution by voice vote, as follows:

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20The full joint report can be found at page 359. Sidney S. Eagles, Jr. of North Carolina and Norma L. Shapiro of Pennsylvania abstained from voting with respect to this recommendation.
21The full joint report can be found at page 401.
REPORT NO. 2 OF THE
SECTION OF INTERNATIONAL LAW AND PRACTICE
PRESENTED JOINTLY WITH THE
SECTION OF INDIVIDUAL RIGHTS
AND RESPONSIBILITIES
AND THE
THE STEERING COMMITTEE ON
THE UNMET LEGAL NEEDS OF CHILDREN

RECOMMENDATION*

RESOLVED, That the American Bar Association supports the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and urges its formal adoption by the United Nations; and

FURTHER RESOLVED, That the American Bar Association urges that upon its final adoption by the United Nations, the United States expeditiously ratify the Optional Protocol on the Sale of Children, child Prostitution and Child Pornography.

REPORT

I. Introduction


(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 the 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 Op-

*The recommendation was revised and approved. See page 19.
shall thereafter inform the other States Parties to the Convention and all States which have signed the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations. If, however on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act which occurs prior to the date at which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

Article 12

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one-third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments which they have accepted.

Article 13

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States which have signed the Convention.
tional 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.

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 Op-

\(^1\) See art. 13.

tional 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 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 "traf-
ricked 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 Sales 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. This framework consists of treaties, international conventions and covenants, and U.N. charter-based mechanisms. The more significant and relevant of these instruments are briefly discussed below.


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. 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.” It contains several instruments 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 on Saint-Germain-en-Laye (to secure the complete suppression of slavery in all its forms and of 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, Article 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.”


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 Agree-
eral 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.”

Under Article 32, “States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or . . . to be harmful to the child’s health or physical, mental, spiritual, moral or social development,” and requires setting of a minimum age or ages for employment. States are bound to “[p]rove 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; [and]
(c) The exploitative use of children in pornographic performances and materials.”

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

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. This Convention (No. 182) requires member states to take immediate steps to prevent, prohibit and eliminate the “worst forms of

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9Id. art. 19(1).
10Id. art. 32(1).
11Id. art. 32(2)(a).
12Id. art 32(2)(c).
13Id. art 34.
14Id. art. 35.
15Id. art. 39.
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.

3. 1949 Universal Declaration of Human Rights

The Universal Declaration of Human Rights 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.” 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.” Article 5 specified that “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Article 13 states that “Everyone has the right to freedom of movement and residence within the borders of each state.” It also provides that: “Everyone has the right to leave any country, including his own, and return to his country.” Other articles also address human rights relating to employment, health, and education.

4. 1966 International Covenant on Civil 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. The ICCPR provides in part that: “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.” Article 8 states that “No one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited.” It also provides that “No one shall be held in servitude” and that “No one shall be required to perform forced or compulsory labour.”

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

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19Universal Declaration of Human Rights, art. 4
20id. art. 5.
21id. art. 13(1).
22id. art. 13(2).
23id. arts. 23 and 24.
24id. art. 25.
27ICCPR, art. 7
28id. art. 8(1).
29id. art. 8(2)
30id. 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).
Cultural Rights represents the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II. Among its many provisions, the Covenant recognizes the rights to “[s]afe and healthy working conditions.”


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

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 Adoption 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.”

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


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 a forced labor and contemporary form of slavery.”

It called 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 Calcutas-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

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reintegration relating to the sexual abuse of children. 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.

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 retracted 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 refer to sale for the purpose of trade in their bodily organs.

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.” At the same time, though, pressure for results continued as the U.N. issued several resolutions in support of the working group’s negotiations.

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. The working group did not take up this request.

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40 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
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." As of this writing, the Optional Protocol has yet to be taken up by the U.N. General Assembly for formal adoption. After adoption, it will be open for signature and ratification, and will go into force three months after the tenth ratification.

Due to the difficulty of the negotiations, the Optional Protocol as agreed to by the working group reflects the minimum level of consensus that its 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.

