

New International Instruments for the Protection of Children

Michael Dennis, attorney advisor, human rights and refugees, U.S. Department of State

As the German theologian Dietrich Bonhoeffer observed, "The test of the morality of a society is what it does for children." This is a test the international community cannot afford to fail. The statistics are staggering:

- 1) 600 million children struggle to survive on less than one dollar per day
- 2) 100 million children of primary school age remain out of school, the majority of them girls
- 3) 30 million children are sexually exploited and trafficked each year
- 4) 50 million children work in intolerable forms of labor
- 5) 300,000 children fight in ongoing armed conflicts

Each of us has a moral responsibility to take action: governments, international organizations, and every element of civil society.

In September 2001, the UN General Assembly will convene a special session on children with the stated purpose of finding practical solutions to the problems facing children and developing realistic targets and goals. Many governments and international organizations tout the Convention on the Rights of the Child as the touchstone and standard to guide all future actions for children. The convention has been ratified by 191 countries, making it the most widely ratified human rights instrument in history. Yet, it has not been effectively implemented.

As a non-party, the U.S. is not in a position to accept the convention as the litmus test for measuring a nation's commitment to children. The Clinton administration signed the convention document in February 1995, but did not send the document to the Senate for advice and consent to ratification. Many senators expressed strong concerns that the convention would infringe on U.S. sovereignty, rights of parents, and state and local law. It is also unclear how the U.S. would effectively guarantee the economic and social rights set forth in the convention, since these services or programs are predominantly provided at the state and local level.

Given our difficulties with the convention, the U.S. has worked to negotiate other human rights instruments that protect children. In December 1999, the U.S. became the third state to ratify ILO Convention No. 182 on the Worst Forms of Child Labor—within five months of its adoption by the International Labor Conference. Last year, the U.S. led international efforts to negotiate two protocols to the Convention on Rights of the Child: the protocol on the sale of children, child prostitution, and child pornography (sale of children

protocol); and the protocol on the involvement of children in armed conflict (children in armed conflict protocol). Pursuant to a U.S. proposal, both protocols are independent multilateral agreements under international law; states may ratify either protocol without becoming a party to the convention or being subject to its provisions.

Together, these new instruments form a trio of vital protections for children, and if widely ratified and implemented, they could become a cornerstone for future action by global society. The following account summarizes the basic provisions of these instruments and addresses major issues considered during their negotiation.

ILO Conventions on the Worst Forms of Child Labor

For the first time in its history, in December 1999, the ILO Conference unanimously adopted a labor convention: ILO Convention No. 182 on the Worst Forms of Child Labor. The convention banned four categories of child labor, categories that no government should be willing to tolerate:

- 1) modern slavery, debt bondage, and similar practices—including forced or compulsory recruitment of children for use in armed conflict
- 2) sex work, including pornography and prostitution
- 3) illicit activities, in particular drug trafficking
- 4) any other work that is likely to harm the health, safety, and morals of children

The convention defined a child to be any person under age eighteen.

Many delegates to the conference believed that at the dawn of the twenty-first century, it was time to establish a clear international consensus concerning work that is the most harmful and performed by the most vulnerable children. In the two years since its adoption, ILO Convention No. 182 has become the fastest ratified convention in the history of the ILO. It has now been ratified by eighty-seven states.

Children in Armed Conflict

The most controversial aspect of the negotiations concerned the treatment of children involved in armed conflict. Several delegations, including the worker members and the African government group proposed that the convention outright ban the use of children (i.e., persons under eighteen) in all forms of military activities. They argued that activities such as military training and participation in armed conflict jeopardize the health or safety of children and therefore should be considered as one of the worst forms of child labor.

Other delegations pointed to the ILO's limited experience with military issues and argued that members should exercise caution and assure consistency with the Geneva conventions of 1949 that generally refer to children as individuals under the age of fifteen.

Ultimately, a consensus text was developed and adopted. It was based on a proposal by the U.S. and other Western governments that included within the definition of the worst forms of child labor the "forced or compulsory recruitment of children for use in armed conflict." The new provision constituted a significant enhancement of current international standards, which generally prohibit the recruitment and use in hostilities of children under the age of fifteen.

Hazardous Work

Another difficult issue regarding the worst forms of child labor involved the proper approach to hazardous work. Worker members sought to include in the convention a specific list of hazardous work conditions (e.g., work underground, at dangerous heights, or in confined spaces) that would remove any discretion from governments to regulate this type of work. Most governments, however, wanted a more flexible approach, one that would permit them to take into account the circumstances in their countries that could make work more or less hazardous. A compromise was reached, leaving the determination of what constitutes hazardous work to the discretion of member states. Additionally, an understanding between employer and worker members established that Article 3(d) does not encompass situations involving work by children on their parents' family farms.

