106TH CONGRESS
2d Session

SENATE

TREATY DOC.
106–37

PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

TWO OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, BOTH OF WHICH WERE ADOPTED AT NEW YORK, MAY 25, 2000: (1) THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON INVOLVEMENT OF CHILDREN IN ARMED CONFLICT; AND (2) THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY, SIGNED ON JULY 5, 2000

JULY 25, 2000.—The Protocols were read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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U.S. GOVERNMENT PRINTING OFFICE

79–118 WASHINGTON : 2000

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *July 25, 2000.*

To the Senate of the United States:

With a view to receiving advice and consent of the Senate to ratification, I transmit herewith two optional protocols to the Convention on the Rights of the Child, both of which were adopted at New York, May 25, 2000: (1) The Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict; and (2) The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. I signed both Protocols on July 5, 2000.

In addition, I transmit for the information of the Senate, the report of the Department of State with respect to both Protocols, including article-by-article analyses of each protocol. As detailed in the Department of State report, a number of understandings and declarations are recommended.

These Protocols represent a true breakthrough for the children of the world. Ratification of these Protocols will enhance the ability of the United States to provide global leadership in the effort to eliminate abuses against children with respect to armed conflict and sexual exploitation.

I recommend that the Senate give early and favorable consideration to both Protocols and give its advice and consent to the ratification of both Protocols, subject to the understandings and declarations recommended in the Department of State Report.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, July 13, 2000.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with the recommendation that they be transmitted to the Senate for advice and consent to ratification, two Optional Protocols to the Convention on the Rights of the Child adopted at New York November 20, 1989 (the "Convention"): (1) the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (the "Children in Armed Conflict Protocol"); and (2) the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (the "Sale of Children Protocol"). On July 5, you signed both Protocols. I have also enclosed, for the information of the Senate, article-by-article analyses of both Protocols.

Though styled as Protocols to the Convention, both texts, by their terms, will operate an independent multilateral agreements under international law. Significantly, States can become parties to either or both Protocols without becoming a party to the Convention or being subject to its provisions. The United States seeks the widest possible acceptance of these two Protocols by the community of nations to make it clear that the Protocols speak forcefully for the protection of all children. It is essential that we work with all of our international partners to achieve our common objective: the elimination of abuses of the world's children.

BACKGROUND

On May 25, 2000, the United Nations General Assembly adopted both the Children in Armed Conflict Protocol and the Sale of Children Protocol. Adoption of these Protocols greatly strengthens international efforts to define and enforce norms to protect the most vulnerable children. These children desperately need the full attention of the United States and the world.

(A) The Children in Armed Conflict Protocol

The Children in Armed Conflict Protocol deals realistically and reasonably with the difficult issue of minimum ages for compulsory recruitment, voluntary recruitment, and participation in hostilities, while fully protecting the military recruitment and readiness requirements of the United States.

The Protocol raises the age for military conscription to 18 years; international law had previously set this at only 15 years. The Pro-

tocol also calls for governments to set a minimum age for voluntary recruitment above the current international standard of 15 years and to report on measures to ensure that recruitment is truly voluntary. States must take "all feasible measures" to ensure that members of their armed forces who are not yet 18 do not take a "direct" part in hostilities. States that become party to the Protocol also agree to "take all feasible measures to prevent" the recruitment and use of persons younger than 18 in hostilities by non-governmental armed groups, including by adopting legal measures to prohibit and criminalize such practices.

Another important provision of the Protocol is its promotion of international cooperation and assistance in the rehabilitation and social reintegration of children who have been victimized by armed conflict.

No implementing legislation would be required with respect to U.S. ratification of the Children in Armed Conflict Protocol because current U.S. law meets the standards in the Protocol. The United States does not permit compulsory recruitment of any person under 18 for any type of military service. While inactive, the selective service system remains established in law and provides for involuntary induction at and after age 18. The United States also does not accept voluntary recruits below the age of 17 pursuant to 10 U.S.C. § 505(a) (1994). Additionally, the United States will take "all feasible measures" to ensure that members of its armed forces do not take "a direct part in hostilities" without necessitating any change in U.S. law. U.S. law already prohibits insurgent activities by non-government actors against the United States, irrespective of age, under 18 U.S.C. § 2381, et seq.

The Department does recommend, however, that the Senate's advice and consent to ratification of the Children in Armed Conflict Protocol be subject to three understandings and a declaration, as follows.

First, as noted above, the United States considers the Children in Armed Conflict Protocol to operate by its very terms as an independent international agreement. As such, by ratifying the Protocol, the United States understands that it would not become a party to the Convention or assume any rights or obligations under the Convention. The following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the Protocol constitutes an independent multi-lateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Second, as detailed in the enclosed article-by-article analysis, the United States views the obligation in Article 1 to take all "feasible measures" to ensure that members of its armed forces who have not attained the age of 18 years do not take a "direct part" in hostilities as reflecting standards whose meanings are well grounded in international law and which the United States can meet while fully protecting its military recruitment and readiness requirements without harming its force readiness. The following under-

standing concerning the meaning of these standards is recommended to accompany the U.S. instrument of ratification:

> With respect to Article 1, the United States understands that the term "feasible measures" are those measures which are practical or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. The United States understands the phrase "direct part in hostilities" to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct casual relationship between the activity engaged in and the harm done to the enemy. The phrase "direct participation in hostilities" does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment. The United States further understands that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

Third, under Article 3(1), States Parties to the Children in Armed Conflict Protocol are required to raise the minimum age for voluntary recruitment into their national armed forces from that set out in Article 38(3) of the Convention. Article 38(3) of the Convention provides a minimum age of 15 years, which reflects the minimum age currently provided for in international humanitarian law. To make clear the nature of the obligation assumed under Article 3(1) of the Protocol, the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that Article 3 obliges States Parties to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of 15.

Fourth and finally, Article 3(2) requires each State Party to the Children in Armed Conflict Protocol to deposit a binding declaration upon ratification setting forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced. In order to satisfy this requirement, the following understanding is recommended to accompany the U.S. instrument of ratification:

> Pursuant to Article 3(2) of the Protocol, the United States declares that the minimum age at which it will permit voluntary recruitment into its armed forces is 17. The United States has a number of safeguards in place to ensure that such recruitment is not forced or coerced, including a requirement in U.S. law, Title 10, United States

Code, Section 505(a), that no person under 18 years of age may be originally enlisted without the written consent of his or her parent or guardian, if he or she has a parent or guardian entitled to his or her custody and control. Moreover, each person recruited into the military receives a comprehensive briefing and must sign an enlistment contract which, together, specify the duties involved in military service. All recruits must provide reliable proof of age before their entry into the military service.

B. The Sale of Children Protocol

The Sale of Children Protocol takes a vital step forward in our efforts to combat crimes of trafficking in children. Those who traffic in children prey on the most vulnerable children, who are most in need of legal and other protections. The Protocol is the first international instrument to define the terms "sale of children," "child pornography," and "child prostitution." The Protocol requires these offenses to be treated as criminal acts, and provides law enforcement and cooperation tools to help guarantee that offenders will not go unpunished. Additionally, the Protocol establishes stronger, clearer grounds for jurisdiction and extradition, to better ensure that offenders can be prosecuted regardless of where they are found. Moreover, its extensive provisions on prevention and cooperation will help child victims receive protection and assistance.

It was especially important for the United States that the Protocol contain effective and practical strategies to prosecute and penalize those who commit crimes involving child prostitution, child pornography and trafficking in children. The administration is committed to ensuring that no child is subjected to these crimes.

It is recommended that the Senate's advice and consent to ratification of the Sale of Children Protocol be subject to five understandings and a declaration, as follows:

First, as noted above, the United States considers the Sales of Children Protocol, by its very terms, to operate as an independent international agreement. As such, by ratifying the Protocol, the United States understands that it would not become a party to the Convention or assume any rights or obligations under the Convention. The following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the Protocol constitutes an independent multilateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Second, Article 2(a) of the Protocol defines the term "sale of children" in general as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or other consideration." To further clarify the meaning of the term "sale of children," the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the definition of "sale of children" in Article 2(a) is intended to reach transactions in which remuneration or other consideration is

> given and received under circumstances in which a person who does not have a lawful right to custody of the child thereby obtains *de facto* authority to exercise control over the child.

Third, Article 2(c) 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." To clarify the meaning of the term further, the following understanding is recommended to accompany the U.S. instrument of ratification:

The United States understands the definition of child pornography in Article 2(c) to mean the visual representation of a child, engaged in real or simulated sexual activities, or of the genitalia of a child where the dominant characteristic is depiction for a sexual purpose."

Fourth, Article 3(1)(a)(i) requires States Parties to ensure that, in the context of sale of children, the offering, delivering, or accepting of a child for the purpose of "transfer of organs of the child for profit" is fully covered under its criminal law. To clarify the scope of the obligation to criminalize the transfer of organs in Article 3, the following understanding is recommended to accompany the U.S. instrument of ratification:

> With respect to Article 3(1)(a)(i), the United States understands that the "transfer of organs for profit" in the context of the sale of a child is not intended to reach situations in which a child donates an organ pursuant to lawful consent, which could never arise in the context of such a sale. Moreover, the United States understands that "profit" does not extend to the lawful payment of reasonable payments associated with such transfer, for example for expenses of travel, housing, lost wages, and medical costs arising therefrom.

Fifth, Article 3(1)(a)(ii) requires States Parties to ensure that, in the context of sale of children, "improperly inducing consent, as an intermediary for adoption in violation of applicable international legal instruments on adoption" is fully covered under its criminal law. In order to clarify the nature of United States obligations under Article 3(1)(a)(ii), the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands the reference to "applicable international legal instruments" in Article 3(1)(a)(ii) of the Protocol to mean the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the "Hague Convention"). Since the United States is not currently a party to the Hague Convention, it understands that it is not obligated to criminalize conduct prohibited therein. The United States further understands the term "improperly inducing consent" in Article 3(1)(a)(ii) to mean knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights.