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 measure 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 im-
migration laws to address activities involved in trafficking schemes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

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

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 in 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,”

\textsuperscript{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.

\textsuperscript{44}Id. at 33.

\textsuperscript{45}Id. at 36–42.

\textsuperscript{46}H.R. 3244, The Trafficking Victims Protection Act of 1999.
Article 3 makes actionable the "producing, distributing, disseminating, importing, exporting, offering, selling or processing 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 basis 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. 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.

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

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47The 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.

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

49In 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.
states parties, and shall be included as extraditable offenses 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 the 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 offenses, 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 calls 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 Convention 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,

Rona Mears  
Chair  
Section of International Law and Practice  
July 2000

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

The States Parties to the present Protocol,

Considering that in order to further 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,

Considering also that the Convention on the Rights of the Child recognizes 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,

Gravely concerned that the significant and increasing international traffic of children for the purpose of the sale of children, child prostitution and child pornography,

Deeply concerned at the widespread and continuing practice of sex tourism to which children are especially vulnerable, as it directly promotes the sale of children, child prostitution and child pornography,

Recognizing that a number of particularly vulnerable groups, including girl children are at greater risk of sexual exploitation, and that girl children are disproportionately represented among the sexually exploited,

Concerned about the growing availability of child pornography on the Internet and other evolving technologies and recalling the International Conference on Combating Child Pornography on the Internet (Vienna, 1999) and, in particular, its conclusion calling for the worldwide criminalization of the production, distribution, exportation, transmission, importation, international possession and advertising of child pornography, and stressing the importance of closer cooperation and partnership between Governments and the Internet industry,

Believing that the elimination of the sale of children, child prostitution and child pornography will be facilitated by adopting a holistic approach addressing the contributing factors, including underdevelopment, poverty, economic disparities, inequitable socio-economic structure, dysfunctioning families, lack of education, urban-rural migration, gender discrimination, irresponsible adult sexual behaviour, harmful traditional practices, armed conflicts and trafficking of children,

Believing that efforts to raise public awareness are needed to reduce consumer demand for the sale of children, child prostitution and child pornography, and in the importance of strengthening global partnership among all actors, and of improving law enforcement at the national level,

Noting the provisions of international legal instruments relevant to the protection of children, including the Hague Convention on the Protection and Co-operation with Respect to Intercountry Adoption, the Hague Convention on the Civil Aspects of Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect
Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists for the promotion and protection of the rights of the child,

Recognizing the importance of the implementation of the provisions of the Programme 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 and the other relevant decisions and recommendations of pertinent international bodies,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Have agreed as follows:

**Article 1**

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by this Protocol.

**Article 2**

For the purpose of the present Protocol:

**SALE OF CHILDREN**

(a) Sale of children means 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**

(b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;

**CHILD PORNOGRAPHY**

(c) Child pornography means 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 sexual purpose.

**Article 3**

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offenses are committed domestically or transnationally or on an individual or organized basis.

(a) In the context of sale of children as defined in article 2 (a):

   (i) The offering, delivering, or accepting by whatever means a child for the purpose of:

      Sexual exploitation of the child;
Transfer of organs of the child for profit
Engagement of the child in forced labour;
(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;
(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2(b); and
(c) Producing, distributing, disseminating; importing, exporting, offering, selling, or possessing for the above purposes, child pornography as defined in article 2(c).
2. Subject to the provisions of a State Party's national law, the same shall apply to an attempt to commit any of these acts and to complicity or participation in any of these acts.
3. Each State Party shall make these offenses punishable by appropriate penalties which take into account their grave nature.
4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offenses established in paragraph 1 of this article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative.
5. State Parties shall take all appropriate legal and administrative measures to ensure that all persons involved in the adoption of a child act in conformity with applicable international legal instruments.

