

# The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers

by Cris R. Revaz\*

## Introduction

On May 25, 2000, the United Nations adopted two Optional Protocols to the United Nations Convention on the Rights of the Child (CRC). Both Optional Protocols address some of the worst forms of human rights abuses perpetrated against children worldwide. The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Sex Trafficking Protocol) addresses the growing problem of sex trafficking. It defines and prohibits the sale of children, child prostitution, and child pornography; requires that a state's criminal or penal law regulate certain proscribed acts; sets forth various bases for asserting jurisdiction and extradition; and provides for protection of children victimized by the prohibited practices.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (Child Soldiers Protocol) addresses the practice of recruiting and using children as soldiers in armed conflict. It bans the use of children under the age of eighteen in armed conflicts, while permitting the voluntary recruitment of sixteen and seventeen year-olds into armed forces.

Both Optional Protocols expressly permit signatories to the CRC to sign and ratify the Protocols even if they have not ratified the underlying Convention. As a result, the United States—which has signed but not ratified the CRC—is eligible to sign, ratify, and implement the two Optional Protocols independent of the CRC. The Optional Protocols are important tools for promoting children's rights both domestically and internationally. Recognizing both the importance of international support and the fact that the United States itself is not impervious to these problems, the American Bar Association (ABA), among others, has joined the domestic effort to urge the United States to ratify the Optional Protocols.

## Sex Trafficking Protocol

### *The Problem of Sex Trafficking*

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, and organ trade. 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 per year are trafficked into prostitution in Southeast Asia alone, and another one million are trafficked worldwide.

The proliferation of child pornography on the Internet contributes to the expansion in illicit trafficking, as low-cost Internet advertising of the commercial sex trade attracts sex tourists and pedophiles. Children are favored targets for this type of commercial sexual exploitation, and groups with low social standing—minorities, refugees, street children, poor children, juveniles from broken homes, and disabled minors—are often the most vulnerable.

The United States certainly is not immune to the trafficking and exploitation of children for sexual purposes or forced labor. The United States Department of State conservatively estimates that 50,000 women and children are trafficked into the United States annually, primarily from the former Soviet Union and Southeast Asia. In addition, according to the National Center for Missing and Exploited Children, "pimps" prey on and actively recruit a large portion of the 500,000 children who run away or are kicked out of their homes annually. A recent study on the commercial sexual exploitation of children in the United States by Dr. Richard Estes and Dr. Alan Weiner of the University of Pennsylvania found that "hundreds of thousands of American children living outside their homes—on the streets, in 'squats,' cheap motels, shelters, vans and even dumpsters—fall victim to sexual exploitation each year." Many of these runaway children are quite young, and many were victims of sexual abuse before leaving home. The report also found that runaway and homeless youth older than twelve years are prime targets for sexual exploitation by organized crime, as many of them engage in some form of prostitution to meet their daily needs for food and shelter.

Children sold or trafficked into sexual servitude 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 post-traumatic shock. Children sold into domestic servitude, bonded sweatshop labor, and other industries are subjected to violence and may be literally worked to death.

The sale of children, child prostitution, and child pornography are contemporary forms of slavery, and make a mockery of children's rights. Such practices violate children's rights as enumerated in numerous international treaties and conventions, such as the CRC, ILO Convention 182 on the Worst Forms of Child Labor, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Due to the untold costs to families, judicial systems, and society at-large, coordinated and effective international, national, and local action is necessary to eliminate all forms of sexual and other slavery-like practices.

### *Principal Provisions of Sex Trafficking Protocol*

The Preamble to the Sex Trafficking Protocol contains a number of important provisions. It states that "[i]n order further to achieve the purposes of the Convention on the Rights of the Child and the implementation of its provisions . . . 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." The Preamble also makes express reference to the need to implement CRC

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Articles 34 and 35, which offer children broad protection against trafficking, sexual exploitation, and abuse. Finally, the Preamble references CRC language by emphasizing 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.”