Sixth, and finally, Article 4(1) obligates every State Party to take "such measures as may be necessary" to establish 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. U.S. law provides a broad range of bases on which to exercise jurisdiction over offenses covered by the Protocol that are committed "on board a ship or aircraft *registered* in" the United States [emphasis added]. U.S. jurisdiction in such cases is not uniformly stated for all crimes covered by the Protocol, nor is it always couched in terms of "registration" in the United States. Therefore, the reach of U.S. jurisdiction may not be co-extensive with the obligation stipulated by this article. The following declaration is recommended to accompany the U.S. instrument of ratification:

> Subject to the declaration that, to the extent that the domestic law of the United States does not provide for jurisdiction over an offense referred to in Article 3(1) of the Protocol when the offense is committed on board a ship or aircraft registered in the United States, the obligation of the United States with respect to jurisdiction over that offense shall be suspended. The suspension shall terminate when the United States informs the Secretary-General of the United Nations that its domestic law is in full conformity with the requirements of Article 4(1) of the Protocol.

CONCLUSION

The Children in Armed Conflict and Sale of Children Protocols constitute historic advances in efforts to strengthen and enforce norms to protect millions of vulnerable children, who desperately need the world's full attention. Subject to the recommended understandings and declarations described above, both Protocols are consistent with U.S. law. Ratification by the United States will reaffirm the tradition of U.S. leadership in efforts to improve the protection of children.

The Department of Defense for the Children in Armed Conflict Protocol, and the Department of Justice for the Sale of Children Protocol join me in favoring ratification of these Protocols, subject to the conditions previously described.

Respectfully submitted,

ALAN LARSON.

Enclosures: As stated.

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

UNITED NATIONS
2000

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 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,

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 at 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, intentional 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 also believing 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 of Children and Cooperation with Respect to Inter-Country Adoption, the Hague Convention on the Civil Aspects of International Child Abduction, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, and International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,

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 adopted at the World Congress against Commercial Sexual Exploitation of Children, held at Stockholm from 27 to 31 August 1996, 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 the present Protocol.

Article 2

For the purpose of the present Protocol:

(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;

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

(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 for primarily sexual purposes.

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 offences 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:

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

a. Sexual exploitation of the child;

b. Transfer of organs of the child for profit;

c. 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;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

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 offences punishable by appropriate penalties that 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 offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, this liability of legal persons may be criminal, civil or administrative.

5. States 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 offences referred to in article 3, paragraph 1, when the offences 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 offences referred to in article 3, paragraph 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 offences when the alleged offender is present in its territory and it does not extradite him or her to another State Party on the ground that the offence 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 offences referred to in article 3, paragraph 1, shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties and shall be included as extraditable offences in every extradition treaty subsequently concluded between them, in accordance with the conditions set forth in those treaties.

2. If 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, it may consider this Protocol as a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State.

3. States Parties that do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences 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 offence described in article 3, paragraph 1, and if the requested State Party does not or will not extradite on the basis of the nationality of the offender, that State shall take suitable measures to submit the case to its competent authorities for the purpose of prosecution.

Article 6

1. States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 3, paragraph 1, including assistance in obtaining evidence at their disposal necessary for the 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 offences under the present Protocol;

(ii) Proceeds derived from such offences;

(b) Execute requests from another State Party for seizure or confiscation of goods or proceeds referred to in subparagraph (a) (i);

(c) Take measures aimed at closing, on a temporary or definitive basis, premises used to commit such offences.

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 or 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 offences 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 training, for the persons who work with victims of the offences prohibited under the present Protocol.

5. 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 victims of such offences.

6. Nothing in the present 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 offences 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 offences 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 information and education and training programmes, including at the international level.

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

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

5. States Parties shall take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol.

Article 10

1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the 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 also 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 in 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 sale of children, child prostitution, child 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 that are more conducive to the realization of the rights of the child and that may be contained in:

(a) The law of a State Party;

(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 from States Parties further information relevant to the implementation of this Protocol.

Article 13

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State that is a party to the Convention or has signed it. 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 or 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 that have signed the Convention. The 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 offence that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee prior to the date on 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.

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

Article-by-Article Analysis
Optional Protocol to the
Convention on the Rights of the Child on the
Sale of Children, Child Prostitution, and Child Pornography

Article 1 – Scope

Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (the "Protocol") is a general scope clause, which provides that "States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol." By its terms, Article 1 creates no obligations aside from those set forth in the remaining articles. During the negotiations the term "child" was understood to mean anyone under the age of 18, consistent with Article 1 of the Convention on the Rights of the Child.

The general scope of the Protocol is similar to that of ILO Convention № 182 on the Worst Forms of Child Labor, adopted by the International Labor Conference on June 17, 1999, which requires, *inter alia*, that States Parties take immediate and effective measures to secure the elimination of the sale and trafficking of children, and the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances. ILO Convention № 182 also defines a child as any person under the age of 18. While ILO Convention № 182 does not expressly require criminal penalties for the conduct prohibited therein, for many of its provisions U.S. compliance was based on existing federal and state criminal laws. The Statement of U.S. Law and Practice prepared in connection with Convention № 182 concluded that U.S. law and practice were in full compliance with its provisions. The Senate gave its advice and consent to ratification of ILO Convention № 182 on November 5, 1999.

Article 2 – Definitions

Article 2 provides the definitions of "sale of children," "child prostitution" and "child pornography."

Article 2(a) defines sale of children as "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or other consideration." Article 3 further specifies the types of conduct to be criminalized in the context of the sale of a child.

To clarify the definition of sale of children in Article 2(a) the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that the definition of "sale of children" in Article 2(a) is intended to reach transactions in which remuneration or other

consideration is given and received under circumstances in which a person who does not have lawful right to custody of the child thereby obtains *de facto* authority to exercise control over the child.

With this understanding, as more fully discussed in the analysis of Article 3, U.S. law is consistent with the obligations of the Protocol with respect to the sale of children.

Article 2(b) defines child prostitution as "the use of a child in sexual activities for remuneration or any other form of consideration." As more fully described in the analysis of Article 3, the definition set forth in the Protocol is consistent with U.S. federal and state law and practice.

Article 2(c) 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." A number of delegations, including those of the European Union, Japan and the United States, stated their understanding that the term "any representation" meant "visual representation." Delegations, including the U.S. delegation, also stated their understanding that the term "sexual parts" meant "genitalia." These understandings were included in the negotiating record of the final session.

To clarify the definition of pornography in Article 2(c), the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands the definition of child pornography in Article 2(c) to mean the visual representation of a child, engaged in real or simulated sexual activities, or of the genitalia of a child where the dominant characteristic is depiction for a sexual purpose.

With this understanding, as more fully discussed in the analysis of Article 3, U.S. law is consistent with the obligations of the Protocol with respect to child pornography.

Article 3 – Criminalization

Substantive offenses (Article 3(1))

Article 3(1) provides that States shall ensure that the following specified acts are fully covered under their criminal or penal law, punishable by appropriate penalties, taking into account the grave nature of such offenses:

- in the context of sale of children, the offering, delivering, or accepting by whatever means a child for the purpose of sexual exploitation of the child, transfer of organs for profit, or engagement of the child in forced labor (Article 3(1)(a)(i));

- in the context of sale of children, "improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international instruments on adoption" (Article 3(1)(a)(ii));

- offering, obtaining, procuring or providing a child for child prostitution (Article 3(1)(b)); and

- producing, distributing, disseminating, importing, exporting, offering, selling, or possessing for these purposes child pornography (Article 3(1)(c)).

These acts violate criminal statutes under existing U.S. federal and state laws. The Protocol does not require that the above-listed elements be crimes *per se* or that specific crimes be established under national law. Rather, the Protocol requires States Parties to ensure that acts and activities specified in Article 3(1) are covered by its criminal law.

(a) In the context of the sale of children, offering, delivering or accepting a child for the purpose of sexual exploitation (Article 3(1)(a)(i)).

The criminalization requirements concerning sale of a child for purposes of sexual exploitation largely overlap with the requirement to criminalize acts concerning child prostitution and child pornography. The term "sexual exploitation" is not defined, but it was generally understood during the negotiations that the term means prostitution, pornography or other sexual abuse in the context of the sale of children.

Since the Protocol aims at punishing sexual abuse in the context of a sale of the child, there is no obligation to criminalize consensual conduct involving individuals under age 18 that is legal under the laws of a State Party.

In the United States, the Federal and State Governments have enacted criminal laws to protect children and youth from sexual exploitation by adults. For example, federal and state laws prohibiting child sexual abuse and statutory rape laws are used to prosecute adults who sexually exploit children for the above-described purposes.

Moreover, as set forth in detail in the analysis of Article 3(1)(b) and 3(1)(c), federal and state law prohibits exploitation of children for purposes of prostitution and pornography. Additionally, federal law prohibits trafficking in children for sexual purposes. Under 18 U.S.C. § 2423(a), it is prohibited to transport in interstate commerce any individual under age 18 with the intent that the "individual engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." Further, the involuntary servitude statutes (18 U.S.C. § 1581, *et seq.*) also apply where prostitution or other commercial sexual activity is obtained or maintained through force, regardless of the age of the victim.

(b) In the context of the sale of children, the offering, delivering, or accepting a child for the purpose of "transfer of organs of the child for profit" (Article 3(1)(a)(i)).

During the negotiations, States limited the scope of the Protocol with respect to organ trafficking to situations where (1) the sale of a child occurred and (2) the organs of that child were subsequently extracted and sold for a profit. While the United States favored a broader prohibition that would have precluded the simple sale of an organ for profit, other delegations cited the problem of legislating comprehensively against such practices at the present time given limited documentation of trade in children's organs.

Article 3(2) states that coverage of complicity or participation in the act of a sale or an attempt to commit such an act is subject to the provisions of a State Party's national law.

U.S. federal law contains comprehensive protections against trafficking in the organs of a child. U.S. federal law criminalizes acquiring, receiving or otherwise transferring any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce. 42 U.S.C. § 274e (National Organ Transplantation Act). The federal proscription is limited to interstate commerce because "laws governing medical treatment, consent, definition of death, autopsy, burial, and the disposition of dead bodies is exclusively State law." S.Rep. 98-382, 98th Cong., 2nd Sess. 1984.

While state law does not always criminalize the sale of organs *per se*, the situation addressed in the Protocol would inevitably fall within the scope of one or more state criminal statutes. Since the transfer of organs of a child must be within the context of the sale of a child, as described in the understanding with respect to Article 2, situations involving the lawful consent of a child to donate an organ are not prohibited. Accordingly, depending on the nature of the crime and state law, the conduct prohibited by the Protocol would constitute assault, and might also be battery, maiming, child abuse or criminal homicide.