Article 4

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 3.1, when the offenses are committed in its territory or on board a ship or aircraft registered in that State.
2. Each State Party may take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 3.1 in the following cases:
(a) When the alleged offender is a national of that State or a person who has his habitual residence in its territory;
(b) When the victim is a national of that State.
3. Each State Party shall also take such measures as may be necessary to establish its jurisdiction over the above-mentioned offenses when 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.
4. This Protocol does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5

1. The offenses referred to in article 3.1 shall be deemed to be included as extraditable offenses in any extradition treaty existing between States Parties, and shall be included as extraditable offenses in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in these treaties.
a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Protocol as a legal basis for extradition in respect of such offenses. Extradition shall be subject to the conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of offenses between themselves subject to the conditions provided by the law of the requested State.

4. Such offenses shall be treated, for the purpose of extradition between States Parties, 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.

5. If an extradition request is made with respect to an offense described in article 3.1 and if the requested State Party does not or will not extradite, on the basis of the nationality of the offender, the State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

Article 6

1. State Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offenses set forth in article 3.1, including assistance in obtaining evidence at their disposal necessary for proceedings.

2. States parties shall carry out their obligations under paragraph 1 of the present article in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 7

States Parties shall, subject to the provisions of their national law:

(a) Take measures to provide for the seizure and confiscation, as appropriate of:
   (i) Goods such as materials, assets and other instrumentalities used to commit or facilitate offenses under the present protocol;
   (ii) Proceeds derived from such offenses:
(b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (i);
(c) Take measures aimed at closing on a temporary or definitive basis premises used to commit such offenses.

Article 8

1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:
(a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;
(b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
(c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
(d) Providing appropriate support services to child victims throughout the legal process;
(e) Protecting as appropriate the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
(f) Providing, 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;
(g) Avoiding unnecessary delay in the disposition of cases and the execution of orders to decrees granting compensation to child victims.

2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.

3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offenses described in the present Protocol, the best interest of the child shall be a primary consideration.

4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological, for the persons who work with child victims of the offenses prohibited under the present Protocol. States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and or protection and rehabilitation of child victims of such offenses.

5. Nothing in this article shall be construed as prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

**Article 9**

1. States Parties shall adopt or strengthen, implement and disseminate laws, administrative measures, social policies and programmes, to prevent the offenses referred to in the present Protocol. Particular attention shall be given to protect children who are especially vulnerable to these practices.

2. States Parties shall promote awareness in the public at large, including children, through information by all appropriate means, education and training, about the preventive measures and harmful effects of the offenses referred to in the present Protocol. In fulfilling their obligations under this article, States Parties shall encourage the participation of the community and, in particular, children and child victims, in such infor-
nation and education and training programmes, including the national level.

3. States Parties shall take all feasible measures with the aim of providing all appropriate assistance to victims of such offenses, including their social reintegration, and their full physical and psychological recovery.

4. States Parties shall ensure that all child victims of the offenses described in the present Protocol have access to adequate procedures to seek justice without discrimination, compensation for damages from those legally responsible.

**Article 10**

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism. States Parties shall promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

2. States Parties shall promote international cooperation to assist child victims for their physical and psychological recovery, social reintegration and repatriation.

3. States Parties shall promote the strengthening of international cooperation in order to address the root causes, such as poverty and underdevelopment, contributing to the vulnerability of children to the practice of sale, prostitution, pornography and child sex tourism.

4. States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes.

**Article 11**

Nothing in the present Protocol shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State Party; or
(b) International law in force for that State.

**Article 12**

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child in accordance with article 44 of the Convention any further
information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.  
3. The Committee on the Rights of the Child may request that States Parties further information relevant to the implementation of this Protocol.

Article 13

1. The present Protocol is open for signature by any State which is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification or open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 14

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.
2. For each State ratifying the present protocol or acceding to it after its entry into force, the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification accession.

Article 15

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States which have signed the Convention. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General of the United Nations.
2. Such a denunciation shall not have the effect of releasing the State party from its obligations under this Protocol in regard to any offense which occurs prior to the date at which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter which is already under consideration by the Committee prior to the date at which the denunciation becomes effective.

Article 16

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one-third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties
present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments which they have accepted.

**Article 17**

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Protocol to all States Parties to the Convention and all States which have signed the Convention.