The Preamble serves as a basis for interpreting and implementing the Sex Trafficking Protocol in a manner that fully conforms with and builds upon the protections enumerated in the CRC. In fact, because a number of its principal provisions (*e.g.*, Article 3(1), Article 4(4), and Article 11) set only minimum standards for compliance, countries may adopt and enforce measures to protect children that are more stringent than the measures mandated under the Sex Trafficking Protocol.

Article 1 of the Sex Trafficking Protocol requires States Parties to prohibit the “sale of children, child prostitution and child pornography,” as defined under Article 2. Article 2 defines “the sale of children” as “any act or transaction whereby a child is transferred . . .

to another for remuneration or any other consideration.” Under Article 2, “child prostitution” means the “use of a child in sexual activities for remuneration or any other form of consideration.” Finally, Article 2 defines “child pornography” 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.”

Article 3 addresses criminalization, and makes certain practices actionable under a State Party’s criminal or penal law, including attempts, complicity, or participation in acts relating to the sale of children, child prostitution, and child pornography. This provision also 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. Article 3 also makes actionable the “offering, obtaining, procuring or providing” of a child for child prostitution and “producing, distributing, disseminating, importing, exporting, offering, selling, or possessing . . .” child pornography. Importantly, Article 3 applies both domestically and internationally, as well as to individuals and organizations.

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 that each party take necessary measures to establish jurisdiction over such offenses when committed within its territory. It also provides 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. Finally, Article 4 does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 5 strengthens the ability of States Parties to pursue extradition of those who commit offenses under the Sex Trafficking Protocol, and includes such violations as extraditable offenses in any current and future extradition treaty existing between State Parties. It further provides that the Protocol may serve as a legal basis for extradition in cases where no extradition treaty exists.

Articles 8 and 9 set forth provisions for protecting and assisting child victims during all stages of the criminal justice process. Article 8(1) requires States Parties to adopt “appropriate measures” to protect the rights and interests of child victims, and enumerates several duties for States Parties, including but not limited to the following duties: recognizing the vulnerability of child victims and adapting procedures to recognize their special needs; informing child victims of their rights; allowing the child victims’ views to be presented and considered in proceedings where

their personal interests are affected; providing appropriate support services to child victims; protecting the privacy and identity of child victims; protecting child victims from intimidation and retaliation; and avoiding unnecessary delay in disposing of cases and executing compensation orders or decrees for child victims. As a guiding principle,

Article 8(3) states that where the judicial treatment of children is concerned, the best interest of the child must constitute the primary consideration.

Article 9 details prevention practices and provides that when taking steps to prevent and redress the offenses covered by the Sex Trafficking Protocol, States Parties must pay particular attention to protecting children who are especially vulnerable to proscribed practices. It requires States Parties to pursue “all feasible measures” in rendering appropriate assistance to victims of such offenses, including their “full social reintegration, and their full physical and psychological recovery.” Importantly, this article also requires that child victims have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.

Article 10 calls for all necessary steps to strengthen international cooperation 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. To monitor compliance with the Sex Trafficking Protocol, Article 12 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 implementation measures. Thereafter, follow-up reports are to be made every five years.

Finally, Article 13(1) establishes that countries that have not ratified the CRC may nonetheless sign and ratify the Sex Trafficking Protocol without being bound by the CRC. This provision was included as an attempt to obtain support from the United States, which has not yet ratified the CRC. The United States insisted that ratification of this Protocol (as well as the Child Soldiers Protocol) not be considered a legal assumption by the United States of

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CRC obligations. France and a number of other countries opposed Article 13, and urged the United States to first ratify the CRC and accept its underlying obligations before ratifying the Optional Protocols. These countries view the two Optional Protocols as extensions of CRC principles, and consider it dangerous precedent to establish that a State Party to a Protocol could legally divest itself of obligations under the mother convention.