To clarify the scope of the obligation to criminalize the transfer of organs in Article 3 the following understanding is recommended to accompany the U.S. instrument of ratification:

> With respect to Article 3(1)(a)(i), the United States understands that the "transfer of organs for profit" in the context of the sale of a child is not intended to reach situations in which a child donates an organ pursuant to lawful consent, which could never arise in the context of a sale. Moreover, the United States understands that "profit" does not extend to the lawful payment of reasonable payments associated with such transfer, for example for expenses of travel, housing, lost wages, and medical costs arising therefrom.

(c) In the context of sale of children, the offering, delivering, or accepting by whatever means a child for the "[e]ngagement of the child in forced labour" (Article 3(1)(a)(i)).

The Protocol requires States Parties to criminalize the conduct of both the seller and buyer of a child in the context of a sale, *i.e.*, (1) acts of arranging for a buyer of a child (seller's

conduct), (2) delivering the child pursuant to a sale (the seller's conduct or the conduct of his/her agent), and (3) accepting the child pursuant to the sale (the buyer's conduct). Since "offering, delivering or accepting" a child for the purpose of forced labor must take place in the context of a sale, criminal penalties are required under Article (3)(1)(a)(i) where the transaction has been completed. Article 3(2) makes clear that, in the event of an attempt, criminalization would be subject to the provisions of a State Party's national law.

U.S. federal law, consistent with the requirements of Article 3(1)(a)(i), criminalizes the sale of a child for the purpose of engagement in forced labor. The provisions of 18 U.S.C. §§ 1581-1588 (which apply to any person, regardless of age) provide criminal penalties for, *inter alia,* holding or returning any person to a condition of peonage; holding to involuntary servitude or selling into any condition of involuntary servitude; and kidnapping or carrying away any person with the intent that such person be sold into involuntary servitude or held as a slave. These laws reach any such conduct that takes place anywhere in the United States. Federal law further criminalizes interstate kidnapping, 18 U.S.C. §§ 1201 and 1583. The kidnapping statutes punish individuals who unlawfully confine and transport others, including minors under the age of 18, for monetary benefit.

The provisions of 18 U.S.C. § 241, the federal civil rights conspiracy statute, allow the prosecution of two or more persons for conspiring, or agreeing, to exaction of labor in violation of the Thirteenth Amendment. The language of the Thirteenth Amendment forbidding slavery or involuntary servitude "within the United States or any place subject to their jurisdiction," prohibits these practices by the Federal Government, State Governments, and territories subject to the jurisdiction of the United States. The Thirteenth Amendment has been construed broadly so as to prohibit all practices that involve any form of subjection having the incidents of slavery, either directly or indirectly. *See United States v. Shackney,* 333 F.2d 475 (2d Cir. 1964). The Supreme Court has held that the purpose of the Thirteenth Amendment was not just to end slavery but to maintain a system of completely voluntary labor.

Finally, a person who "aids, abets, counsels, commands, induces or procures" the commission of one of these federal offenses is punishable as a principal under 18 U.S.C. § 2. Accordingly, those who take part in a portion of the transaction resulting in the sale of a child for the purpose of forced labor would also be subject to punishment under 18 U.S.C. §§ 1581-1588 in combination with § 2. Such conduct when involving two or more persons would also incur conspiracy liability under 18 U.S.C. §§ 241 or 371.

(d) In the context of sale of children, improperly inducing consent as an intermediary for adoption in violation of applicable international legal instruments on adoption (Article 3(1)(a)(ii)).

The obligation contained in Article 3(1)(a)(ii) to criminalize "improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption" is drawn from the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the "Hague Convention"), adopted May 29, 1993. The Hague Convention (Article 4(c)(3)) requires that an adoption within the scope of the

Convention shall take place only if the competent authorities of the State of origin determine, *inter alia,* that consent has not been induced by payment or compensation of any kind.

During the final session of negotiations, both Japan and the United States stated their understanding that "applicable international instruments on adoption" meant the Hague Convention. Further, both countries stated their understanding that, since they were not parties to that instrument, they would not be bound to penalize the conduct barred by the Hague Convention, *i.e.,* improperly inducing consent. The United States further stated that it understood the term "improperly inducing consent" to mean knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights. These understandings are reflected in the negotiating record of the last session. No State stated a contrary understanding.

The United States Senate is currently considering whether to give its advice and consent to ratification of the Hague Convention. If the United States were to ratify the Hague Convention, it would have an obligation under the Protocol to criminalize the conduct specified in Article 3(1)(a)(ii). Current proposed implementing legislation with respect to the Hague Convention would criminalize an intermediary's knowing and willful inducement of consent by offering or giving compensation for the relinquishment of parental rights. *See* Intercountry Adoption Convention Implementation Act of 1999, S. 682, 106th Cong. § 404 (1999); Intercountry Adoption Act of 2000, H.R. 2909, 106th Cong. § 404 (1999).

In order to clarify the nature of U.S. obligations under Article 3(1)(a)(ii), the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands the reference to "applicable international legal instruments" in Article 3(1)(a)(ii) of the Protocol to mean the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the "Hague Convention"). Since the United States is not currently a party to the Hague Convention, it understands that it is not obligated to criminalize conduct prohibited therein. The United States further understands the term "improperly inducing consent" in Article 3(1)(a)(ii) to mean knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights.

(e) Child prostitution (Article 3(1)(b)).

Child prostitution is not legal anywhere in the United States. Under U.S. federal law, the Mann Act, 18 U.S.C. § 2421, prohibits transporting a person across foreign or state borders for the purpose of prostitution. In addition to this general prohibition, federal law specifically prohibits transportation across foreign or state borders of any individual under age 18 with the intent that the "individual engage in prostitution or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. § 2423. Federal laws further prohibit enticing, persuading, inducing, etc., any person to travel across a state boundary for prostitution or for any sexual activity for which any person may be charged with a crime,

18 U.S.C. § 2422, and travel with intent to engage in any sexual act with one under age 18, 18 U.S.C. § 2423(b).

In addition, all 50 states prohibit prostitution activities involving minors under the age of 18. State child prostitution statutes specifically address patronizing a child prostitute, inducing or employing a child to work as a prostitute, or actively aiding the promotion of child prostitution.

(f) Child pornography (Article 3(1)(c)).

U.S. federal and state criminal law also covers the activities proscribed by Article 3(1)(c) concerning child pornography. Federal law prohibits the production, distribution, receipt, and possession of child pornography, if the pornographic depiction was produced using any materials that have ever been transported in interstate or foreign commerce, including by computer, or if the image was transported interstate or across a U.S. border. 18 U.S.C. §§ 2251-2252(A). Conspiracy and attempts to violate the federal child pornography laws are also chargeable federal offenses. Thus, federal law essentially reaches all the conduct proscribed by this Article.

More specifically, 18 U.S.C. § 2251 establishes as criminal offenses the use, enticement, employment, coercion or inducement of any minor to engage in "any sexually explicit conduct for the purpose of producing any visual depiction" of that conduct. That provision further prohibits the transportation of any minor in interstate or foreign commerce with the intent that the minor engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. Parents, legal guardians and custodians are punishable under this provision if they permit a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct that the parent or guardian knows or has reason to know will be transported or has been transported in interstate or foreign commerce. The provision also subjects to criminal penalty those who produce and reproduce the offending material, as well as those who advertise seeking/offering to receive such materials or seeking/offering participation in visual depictions of minors engaged in sexually explicit conduct.

Federal law also prohibits (1) the transfer, sale, purchase and receipt of minors for use in production of visual depictions of minors engaged in sexually explicit conduct, 18 U.S.C. § 2251A; (2) knowingly transporting, shipping, receiving, distributing, or possessing any visual depiction involving a minor in sexually explicit conduct, 18 U.S.C. §§ 2252 and 2252A; (3) the use of a minor to produce child pornography for importation into the United States, and the receipt, distribution, sale or possession of child pornography intending that the visual depiction will be imported into the United States, 18 U.S.C. § 2260. For purposes of these statutes, minor is defined as anyone under age 18. 18 U.S.C. § 2256(1).

Sexually explicit conduct is defined in these federal statutes as "actual or simulated – (A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) masturbation; (D) sadistic or masochistic abuse; or (E) lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. § 2256(2).

Further, each state has enacted laws addressing child pornography. The precise scope of these statutes vary from state to state; however, they all prohibit the visual depiction by any means of a child engaging in sexually explicit conduct. While the exact wording of the statutes may differ, all state statutes address the following three areas: (1) *production:* employment or use of a minor to engage in or assist in any sexually explicit conduct for the purpose of producing a depiction of that conduct; (2) *trafficking:* distributing, transmitting or selling child pornography; and (3) *procurement:* inducing or persuading a minor to be the subject of child pornography.

Ancillary liability Article 3(2)

The Protocol does not obligate States to criminalize attempts to commit acts covered by Article 3(1) or complicity or participation in such acts. Article 3(2) provides that "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." The phrase "subject to the provisions of a State Party's national law" was specifically incorporated into Article 3(2) to reflect the fact that practice with respect to the coverage of attempts differs in national laws and that there is no obligation to criminalize attempts if the law of a State Party does not so provide.

Under 18 U.S.C. § 2, aiding and abetting the commission of an offense against the United States is a criminal offense. Federal and state laws do not, however, criminalize all attempts to commit the offenses covered by the Protocol (*e.g.,* many U.S. states do not criminalize attempts to commit prostitution).

In sum, although U.S. law does not always punish the attempt to commit, or all forms of participation in, Article 3(1) offenses, U.S. law is consistent with the requirements of Article 3(2).

Effective sanction (Article 3(3))

U.S. federal and state law punish the conduct proscribed by the Protocol with sufficient severity as required by Article 3(3). For example, federal offenses cited above, by which the United States would implement the Protocol's requirement to criminalize the conduct described in Article 3(1), are felonies. The statutes relating to forced labor, 18 U.S.C. §§ 1581-1588, provide for a range of penalties from two to ten years' imprisonment, with the offenses of holding a person in peonage (18 U.S.C. § 1581) and holding or selling a person into involuntary servitude (18 U.S.C. § 1584) each subject to the most severe maximum penalties of ten years' imprisonment.

The statute relating to sexual exploitation of minors, 18 U.S.C. § 2251, provides for a range of penalties, including fines, and sentences ranging from 10 years' imprisonment to life imprisonment; the statute covering activities related to material involving the sexual exploitation of children, 18 U.S.C. § 2252, provides for penalties ranging from a maximum of 30 years' imprisonment (for knowing distribution, transportation, etc., of child pornography, with prior convictions) down to a maximum imprisonment of not more than 5 years for simple possession of child pornography; and the statute regarding activities relating to child pornography,

18 U.S.C. § 2252A, provides for maximum periods of imprisonment of either 10 years or 30 years (with prior convictions). The prohibition of the production of sexually explicit depictions of a minor for importation into the United States, 18 U.S.C. § 2260, contains maximum penalties of 10 or 20 years' imprisonment.

The statutes relating to transportation for purposes of prostitution, 18 U.S.C. §§ 2421-2423, provide for fines and terms of imprisonment ranging from not more than 10 years' imprisonment to not more than 15 years, where the person transferred is a minor.

With regard to the transfer of organs, 42 U.S.C. § 274e(b) provides for a substantial fine and/or a term of imprisonment of not more than five years. Should the United States become a party to the Hague Convention, implementing legislation would punish the offense described in Article 3(1)(a)(ii) of the Protocol as a felony.

Liability of legal persons (Article 3(4))

Article 3(4) requires States Parties, where appropriate and subject to provisions of their national law, to establish liability (whether criminal, civil, or administrative) of legal persons for the offenses established in Article 3(1).

Generally, under U.S. law, a corporation is criminally liable for the acts of its employees or agents if the employee's or agent's acts (1) lie within the scope of employment and (2) are motivated at least in part by an intent to benefit the corporation. *See United States v. Sun Diamond,* 138 F.3d 961, 970 (D.C. Cir. 1998). Liability can be imputed to the corporation even though the employee's conduct was not within the employee's actual authority (provided it was within his "apparent authority") and even though it may have been contrary to the corporation's stated policies. *See United States v. Hilton Hotels, Inc.,* 467 F.2d 1000, 1004 (9th Cir. 1972). Accordingly, U.S. law is consistent with Article 3(4) since a State Party is required to establish corporate liability "where appropriate" and "subject to provisions of its national law."

Article 4 – Jurisdiction

Article 4 provides that each State Party shall take measures as may be necessary to establish jurisdiction over criminal conduct identified in Article 3(1) concerning the sale of children, child prostitution and child pornography when the offense is committed in its territory or on board a ship or aircraft registered in that State (Article 4(1)). Each State Party is also required to establish jurisdiction 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 (Article 4(3)). Article 4 further provides that each State Party may, but is not obligated to, establish jurisdiction when (1) the alleged offender is a national of that State or has his habitual residence in that country (Article 4(2)(a)); and (2) when the victim is a national of that State (Article 4((2)(b)). Comparable provisions are found in other multilateral conventions to which the United States is a party, including the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 20, 1988 (Senate Treaty Doc. 101-4; Senate Ex. Rpt. 101-15).

Territorial, ship and aircraft jurisdiction (Article 4(1))

Article 4(1) obligates States to take "such measures as may be necessary" to establish 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.

Federal laws criminalizing the offenses described in the Protocol confer jurisdiction over such offenses committed on U.S. territory. Additionally, U.S. laws extend special maritime and territorial criminal jurisdiction (18 U.S.C § 7) over crimes involving (among others) sexual abuse, (18 U.S.C. §§ 2241-2245), child pornography (18 U.S.C. § 2252A), travel with intent to engage in a sexual act with a juvenile (18 U.S.C. § 2423(b)), assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), murder (18 U.S.C. § 1111), and manslaughter (18 U.S.C. § 1112). Special maritime and territorial jurisdiction extends to any vessel or aircraft belonging in whole or in part to the United States, or any citizen or corporation thereof while such vessel or aircraft is on or over the high seas, or any other waters within the admiralty or maritime jurisdiction of the United States and out of the jurisdiction of any particular State. Special maritime jurisdiction also extends to any place outside of the jurisdiction of any nation with respect to an offense by or against a national of the United States. Additionally, federal law extends special aircraft jurisdiction over the following crimes (among others) if committed on aircraft registered in the United States (49 U.S.C. §§ 46501, 46506): assault (18 U.S.C. § 113), maiming (18 U.S.C. § 114), murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), and attempts to commit murder or manslaughter (18 U.S.C. § 1113). For cases not covered by special aircraft or special maritime and territorial jurisdiction, U.S. law extends jurisdiction in other ways. U.S. law extends jurisdiction over transportation in foreign commerce of any individual who has not attained the age of 18 years with the intent to engage the person in pornography (18 U.S.C. §§ 2251-2252) or prostitution (18 U.S.C. § 2421). U.S. law also broadly extends criminal jurisdiction over vessels used in peonage and slavery. (18 U.S.C. §§ 1582, 1585-1588).

Accordingly, while U.S. law provides a broad range of bases on which to exercise jurisdiction over offenses covered by the Protocol that are committed "on board a ship or aircraft *registered* in" the United States [emphasis added], U.S. jurisdiction in such cases is not uniformly stated for all crimes covered by the Protocol, nor is it always couched in terms of "registration" in the United States. Therefore, the reach of U.S. jurisdiction may not be co-extensive with the obligation contained in this Article. This is a minor technical discrepancy. As a practical matter, it is unlikely that any case would arise which could not be prosecuted due to the lack of maritime or aircraft jurisdiction. The Administration does not, therefore, recommend delaying ratification of this Protocol for this reason, but instead proposes that a declaration be included at the time of U.S. ratification that suspends the obligation that the United States establish jurisdiction over any covered offenses that may fall within this technical gap until the United States has enacted the necessary legislation to establish such jurisdiction. The text of that recommended declaration to accompany the U.S. instrument of ratification would read as follows:

> Subject to the declaration that, to the extent that the domestic law of the United States does not provide for jurisdiction over an offense referred to in

> Article 3(1) of the Protocol when the offense is committed on board a ship or aircraft registered in the United States, the obligation of the United States with respect to jurisdiction over that offense shall be suspended. The suspension shall terminate when the United States informs the Secretary-General of the United Nations that its domestic law is in full conformity with the requirements of Article 4(1) of the Protocol.

Apart from the requirements of this Protocol, other multilateral conventions currently under negotiation in the area of criminal law enforcement may require the exercise of jurisdiction over covered offenses committed on board vessels or aircraft registered under the laws of a State Party. The Administration is drafting legislation that would enable the United States as a general matter to assert criminal jurisdiction over vessels and aircraft registered under our laws when provided for by an international treaty.

Nationality and passive personality jurisdiction (Article 4(2))

With respect to Article 4(2), some federal laws provide for the assertion of jurisdiction over U.S. nationals for covered offenses committed outside the United States, *e.g.,* 18 U.S.C. § 1585 (seizure, detention, transportation or sale of slaves); 18 U.S.C. § 1587 (possession of slaves aboard vessel), but U.S. extraterritorial jurisdiction based on nationality of the offender does not reach all offenses set forth in the Protocol. Also, federal law generally does not provide for the assertion of extraterritorial jurisdiction where the victim is a U.S. national. Nonetheless, since Article 4(2) is permissive rather than obligatory, U.S. law is consistent with the requirements of the provision.

Jurisdiction where extradition denied on grounds of nationality (Article 4(3))

The requirement of Article 4(3) – that States Parties that do not extradite their nationals must have a means of asserting jurisdiction over them – does not apply to the United States. The United States does not deny extradition on the grounds that the person sought is a U.S. national, and the Secretary of State may order the extradition of a U.S. citizen under an extradition treaty if the other requirements of the treaty are met. *See* 18 U.S.C. § 3196. Accordingly, this paragraph does not require any change in current U.S. law or practice.

Article 5 – Extradition

Article 5 addresses the legal framework for extradition of alleged offenders and contains standard provisions that effectively amend existing extradition treaties to include the offenses defined in Article 3(1) as extraditable offenses for purposes of those treaties. The Article is generally modeled on similar provisions contained in other multilateral conventions to which the United States is a party, such as the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

Article 5(1) provides that the offenses described in Article 3(1) will be "deemed to be included as extraditable offenses" in preexisting extradition treaties between States Parties to the

Protocol and will be included in future extradition treaties. The terms of the bilateral extradition treaties, and not the Protocol, will determine whether or not the United States has an obligation to extradite in a given case.

Articles 5(2) and (3) concern extradition requests when no bilateral extradition treaty exists between the requesting and requested State. If, under the law of the requested State, a treaty is required for extradition, that State may at its option consider the Protocol as the treaty that provides the legal basis for extradition. If, on the other hand, the law of the requested State permits extradition without a treaty, it must extradite subject to the conditions established by its law. Under U.S. law, with very limited statutory exceptions, a treaty is generally required for extradition from the United States. Article 5(2) does not provide an obligatory basis for extradition. Moreover, since the United States has a general regime for extradition by treaty, no obligation exists under Article 5(3) to extradite to States with which we do not have an extradition treaty.

Article 5(4) provides that for purposes of extradition between States Parties, offenses shall be treated as if they occurred within the States required to assert jurisdiction in accordance with Article 4. This provision is understood to require a Party to determine extraditability by assessing whether the conduct would be criminal if it had been committed in its territory. Under U.S. extradition law, precisely this type of analysis is undertaken in assessing whether the dual criminality standard has been satisfied. *See, e.g., Factor v. Laubenheimer,* 290 U.S. 276 (1933); *Collins v. Loisel,* 259 U.S. 309 (1922); *Bozilov v. Seifert,* 983 F.2d 140 (9th Cir. 1993); *Casey v. Department of State,* 980 F.2d 1472 (D.C.Cir. 1992); *United States v. Casamento,* 887 F.2d 1141 (2d Cir. 1989); *Emami v. United States District Court,* 834 F.2d 1444 (9th Cir. 1987).

Article 5(5) provides that if a request for extradition of an alleged offender found within its jurisdiction is refused on the basis of the nationality of the offender, the State shall "take suitable measures" to submit the case to its competent authorities for prosecution. As stated above, since the United States does not deny extradition on the basis of nationality, the United States is in compliance with Article 5(5) of the Protocol.

Article 6 – Mutual Legal Assistance

This article provides for general mutual legal assistance between States Parties in connection with investigations or criminal or extradition proceedings brought in respect of the offenses established in Article 3(1). The article is modeled on other multilateral conventions, to which the United States is a party, including the International Convention for the Suppression of Terrorist Bombing and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 6(1) provides that States Parties "shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings" concerning Article 3(1) offenses, including the supply of evidence at their disposal necessary for the proceedings. While not expressly stated, it was generally understood that the law of the requested state would apply to determine the scope of the assistance that would be afforded.