#### *Opposition to the Sex Trafficking Protocol*

There was a fair amount of controversy surrounding the negotiations of the Sex Trafficking Protocol, particularly from the non-government organization Group for the CRC and the NGO Committee on the Status of Women. Both entities are comprised of various NGOs that advocate for ratification and implementation of the CRC and the realization of other human rights principles. They argued that the Protocol weakens existing protections under the CRC. In particular, the NGOs expressed concern that despite a growing international effort to combat commercial sexual exploitation through prosecution, the Sex Trafficking Protocol does not protect child victims from such prosecution. Further, while Article 1 of the CRC contains an upper age limit of eighteen, the NGOs condemned the absence of an upper age limit in the Sex Trafficking Protocol. Additionally, the NGOs criticized the Sex Trafficking Protocol's several references to national laws, such as in Article 8(1)(c) and (e). They argue that such references could potentially weaken the obligations imposed on States Parties under Articles 34 and 35, which require States Parties to take all appropriate national, bilateral, and multilateral measures to prevent the sexual exploitation of children.

Due to the difficulty of the negotiations, the Sex Trafficking Protocol as adopted by the UN General Assembly reflects the minimum level of consensus that the working group members were able to achieve. Despite the criticisms, the overall result reflects a positive and useful extension of the CRC's broad language relating to sex trafficking.

In this regard, the Sex Trafficking Protocol features expansive provisions regarding the definitions for the sale of children, child prostitution, child pornography, and actionable practices relating thereto. Moreover, it clarifies and strengthens the bases for jurisdiction, extradition, and international cooperation. In addition, the effort to lend greater specificity to the CRC's broad terms may well advance its practical implementation. The Sex Trafficking Protocol also is beneficial to the extent that it heightens international awareness of the underlying problem. Moreover, the Protocol does not contain any provisions that would negate or circumvent any of the broad obligations to which States Parties to the CRC are bound. As stated in the Preamble, the Sex Trafficking Protocol is intended to help realize the purposes of the CRC. Ultimately, the effectiveness of the Sex Trafficking Protocol will be determined by the extent to which its obligations are reflected in national laws and aggressively enforced thereunder.

Finally, the Sex Trafficking Protocol is laudable as an instrument that allows for United States participation and support to stop the sale of children, child prostitution, and child pornography, despite its failure to ratify the CRC. Ratification of the Sex Trafficking Protocol would enable the United States to substantially contribute both in terms of offering resources and in demonstrating international cooperation.

#### **The Child Soldiers Protocol**

##### *The Problem of Child Soldiers*

The Coalition to Stop the Use of Child Soldiers reports that approximately 300,000 children in over 40 countries worldwide are engaged in military conflict, while another 500,000 are recruited into paramilitary organizations, guerilla groups, and civil militias in more than 85 countries. Children are easily manipulated and drawn into violence they are unable to understand due to their emotional and physical immaturity. The children most vulnerable to manipulation are poor, separated from their families, displaced from their homes, living in a combat zone, or with limited access to education.

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As soldiers, both boys and girls may be sent to the front lines of combat or into minefields ahead of other troops. These child soldiers are often used for suicide missions and have been forced to commit atrocities against their own family and neighbors. In some places, young soldiers have been given drugs to increase their courage and dull their sensitivity to pain. Because of their inexperience and lack of training, child soldiers suffer far higher casualty rates than adult soldiers. Those who survive may be permanently disabled, with the most common injuries being loss of hearing, loss of limbs, and blindness. Others bear psychological scars from being forced to both commit and witness horrific atrocities.

##### *Principal Provisions of Child Soldiers Protocol*

The Child Soldiers Protocol extends the minimum age requirement for direct participation in armed conflict and conscription, *i.e.*, forced recruitment, to eighteen years. Article 1 of the Optional Protocol states that governments "shall take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities." Article 2 provides that governments "shall ensure that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces." Article 4(1) forbids rebel or other non-governmental armed groups from recruiting persons under the age of eighteen years or using them in hostilities under any circumstances. Under Article 4(2), governments are required to take all feasible measures to prevent the recruitment and use of children by such groups, including the criminalization of such practices.