Article 6(2) provides that the obligation contained in Article 6(1) shall be carried out "in conformity with" any treaties or arrangements on mutual legal assistance. In the event that no treaty or other arrangement on mutual legal assistance is in effect between the respective States, assistance would be provided in accordance with the domestic law of the requested State.

The United States has Mutual Legal Assistance Treaties (MLATs) with 35 countries and could offer assistance to those countries to the extent provided for under each MLAT. In the absence of a treaty, 28 U.S.C. § 1782 permits a U.S. district judge to order the production of evidence for a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. Accordingly, this Article can be implemented on the basis of U.S. law and treaties.

Article 7 – Seizure and Confiscation

Article 7 provides that States parties shall, "subject to the provisions of their national law" take, "as appropriate," measures: (1) to provide for the seizure and confiscation of goods used to commit offenses under the Protocol or proceeds derived from such offenses (Article 7(1)); (2) to execute requests from another State Party for seizure and confiscation of such goods or proceeds (Article 7(2)); and (3) aimed at closing on a temporary or definitive basis premises used to commit such offenses (Article 7(3)).

Given that the obligations of Article 7 are subject to the limits of a State Party's laws and that each State Party is obligated to take only such measures as are appropriate, U.S. ratification would not require implementing legislation. U.S. law, does, however, contain extensive provisions regarding forfeiture for offenses under the Protocol. For example, 18 U.S.C. § 2253 and § 2254 are, respectively, the criminal and civil forfeiture provisions for violations of federal law concerning child pornography and prostitution. Items subject to forfeiture include the pornographic depictions themselves, real or personal property used to commit or promote the offenses, or any property or proceeds obtained from a violation. Forfeiture of property involved in these offenses is also possible under 18 U.S.C. § 981 (civil forfeiture) or 18 U.S.C. § 982 (criminal forfeiture), where a financial transaction has taken place, since these underlying offenses constitute "specified unlawful activities" as set forth in the money laundering statute, 18 U.S.C. § 1956(c)(7).

Moreover, 19 U.S.C. § 1305 provides for the civil forfeiture of obscene materials being imported into the United States (not limited to offenses against children). Similarly, 18 U.S.C. § 1467 is a criminal forfeiture statute providing that "[a] person who is convicted of an offense involving obscene material under this chapter shall forfeit" the obscene material, real or personal property constituting the proceeds of the offense or traceable thereto, and any real or personal property used to commit or promote the offense. All of these various forfeiture provisions are broad enough to cover the forfeiture of profits, obscene materials, and businesses used to commit the crimes covered. *See, e.g., Alexander v. United States,* 509 U.S. 544 (1993) (forfeiture of businesses and real estate connected with the sale of obscene materials); *United States v. Ownby,* 926 F. Supp. 558 (W.D. Va. 1996), aff'd 131 F.3d 138 (4th Cir. 1997) (forfeiture under 18 U.S.C. § 2253(a)(3) of a house used to store pornography of juveniles engaged in sexually

explicit conduct); *United States v. Krasner,* 841 F. Supp. 649 (M.D. Pa. 1993) (forfeiture pursuant to 18 U.S.C. § 982 of a business engaged in the shipment of obscene materials).

Neither federal nor state law generally provides for the forfeiture of all proceeds and instrumentalities of the offenses covered by the Protocol, and the United States has limited forfeiture authority for purely foreign offenses. Nonetheless, since Article 7 permits a State Party to impose appropriate limitations, as provided in national law, this article establishes no obligations that cannot be met through application of existing federal and state forfeiture statutes.

Article 8 – Protection of Children

Article 8(1)

Article 8(1) provides that State Parties shall adopt "appropriate" measures to protect the rights and interests of child victims of the practices prohibited under the Protocol at all stages of the criminal justice process, in particular by: (1) recognizing the vulnerability of child victims and adopting procedures to recognize their special needs (Article 8(1)(a)); (2) informing child victims of their rights and the progress and disposition of related proceedings (Article 8(1)(b)); (3) allowing the views, needs and concerns of child victims to be presented in proceedings where their personal interests are affected, "in a manner consistent with the procedural rules of national law" (Article 8(1)(c)); (4) providing "appropriate" support services to child victims throughout the legal process (Article 8(1)(d)); (5) 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 (Article 8(1)(e)); (6) providing in "appropriate cases" for the safety of child victims, family members and witnesses (Article 8(1)(f)); and (7) avoiding "unnecessary" delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims (Article 8(1)(g)).

During the negotiations, delegations generally recognized that each of the protections to be afforded children under Article 8(1) are necessarily a matter of discretion under national law. As described below, federal and state law provides extensive protection for child victims in the criminal justice process as contemplated by Article 8(1).

With regard to Article 8(1)(a), U.S. law at both the federal and state levels recognizes the special needs of child victims and witnesses. For example, in federal cases, 18 U.S.C.§ 3509(b) provides various alternatives for live, in-court testimony when it is determined that a child cannot or should not testify for various reasons. Additionally, all states provide special accommodation for child victims and witnesses, including the use of videotaped testimony or closed-circuit testimony, and use of child interview specialists and developmentally appropriate questioning of children. *See, e.g.,* Colorado Revised Statutes 18-3-413.5; North Dakota Century Code, 31-04-04.1.

With respect to Article 8(1)(b), federal and state law also provides for informing child victims of their rights and the progress of their cases. For example, the general Federal

Guidelines for Treatment of Crime Victims and Witnesses in the Criminal Justice System provide that law enforcement personnel should ensure that victims are informed about the role of the victim in the criminal justice system, as well as the scheduling of their cases and advance notification of proceedings in the prosecution of the accused. The Federal Government also aids states to provide for appropriate notification of victims, through funding to states under the Victims of Crime Act (VOCA) and technical assistance programs. The promotion by the Federal Government of state compliance is also an "appropriate measure" to protect the rights described in Article 8(1)(b). Guidelines and statutes at the state level further provide extensive procedures for victim notification of the victim's rights, and of the scheduling of proceedings. *See, e.g.,* Iowa Victim Rights Act, 1997 Ia. HF 2527, §§ 6-14.

With respect to Article 8(1)(c), federal and state law allows the views and needs of child victims to be presented in a manner consistent with the procedural rules of national law. For example, at the federal level, 18 U.S.C. § 3509 specifically provides for the preparation of a victim impact statement to be used to prepare the presentence report in sentencing offenders in cases in which the victim was a child. Through guidelines and statutes, states provide for victims' presentation of their views at different stages of proceedings. *See, e.g.,* Iowa Victim Rights Act, 1997 Ia. HF 2527, § 17.

Both federal and state laws also provide appropriate support services throughout the legal process consistent with the provisions of Article 8(1)(d). For example, at the federal level, 18 U.S.C. § 3509(g) provides for the use of multidisciplinary child abuse teams "when it is feasible to do so;" 18 U.S.C. § 3509(h) provides for the appointment of a guardian *ad litem* for a child who was a victim of or witness to a crime involving abuse or exploitation "to protect the best interests of the child." ("Exploitation" is defined as child prostitution or pornography.) Additionally, all states provide special accommodations and support services, including the appointment of guardians *ad litem* or other support persons. *See, e.g.,* California Penal Code § 1348.5; HRS § 587-2 (Hawaii).

Federal and state laws further provide for protecting "as appropriate" the privacy of child victims in accordance with national law as provided in Article 8(1)(e). Both federal and state laws attempt to provide for the privacy of child victims. *See, e.g.,* 18 U.S.C. § 3509(d), "confidentiality of information," which provides detailed procedures for keeping the name of or any other information about a child confidential, and Iowa Code § 915.36. While modalities of protection of privacy may vary from state to state, the Protocol requires only the providing of the level of protection deemed "appropriate." Given this flexibility, current U.S. law meets the requirements of this provision.

With respect to Article 8(1)(f), U.S. law and policy provide "in appropriate cases" for the safety of child victims, as well as that of their family and witnesses on their behalf, from intimidation and retaliation. In the United States at both the federal and state levels there is a general policy of attempting to promptly establish the criminal responsibility of service providers, customers and intermediaries in child prostitution, child pornography and child abuse, in part in order to provide for the safety of victims and their families. Additionally, at both the Federal and state levels safe havens may be provided on a discretionary basis for children

escaping from sexual exploitation, as well as protection for those who provide assistance to victims of commercial exploitation from intimidation and harassment. *See, e.g.,* Federal Witness Protection Act, 18 U.S.C. § 3521; HRS § 587-2 (Hawaii).

The U.S. judicial procedure at both the federal and state level provides protection against unnecessary delay in the disposition of cases and the execution of orders granting awards to child victims consistent with the provisions of Article 8(1)(g). In all U.S. criminal cases, the Sixth Amendment to the Constitution requires a speedy trial. Additionally, many states as well as the Federal Government have enacted speedy trial laws, which set strict time deadlines for the charging and prosecution of criminal cases. *See* Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*

Article 8(2) through 8(6)

Article 8 further provides that States Parties shall, with respect to the offenses prohibited under the Protocol: (1) ensure that uncertainty as to the actual age of the victim not prevent the initiation of a criminal investigation (Article 8(2)); (2) ensure that the best interest of the child be a primary consideration in the treatment of child victims by the criminal justice system (Article 8(3)); (3) "take measures" to ensure "appropriate" training, in particular legal and psychological, for the persons who work with child victims (Article 8(4)); and (4) "in appropriate cases," adopt measures in order to protect the safety and integrity of the persons and/or organizations involved in the prevention and/or protection and rehabilitation of child victims (Article 8(5)).

U.S. federal and state law satisfies each of these requirements. With respect to Article 8(2), nothing in U.S. federal or state law prohibits an investigation of exploitation of a child from going forward when the age of the child is unknown, or when it is unclear if the victim is, in fact, an adult. In fact, it is common for investigations in the United States to try to determine the child's age while investigating all aspects of the case.

With respect to Article 8(3), it is a general policy underlying both federal and state law that the best interests of the child are a primary consideration in the treatment of child victims. In many cases, laws have been passed with the child victim's best interest specifically in mind. *See, e.g.,* Rhode Island Children's Bill of Rights, R.I. Gen. Laws § 42-72-15; Hawaii Child Protective Act, HRS 587.

Article 8(4) and 8(5) are flexible; in view of the broad scope of the provision, the obligations were qualified, *i.e.,* "take measures to ensure appropriate" training and protect the safety of the child in "in appropriate cases." Consistent with these articles it is a general policy of the Federal and State Governments at all levels to provide training for those who work with child victims, and to adopt measures where appropriate to protect those involved with prevention of such offenses and the protection and rehabilitation of children. The United States satisfies its obligation to provide for such training by the use of federal funds administered, *inter alia,* by the Department of Health and Human Services (HHS) and by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention (OJJDP) and Office of Victims of Crime (OVC), to promote such training in those states where such training is needed. Similar provisions exist at the state level. *See, e.g.,* Ark. Stat. Ann. § 20-82-206 (Arkansas); Idaho Code § 16-1609A.

Article 8(6) is a savings clause. It states that nothing in Article 8 shall be construed as prejudicial to the rights of the accused to a fair and impartial trial.

Article 9 – Prevention

Article 9 provides that States Parties shall, with respect to the offenses referred to in the Protocol, (1) adopt or strengthen, implement and disseminate laws, policies and programs to prevent the offenses (Article 9(1)); (2) promote awareness in the public at large, including children, about "the preventive measures and harmful effects of the offences" (Article 9(2)); (3) take all "feasible" measures with "the aim" of ensuring "all appropriate" assistance to victims of such offenses, including their full social reintegration, and their full physical and psychological recovery (Article 9(3)); (4) ensure that child victims have access to adequate procedures to seek compensation (Article 9(4)); and (5) take "appropriate" measures "aimed at" effectively prohibiting advertisement of the offenses covered by the Protocol (Article 9(5)).

The United States meets the requirements of Article 9. With respect to Articles 9(1) and 9(2), it is a priority commitment for the United States at both the federal and state levels to strengthen and implement laws to prevent the offenses prohibited by the Protocol. It is also a policy priority for the United States to create a climate through education, social mobilization, and development activities to ensure that parents and others legally responsible for children are able to protect children from sexual exploitation.

With respect to measures to ensure appropriate assistance to victims, including their full social integration and full physical and psychological recovery, a wide range of federal and state programs satisfy the standards set forth in Article 9(3). The Federal Government provides many types of aid to such agencies and comparable organizations that serve children. The Family and Youth Services Bureau of the Department of Health and Human Services (HHS) administers grant programs supporting a variety of locally based youth services. These services include youth shelters which provide emergency shelter, food, clothing, outreach services, and crisis intervention for victimized youths; "transitional living programs" for homeless youth which assist these youth in developing skills and resources to live independently in society; and education and prevention grants to reduce sexual abuse of runaway, homeless, and street youth.

The Justice Department's Office of Juvenile Justice and Delinquency Prevention oversees the Model Court Project under which local courts have put in place a variety of reforms to strengthen their abilities to improve court decision-making in abuse and neglect cases, and to work more closely with the child welfare agencies to move children out of foster care and into safe, stable, permanent homes.

HHS's Children's Bureau supports research on the causes, prevention, and treatment of child abuse and neglect; demonstration programs to identify the best means of preventing maltreatment and treating troubled families; and the development and implementation of training programs. Grants are provided nationwide on a competitive basis to state and local agencies and organizations. Projects have focused on every aspect of the prevention, identification, investigation, and treatment of child abuse and neglect.

State child protection agencies ensure the safety of children and youth who require protective custody, making placement recommendations, and coordinating assessments and interviews of children and adults with appropriate law enforcement and licensing agencies. Victim assistance programs provide victimized youth with assistance for dealing with the court system, emotional support, and referrals to additional resources. Such services enable these youth both to address the immediate consequences of their victimization and to reenter society. The routine operation of state child welfare agencies also serves these aims.

With regard to the requirement under Article 9(4) that States Parties ensure access by child victims to adequate procedures for seeking compensation, there is mandatory restitution for victims in these cases under federal law. The Victims of Crime Act (VOCA) funds support more than 4,000 victim services programs across the country, and many of these provide services for child victims. In addition, VOCA supports state victim compensation programs for which child victims or their caretakers can apply.

Consistent with the provisions of Article 9(5), U.S. law contains certain restrictions on advertising that are appropriate under our legal system. For example, 18 U.S.C. § 2251 proscribes advertising child pornography when the child pornography actually exists for sale or distribution. Advertising or promoting child prostitution could, in some circumstances, be punished under federal law if it aids and abets child prostitution or constitutes a conspiracy to violate child prostitution laws.

Article 10 – International Cooperation and Assistance

Article 10 provides that States Parties shall undertake international cooperation for: (1) the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and sex tourism (Article 10(1)); (2) the rehabilitation and social reintegration of children who have been victims of such practices (Article 10(2)); and (3) addressing the root causes of the vulnerability of children to these crimes (Article 10(3)). Article 10 does not, however, require States Parties to provide a specific type or amount of assistance. Article 10(4) specifies that States Parties "in a position to do so" shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programs.

Article 10 is consistent with the U.S. commitment to bring about an end to the sexual exploitation of and trafficking in children worldwide through international cooperation and assistance among concerned States and relevant international organizations. The Protocol should serve as a means of further encouraging such programs and should constitute an important tool for increasing assistance to children who are victims of such practices.

With regard to Article 10(1), the United States regularly engages in bilateral and multilateral efforts to deter and prevent the increasing international traffic in children for labor and sexual exploitation. In an effort to attack this issue at its source, the United States has worked with foreign governments and non-governmental organizations (NGO's) to inform potential victims of the risks posed to them by the traffic in women and children, the tactics

criminal groups use to coerce victims and conduct such traffic, and the ways in which victims can seek assistance in the United States. Within the past year, the United States and the European Union co-sponsored an international conference to combat child pornography on the Internet. The goals of the conference were: (1) to reinforce cooperation between law enforcement and the judiciary; (2) to encourage Internet Service Providers (ISP's) to establish self-regulatory mechanisms; and (3) to encourage the establishment of further hotlines and networking.

Additionally, pursuant to bilateral and multilateral legal assistance treaties with foreign governments, the United States regularly cooperates with law enforcement agencies of other countries to counteract child prostitution, pornography, and sale of children, as well as sex tourism. The United States funds training for law enforcement officials of foreign countries in the areas of domestic violence and sexual exploitation of women and children, and programs that encourage innovative partnerships among governments, labor, industry groups, and NGO's to end the employment of children in hazardous or abusive conditions.

With regard to Articles 10(2) and 10(3), the United States is committed to working with other governments to address the root causes of these crimes and to developing rehabilitation approaches that are effective. The United States funds and supports international initiatives to provide vocational training for children and income-generating opportunities for their families, and assists various countries in developing, implementing, and enforcing national policies to combat child labor and sex crimes. In addition, the United States supports and funds a variety of international initiatives to safeguard children from hazardous or abusive working conditions, which include projects to assist exploited children and provide them and their families with a variety of social services. The United States has provided funds to expand existing shelters, such as the Thailand Coordination Center for the Protection of Child Rights, and to improve and expand the capabilities of such assistance centers. Additionally, the United States has sponsored public awareness events in Southeast and Southern Asia as part of its ongoing efforts to deter and prevent the abuse of children worldwide.

Article 11 – Savings Clause

Article 11 is a savings clause. The Article states that nothing in the Protocol is to be construed as precluding provisions in the law of a State Party or international law in force for that State that might provide more favorable treatment for the rights of children.

Article 12 – Reporting

Article 12 (which is drawn from Article 8 of the Protocol on the Involvement of Children in Armed Conflict) obligates States Parties to 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. As detailed in Article 42 of the Convention on the Rights of the Child, the Committee on the Rights of the Child consists of ten "experts of high moral standing and

recognized competence in the field of human rights" serving in their individual capacities and not as representatives of governments. The creation of such a body is a standard procedure; similar bodies were established for example, by the International Convention on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (all of which have been ratified by the United States).

Initial U.S. reporting under Article 8 would be limited to reporting on the measures the United States has taken to implement the provisions of the Protocol consistent with the information provided in this analysis under Articles 1-10. The United States would have no obligation to comply with reporting requirements contained in Article 44 of the Convention on the Rights of the Child, nor would the Committee on the Rights of the Child be authorized to request information from the United States on any matter other than implementation of the Protocol to which it is a party.

Article 12(2) also creates separate supplemental reporting requirements for States Parties to the Convention on the Rights of the Child (*i.e.*, to include reports on Protocol implementation within supplemental reports submitted under the Convention) and for non-State parties (*i.e.*, to submit supplemental reports on any further information with respect to implementation of the Protocol every five years). Additionally, Article 12(3) draws from Article 44(4) of the Convention on the Rights of the Child, when it permits the Committee on the Rights of the Child to request further information relevant to the implementation of the Protocol.

The Protocol grants the Committee on the Rights of the Child no authority other than receiving reports and requesting additional information as set forth above. During the negotiations, delegations rejected proposals that would have permitted the Committee, *inter alia,* to hold hearings, initiate confidential inquiries, conduct country visits, and transmit findings to the State Party concerned.

Articles 13 – Signature and Ratification

Article 13 provides that the Protocol shall be subject to ratification or open for accession by any State that is a party to the Convention on the Rights of the Child or has signed it. Thus, the United States is eligible to become a party to the Protocol because it signed the Convention in February 1995, even though it has not become a party to the Convention. Article 13 is similar to Article 9 of the Protocol on the Involvement of Children in Armed Conflict, which is subject to ratification by any State. During the negotiations concerning the Children in Armed Conflict Protocol, the United Nations Legal Counsel provided a legal opinion which confirmed that under the rules of the law of treaties there was no legal impediment to an instrument which is entitled "optional protocol" being open to participation by States that had not also established, or which did not also establish, their consent to be bound by the convention to which that instrument was said to be an optional protocol.

Consistent with the fact that the Protocol is an independent international agreement, the following understanding is recommended to accompany the U.S. instrument of ratification:

The United States understands that the Protocol constitutes an independent multilateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Articles 14-17 – Final Clauses

The final clauses of the Protocol are consistent with the clauses used in many international agreements. Pursuant to Article 14(1), the Protocol will enter into force three months after the deposit of the tenth instrument of ratification or accession. Under Article 14(2), after its entry into force, the Protocol enters into force for each subsequent ratifying State one month after the date of deposit of its instrument of ratification or accession. Under Article 15, any state may denounce the Protocol at any time by written notification to the U.N. Secretary-General. Such a denunciation shall take effect one year after notice is given, but the denunciation cannot affect obligations regarding acts or omissions prior to the effective date of denunciation.