The Protocol departs from the age eighteen minimum, however, with respect to voluntary recruitment into a state's armed forces. Under Article 3, governments must raise the current minimum age for voluntary recruitment from fifteen (CRC, Article 38(3)) to sixteen years. This provision also establishes that upon ratification of or accession to the Child Soldiers Protocol, governments must deposit a binding declaration stating their minimum recruiting age. Article 3 also mandates that states recruiting persons under eighteen maintain a series of safeguards to ensure recruitment is voluntary, that it is conducted with the informed consent of the person's parents or legal guardians, and that recruits are fully informed of the duties involved in military service once proof of age is established.

With respect to implementation of the Optional Protocol, Article 6 requires that States Parties "take all necessary legal and administrative measures to ensure the effective implementation and enforcement" of the Protocol obligations, and that they take "all feasible measures to ensure" demobilization of children recruited into armed conflict. Article 6 also requires that States Parties, "when necessary," provide appropriate rehabilitation and reintegration assistance.

As with Article 13(1) of the Sex Trafficking Protocol, Article 9 of the Child Soldiers Protocol provides that all states are free to sign and ratify the Protocol regardless of whether they have ratified the underlying CRC. The enforcement and reporting requirements of this Protocol mirror the Sex Trafficking Protocol.

#### *Opposition to the Child Soldiers Protocol*

Throughout the negotiations over the Child Soldiers Protocol, the fundamental obstacle to achieving a consensus was United States-led opposition to the minimum-age requirement for military service. The United States currently accepts seventeen year-old volunteers into its armed forces, contingent upon parental permission. In recent years, it has deployed seventeen year-old troops to conflicts in Somalia, Bosnia, and the Persian Gulf. The United States refused to compromise on its policy of accepting seventeen year-olds into the military and of using them in armed conflict, despite the general consensus to the contrary, and notwithstanding that fewer than 3,000 members of its 1.3 million active duty force are minors.

In January 2000, facing both international and domestic pressure, the United States agreed to support eighteen as the minimum age for direct participation in armed conflict and forced recruitment. The United States did not, however, abandon its long-standing policy of allowing seventeen year-olds to voluntarily enlist. This shift broke the impasse and on January 21, 2000, a consensus finally was achieved, setting eighteen as the minimum age for involvement in military conflict, while allowing voluntary recruitment of sixteen and seventeen year olds, subject to the safeguards discussed above.

On July 25, 2000, former President Clinton submitted the Child Soldiers Protocol to the United States Senate, arguing that the Article 1 obligation, which set eighteen as the minimum age requirement for direct participation in hostilities, reflected standards grounded in international law. Moreover, Clinton argued, the Article 1 obligation would not affect force readiness or prevent the United States from protecting its military recruitment policies. These arguments were a direct response to concerns that ratification of the Child Soldiers Protocol would undermine U.S. military readiness.

#### **Conclusion**

Since former President Clinton forwarded the Optional Protocols to the United States Congress in 2000, the Senate Foreign Relations Committee has failed to take action. Acknowledging the importance of the two Optional Protocols for promoting children's rights worldwide, and more importantly recognizing that the United States is not

immune to these problems, last year the ABA adopted policy statements urging the United States to expeditiously ratify both Protocols. On August 21, 2001, the ABA renewed its call for ratification in a letter to Foreign Relations Chairman Joseph Biden (D-DE) and Ranking Minority Member Senator Jesse Helms (R-NC). Because these two Protocols can be used to advance a concerted global effort toward

the eradication of two of the world's worst human rights abuses both domestically and abroad, United States ratification of the protocols is critical.

The United States took an important step in signing the Optional Protocols to the CRC. In so doing, it recognized that the scourges of sex trafficking and child soldiers will not be tolerated at home or abroad. Ratification of these Protocols is critical if the United States is to honor its commitments to its children, and provide full support to global efforts that seek an end to these insidious practices. 🌐

*\* Cris R. Revaz is co-chair of the American Bar Association's International Human Rights Committee and its Subcommittee on the Rights of the Child, [http://www.abanet.org/intlaw/divisions/public/child\\_rights.html](http://www.abanet.org/intlaw/divisions/public/child_rights.html), and is Counsel at Hale and Dorr, LLP, in Washington, D.C.*

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