Under Article 16, the Protocol can be amended by a majority of States Parties present and voting at a Conference called for that purpose. Such an amendment shall not enter into force, however, until two-thirds of all States Parties to the Protocol have accepted it, and shall be binding only on those States that specifically accept it. Substantially identical procedures for amendment exist in other human rights instruments which the United States has ratified, including the International Convention on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination, and the Convention against Torture or other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 17(1) provides that the respective texts in all U.N. official languages are equally authentic. Pursuant to Articles 13(2) and 17(2), the U.N. Secretary-General is effectively the depositary for the Protocol.

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

UNITED NATIONS
2000

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The States Parties to the present Protocol,

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child,

Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security,

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development,

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals,

Noting the adoption of the Statute of the International Criminal Court and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts,

Considering, therefore, that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict,

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,

Convinced that an optional protocol to the Convention raising the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Noting that the twenty-sixth international Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities,

Welcoming the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, *inter alia*, forced or compulsory recruitment of children for use in armed conflict,

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

Stressing that this Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law,

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation,

Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to this Protocol owing to their economic or social status or gender,

Mindful of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflicts,

Convinced of the need to strengthen international cooperation in the implementation of this Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol,

Have agreed as follows:

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is done with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.

Article 6

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.

2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organizations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, *inter alia*, through a voluntary fund established in accordance with the rules of the General Assembly.

Article 8

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, including the measures taken to implement the provisions on participation and recruitment.

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 from States Parties further information relevant to the implementation of this Protocol.

Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to article 13.

Article 10

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 or accession.

Article 11

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 that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. 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 that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee prior to the date on 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.

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

Article-by-Article Analysis
Optional Protocol to the
Convention on the Rights of the Child on
Involvement of Children in Armed Conflict

Article 1 – Direct Participation in Hostilities

Article 1 of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (the "Children in Armed Conflict Protocol") requires States Parties to "take all feasible measures" to ensure that members of their armed forces under age 18 do not take "a direct part in hostilities." The language is drawn from Article 38(2) of the United Nations Convention on the Rights of the Child, adopted at New York November 20, 1989 ("Convention on the Rights of the Child") and Article 77(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted at Geneva June 8, 1977 ("Protocol I to the Geneva Conventions"), which both require that States Parties take all "feasible measures" to ensure that children under the age of 15 do not take a "direct part in hostilities."

The terminology used in Article 1, with its roots in international humanitarian law, is clear, well understood, and contextually relevant, and provides an effective, sensible and practical standard. The standard recognizes that in exceptional cases it will not be "feasible" for a commander to withhold or remove a soldier under the age of 18 from taking a part in hostilities. The term "feasible" has been understood in law of armed conflict treaties to mean that which is "practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations." This is the definition used in Article 3(10) of the Protocol to the 1980 Conventional Weapons Convention Concerning the Use of Mines, Booby-Traps and Other Devices (Protocol II), adopted at Geneva October 10, 1980. It is also the generally accepted meaning of the term in Protocol I to the Geneva Conventions. Indeed, a number of States (*e.g.*, Canada, Germany, Ireland, Italy, Netherlands, and Spain) included such a definition of "feasible" in understandings that accompanied their instruments of ratification to Protocol I to the Geneva Conventions.

The standard set out in Article 1 also recognizes that there is no prohibition concerning indirect participation in hostilities or forward deployment. The term "direct" has been understood in the context of treaties relating to the law of armed conflict (including International Committee of the Red Cross ("ICRC") commentaries on the meaning of the provisions of Protocol I to the Geneva Conventions) to mean a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.

Throughout negotiations with respect to Article 77(2) of Protocol I to the Geneva Conventions, Article 38(2) of the Convention on the Rights of the Child, and the Children in Armed Conflict Protocol, various delegations, as well as the ICRC, repeatedly attempted to replace "all feasible measures" with "necessary" or a variant thereof and to remove the reference

to "direct." However, other delegations, including the United States, insisted that there should be no deviation from existing treaties using the same terminology.

For example, during negotiation of the Convention on the Rights of the Child, the ICRC explained its position in the Working Group as follows:

> The Working Group could have taken advantage of the adoption of Article 20 [subsequently renumbered as Article 38] to improve protection by prescribing that the States Party to the present Convention take all "necessary" measures instead of "all feasible" measures. In other words, the text which was finally approved means that voluntary participation by children is not totally prohibited. During the Diplomatic Conference (1974-1977) [concerning Protocol I to the Geneva Conventions], the ICRC had proposed the words 'necessary measures' but this was, unfortunately, not accepted. Protocol I, Article 77 speaks of 'feasible measures'.
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> Likewise, the Working Group could have strengthened protection by removing the word 'direct'. The ICRC suggested this too during the Diplomatic Conference but the proposal was not approved. This being the case, it can reasonably be inferred from the present Article 20 of the Draft Convention that indirect participation, for example gathering and transmitting military information, transporting weapons, munitions and other supplies is not affected by the provision.

U.S. law and practice has been to assign all recruits after basic training, including those aged 17, to a unit, but not based on whether that unit might be deployed into hostilities. Accordingly, the United States generally supported an age 17 standard for participation in hostilities. Prior to the January 2000 negotiating session of the Children in Armed Conflict Protocol, however, the Department of Defense reviewed its practice and decided that it could support adoption of a rule that would require that the United States take all "feasible measures" to ensure that persons under the age of 18 would not take "a direct part in hostilities." The Department of Defense determined that it could execute its national security responsibilities under the obligation of Article 1 of the Children in Armed Conflict Protocol, as the terms of Article 1 (with respect to the meaning of "all feasible measures" and "take a direct part in hostilities") are currently understood under the law of armed conflict. Thus, the Department of Defense agreed that, in the context of a successful outcome in the negotiations, it could adopt such a rule.

Indeed, during the final session of negotiations, just before adoption of the Children in Armed Conflict Protocol, the U.S. delegation made a statement regarding its understanding of Article 1 that the U.N. Working Group summarized as follows:

> As for participation in hostilities, the terms in Article 1, with their roots in international humanitarian law and the law of armed conflict, were clear, well understood and contextually relevant. The United States of America would take all steps it feasibly could to ensure that under-18-year-old service personnel did

not take a direct part in hostilities. While the standard recognizes that, in exceptional cases, it might not be feasible for a commander to withhold or remove such a person from taking a direct part in hostilities, the United States believed that it was an effective, sensible and practical standard that would promote the object that all sought: protecting children and ensuring that the protocol had the widest possible adherence and support.

In contrast, other delegations expressed disappointment that the Protocol did not bar "indirect" participation in hostilities and that the discretionary power granted to States through use of the term "feasible measures" weakened the Protocol. The Russian delegation acknowledged that since States were not required to prohibit participation, but only called on to take "all feasible measures" to prevent such participation, the Protocol left States open to the possibility in any emergency of involving persons under 18 years of age in hostilities.

In order to clarify the U.S. view of the terms "feasible" and "direct part in hostilities", the following understanding is recommended to accompany the U.S. instrument of ratification to the Protocol:

With respect to Article 1, the United States understands that the term "feasible measures" are those measures which are practical or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. The United States understands the phrase "direct part in hostilities" to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase "direct participation in hostilities" does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment. The United States further understands that any decision by any military commander, military personnel, or any other person responsible for planning, authorizing, or executing military action shall only be judged on the basis of that person's assessment of the information reasonably available to the person at the time the person planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

While the preamble of the Children in Armed Conflict Protocol refers to the Statute of the International Criminal Court, it does so to note that the Statute includes as a war crime the conscription or enlistment of children under the age of 15 or their use as active participants in hostilities. The Protocol does not authorize the trial of any person before an international criminal tribunal for a violation of the Protocol or include any mechanism for cooperation in prosecution before international tribunals. It was an important negotiating objective of the United States that the Protocol create no obligations for the United States under other agreements which the United States has not ratified.

Article 2 – Forced or Compulsory Recruitment

Article 2 prohibits States Parties from forcibly or compulsorily recruiting into military service anyone under 18. The United States does not permit compulsory recruitment of any person under 18 for any type of military service. While inactive, the U.S. selective service system remains established in law and provides for involuntary induction at and after age 18.

The general scope of Article 2 is also substantially identical to Article 3 of the Convention (No. 182) for Elimination of the Worst Forms of Child Labor, adopted by the International Labor Conference on June 17, 1999, which, *inter alia*, requires that States Parties take immediate and effective measures to secure the elimination of forced or compulsory recruitment of children under the age of 18 for use in armed conflict. Although it is not yet in force, the Senate gave its advice and consent to ratification of the ILO Convention on November 5, 1999.

Article 3 – Voluntary Recruitment

Article 3(1) obliges States Parties to raise the minimum age for voluntary recruitment into their national armed forces from 15 years, which is the minimum age now provided in Article 38(3) of the Convention on the Rights of the Child and in Article 77(2) of Protocol I to the Geneva Conventions. The United States fully meets the requirements of Article 3 of the Children in Armed Conflict Protocol since it does not accept voluntary recruits below the age of 17. *See* 10 U.S.C. § 505(a) (1994).

Article 3(1) further states that in raising the age for voluntary recruitment States Parties shall "take account" of the "principles" contained in Article 38(3) of the Convention on the Rights of the Child and recognize that persons under the age of 18 are entitled to special protection. Article 38(3) in this regard, states that "[i]n recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest." This provision does not create an additional obligation for the United States, given the long-standing U.S. practice of permitting 17-year-olds, but not those who are younger, to volunteer for service in the Armed Forces. Additionally, as discussed more fully below, the United States maintains special safeguards with respect to the voluntary recruitment of those below the age of 18 in order to ensure that it is truly voluntary.

The obligation to raise the minimum age for voluntary recruitment from age 15 in Article 3(1) is drawn from a United States proposal, which recognized that voluntary recruitment is qualitatively different from compulsory recruitment, and that voluntary recruitment may be preferable to conscription as a matter of principle. During the negotiating process, governments that meet their national armed forces' recruitment needs through compulsory recruitment suggested that it was better to conscript 18-year-olds than to voluntarily recruit 16- or 17-year-olds even if they had finished secondary school and that, therefore, there should be an absolute bar on all recruitment below the age of 18. Governments with an exclusively volunteer system of recruitment, such as the United States, stated that they could not accept this proposition and

that maintaining the freedom of an individual to choose military service was important from a human rights standpoint. Moreover, from a practical standpoint, it was important for countries with all-volunteer professional armed forces to maintain flexibility with respect to the age of voluntary recruitment, since it was essential to attract individuals into military service at the crucial juncture when they are about to leave secondary school and are contemplating career choices. Recruiters of all-volunteer armed forces must compete with all other employment sectors rather than rely on conscription.

In order to make clear the nature of the obligation assumed under Article 3(1), the following understanding is recommended to accompany the U.S. instrument of ratification:

> The United States understands that Article 3 obliges States Parties to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of age 15.

Article 3(2) further provides that each State Party would effect the increase in minimum age by depositing a binding declaration to that effect upon ratification, and by providing a description of the safeguards it maintains to ensure that such recruitment is not forced or coerced. Pursuant to this obligation, the following declaration is proposed to accompany the U.S. instrument of ratification:

> Pursuant to Article 3(2) of the Protocol, the United States declares that the minimum age at which it will permit voluntary recruitment into its armed forces is 17. The United States has a number of safeguards in place to ensure that such recruitment is not forced or coerced, including a requirement in U.S. law, Title 10, United States Code, Section 505(a), that no person under 18 years of age may be originally enlisted without the written consent of his or her parent or guardian, if he or she has a parent or guardian entitled to his or her custody and control. Moreover, each person recruited into the military receives a comprehensive briefing and must sign an enlistment contract which, together, specify the duties involved in military service. All recruits must provide reliable proof of age before their entry into the military service.

Article 3(3) further describes the safeguards that States are required to maintain, including ensuring that such recruitment is genuinely voluntary; requiring the informed consent of the person's parents or legal guardians; fully informing such recruits of the duties involved in military service; and requiring reliable proof of age prior to acceptance into national military service. As discussed above, U.S. law fully meets these safeguards.

Article 3(4) permits States Parties to further raise the minimum age for voluntary recruitment into their national armed forces from their initial Article 3(2) declaration, by means of a notification to that effect to the U.N. Secretary-General.

Article 3(5) provides that military schools are exempt from the requirements of this article. By its terms, this exemption extends to the schools, regardless of whether or not

individuals attending that facility are members of the armed forces. In this regard, U.S. law specifies a minimum age of 17 for admission to military academies. *See, e.g.,* 10 U.S.C. § 4346.

Article 4 – Non-governmental Actors

Article 4, which is in part drawn from a U.S. proposal, reflects a recognition that the heart of the problem concerning child soldiers includes the practices of non-governmental armed groups, often involved in non-international armed conflicts, wherein such groups force young children, often at gunpoint, to take up arms. During the Children in Armed Conflict Protocol negotiations, evidence was presented that in some 28 ongoing situations of armed conflict, persons below the age of 18 were being used heavily by non-governmental groups in hostilities, both directly and indirectly. States, however, were unwilling to draft an international legal obligation for non-governmental actors under the Protocol, not wishing to equate rebel groups with States Parties and not wanting to provide recognition to such groups in an international legal document. As a result, Article 4(1) provides that armed groups, distinct from the armed forces of a State, "should" not recruit or use in hostilities persons under the age of 18. Additionally, Article 4(3) expressly provides that "the application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict."

Article 4(2) requires that States Parties take "all feasible measures" to prevent recruitment and use in hostilities of persons under the age of 18 by "armed groups, distinct from the armed forces of a State," including by the enactment of legislation to ensure that such recruitment and use is punishable as a criminal offense under their national laws. Negotiating States recognized that a criminal prosecution under domestic law might not be a sufficient measure to ensure that such armed groups ceased their practices (because those who took up arms against the lawful Government of a country already exposed themselves to the most severe penalties of the law, and because the capacity of the Government to enforce its domestic law could be limited in situations of non-international armed conflict). Governments also recognized, however, that in some cases other States provided support for, and exerted influence over, such groups. For this reason, Article 7, expressly obligates States Parties to cooperate internationally "in the prevention of any activity contrary to the Protocol," which would include recruitment and use of persons under age 18 in hostilities by non-governmental actors.

Consistent with Article 4, U.S. law already prohibits insurgent activities by non-governmental actors against the United States, irrespective of age. *See* 18 U.S.C. § 2381, *et seq.*

Article 5 – Savings Clause

Article 5 is a savings clause. The article states that nothing in the Children in Armed Conflict Protocol Is to be construed as precluding provisions in the law of a State Party, international instruments or international humanitarian law that might provide more favorable treatment with respect to the rights of children.

Article 6 – National Implementation.

Article 6 obligates States Parties to ensure effective implementation and enforcement of obligations accepted under the Children in Armed Conflict Protocol within their respective jurisdictions; to ensure wide dissemination of the Children in Armed Conflict Protocol; to take all feasible measures to demobilize children employed in contravention of the terms of the Children in Armed Conflict Protocol; and "when necessary" accord to such children "appropriate assistance" for their physical and psychological recovery, and their social reintegration.

As discussed under the pertinent articles above, no new legislation or regulations are required to bring the United States into compliance with the Children in Armed Conflict Protocol. (As a matter of good administration, the Department of Defense intends to issue an appropriate internal directive providing guidance to its components on the treaty obligations.) Nor will it be necessary for the United States to demobilize or provide appropriate assistance to U.S. children, since the United States does not deploy children in contravention of the terms of the Children in Armed Conflict Protocol.

Article 7 – International Cooperation and Assistance

Article 7(1) obligates States Parties to undertake to cooperate in the implementation of the Children in Armed Conflict Protocol, including in the prevention of any act contrary to the Children in Armed Conflict Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to the Children in Armed Conflict Protocol, including through technical cooperation and financial assistance. The text is based on a U.S. proposal, and reflects the U.S. commitment to assist in bringing an end to this tragedy through international cooperation and assistance among concerned States Parties and relevant international organizations. The provision does not, however, require States Parties to provide a specific type or amount of assistance.

Article 7(2) specifies that States Parties "in a position to do so" shall provide financial, technical or other assistance through existing multilateral, bilateral or other programs. The United States has contributed substantial resources to programs aimed at reintegrating child soldiers into society and is committed to continue to develop rehabilitation approaches that are effective in addressing this seriously difficult problem. The United States actively supports activities to assist children affected by war, including demobilization, rehabilitation and integration into civilian society. The Children in Armed Conflict Protocol should serve as a means for encouraging such programs and constitute an important tool for increasing assistance to children who are victims of armed conflict.

Article 8 – Reporting

Article 8 (like Article 12 of the Protocol on the Sale of Children, Child Prostitution and Child Pornography) provides that States Parties shall submit, within two years following the entry into force of the Children in Armed Conflict 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 Children in Armed Conflict Protocol. As detailed in Article 42 of the Convention on the Rights of the Child, the Committee on the Rights of the Child consists of ten "experts of high moral standing and recognized competence in the field of human rights" serving in their individual capacities and not as representatives of governments. The creation of such a body is a standard procedure; similar bodies were established, for example, by the International Convention on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (all of which have been ratified by the United States).

Initial U.S. reporting under Article 8 would be limited to reporting on the measures the United States has taken to implement the provisions of the Children in Armed Conflict Protocol, consistent with the information provided in this analysis under Articles 1-7. The United States would have no obligation to comply with any additional reporting requirements contained in Article 44 of the Convention on the Rights of the Child, nor would the Committee on the Rights of the Child be authorized to request information from the United States on any matter other than implementation of the Children in Armed Conflict Protocol.

Article 8(2) also creates separate supplemental reporting requirements for States Parties to the Convention on the Rights of the Child (*i.e.*, to include reports on implementation of the Children in Armed Conflict Protocol within supplemental reports submitted under the Convention on the Rights of the Child) and for States that are not parties to the Convention on the Rights of the Child (*i.e.*, to submit supplemental reports on any further information with respect to implementation of the Children in Armed Conflict Protocol every five years). Additionally, Article 8(3) draws from Article 44(4) of the Convention on the Rights of the Child when it permits the Committee on the Rights of the Child to request further information relevant to the implementation of the Children in Armed Conflict Protocol.

The Children in Armed Conflict Protocol grants the Committee on the Rights of the Child no authority other than receiving reports and requesting additional information as set forth above. During the negotiations, States rejected proposals that would have permitted the Committee, *inter alia*, to hold hearings, initiate confidential inquiries, conduct country visits, and transmit findings to the State Party concerned.

Article 9 – Signature and Ratification

Article 9 provides that the Children in Armed Conflict Protocol is subject to ratification or open for accession by any State, *i.e.*, it is not limited to parties to the Convention on the Rights of the Child. Thus, the United States is eligible to become a party to the Children in Armed Conflict Protocol even though it has not become a party to the Convention. During the negotiations concerning the Children in Armed Conflict Protocol, the United Nations Legal Counsel provided a legal opinion which confirmed that under the rules of the law of treaties there was no legal impediment to an instrument which is entitled "optional protocol" being open to

participation by States that had not also established, or which did not also establish, their consent to be bound by the convention to which that instrument was said to be an optional protocol.

Consistent with the fact that the Children in Armed Conflict Protocol is an independent international agreement, the Department recommends the following understanding to be attached to the U.S. instrument of ratification:

> The United States understands that the Protocol constitutes an independent multilateral treaty, and that the United States does not assume any obligations under the Convention on the Rights of the Child by becoming a party to the Protocol.

Articles 10-13 – Final Clauses

The final clauses of the Protocol are consistent with the clauses used in many international agreements. Pursuant to Article 10(1), the Children in Armed Conflict Protocol will enter into force three months after the deposit of the tenth instrument of ratification or accession. Under Article 10(2), after its entry into force, the Children in Armed Conflict Protocol enters into force for each subsequent ratifying State one month after the date of the deposit of its own instrument of ratification or accession. Under Article 11, any State may denounce the Children in Armed Conflict Protocol at any time by written notification to the U.N. Secretary-General. Such a denunciation shall take effect one year after notice is given, but the denunciation cannot affect obligations regarding acts or omissions prior to the effective date of denunciation or if the State is engaged in armed conflict.

Under Article 12, the Children in Armed Conflict Protocol can be amended by a majority of States Parties present and voting at a Conference called for that purpose. Such an amendment shall not enter into force, however, until two-thirds of all States Parties to the Children in Armed Conflict Protocol have accepted it, and shall be binding only on those States that specifically accept it. Substantially identical procedures for amendment exist in other human rights instruments which the United States has ratified, including the International Convention on Civil and Political Rights, the Convention on the Elimination of Racial Discrimination and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Article 13(1) provides that the respective texts in all U.N. official languages are equally authentic. Pursuant to Articles 9(3) and 13(2), the U.N. Secretary-General is effectively the depositary for the Children in Armed Conflict Protocol.

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