Education

The delegates faced a key issue in determining the relationship between exploitative labor and education. Some governments, including the U.S., as well as all worker members, wanted the convention to cover work that systematically prevents a child from taking advantage of available or compulsory education. Other delegations opposed this formulation. They asserted that lack of access to education was fundamentally different from the other abuses targeted by the convention and that the formulation's inclusion would harm its prospects for ratification. In the end, the need for rehabilitation formed the basis for consensus. Article 7(c) incorporated the obligation "to ensure access to free basic education, and wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labor."

A number of delegates assumed that in using the term "basic education," they were referring to primary education, consistent with Article 28 of the Convention of the Rights of the Child and Article 13 of the International Covenant on Economic, Social, and Cultural Rights. These documents

obligate governments to progressively make primary education compulsory, available, and free for all. However, in other contexts, "basic education" has been understood to go beyond primary education to encompass both preschool, secondary school, and nonformal education, including second-chance primary education for youth and adults. Even for countries with strong education systems, such a reading could pose difficulties. For this reason, worker and employer members clarified the record with their understanding that "basic education means primary education, plus one year (i.e., eight or nine years of schooling), such education being based on curriculum and not age."

With this understanding, the article should not pose any obstacles to ratification for states. In the U.S., each of the fifty states offer all children residing in the state free public education through the twelfth grade, and the states' compulsory education requirements apply to children until the age of sixteen.

International Cooperation

At the end of the negotiations, an additional issue arose under Article 8 of the convention. It concerned the extent of ratifying members' obligation to assist one another in implementing the convention. Worker and government members, together with the governments of most developing countries, sought an amendment to the text that would have committed governments to "enhanced international cooperation and assistance, including support for social and economic development, poverty eradication programs, and universal education." Other governments expressed apprehension about the text because it might be misread as creating a legal obligation to increase financial contributions to other states or ILO child labor programs.

Ultimately, a compromise text emerged that obligated states to help give effect to the provisions of the convention through "enhanced international cooperation and/or assistance." The ILO Deputy Legal advisor confirmed the meaning of the text for the record, noting that, while ratifying states would be bound to work together to meet the goals of the convention, they would have no legal obligation concerning the nature or amount of cooperation or assistance.

The compromise text is entirely consistent with U.S. policy and practice. Notably, the U.S. is currently the world's largest donor to the ILO's International Program on the Elimination of Child Labor (IPEC), contributing over \$110 million over the course of the last six years. These funds support a broad range of educational and development programs for working children around the world. It is anticipated that these programs will enable as many as 160,000 children to withdraw from exploitative work and that they will prevent another 100,000 from entering such work, while also providing indirect assistance to many others.

Protocol on Sale of Children, Child Prostitution, and Child Pornography

The sale of children protocol directly complements ILO No. 182 on the Worst Forms of Child Labor. It 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 perpetrators of these offenses are brought to justice. 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 the protection and assistance they desperately need.

The protocol was the subject of extensive negotiations over a six-year period in a working group established by the Commission on Human Rights. The most controversial aspects of the negotiations involved the definitions of the terms “sale of children,” “child prostitution,” and “child pornography,” and also the obligation of states to criminalize conduct related to those activities.

Prostitution and Pornography

The major dispute concerning prostitution and pornography concerned the minimum age for protection of children. In many countries, the age of sexual consent is between thirteen and sixteen; if a child of that age has consented to a sexual act, no crime involving child prostitution or child pornography has been committed. For this reason, several Western delegations proposed that in this regard, the protocol, like Article 34 of the Convention on the Rights of the Child, should be subject to national law and permit states parties to derogate from the majority age otherwise contained in their national legislation (which in most cases is age eighteen). Developing countries, as well as Italy, Canada, and the U.S., took the position that the age of protection should be eighteen and that the protocol should preclude the possibility that a child under eighteen could consent to crimes such as child prostitution, child pornography, and trafficking in children.

Ultimately, a text emerged that required states parties to broadly criminalize activities relating to child prostitution and child pornography without reference to state law or the age of consent. Article 2(b) defines child prostitution as “the use of a child in sexual activities for remuneration or any other form of consideration.” Article 2(c) defines 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,” primarily for sexual purposes. While the protocol does not specifically define the term “child,” states parties to the Convention on the Rights of the Child are bound by Article 1 that defines the

term “child” as “every human being below the age of eighteen years, unless, under the law applicable to the child, majority is attained earlier.” The preamble to the protocol further articulates the general understanding that “in order to further achieve the purposes of the Convention on the Rights of the Child, and the implementation of its provisions” including Articles 1 and 34 (on sexual exploitation and abuse), “it would be appropriate to extend the measures that States Parties [to the convention] should undertake in order to guarantee the protection of the child from the sale of children, child prostitution, and child pornography.”

The requirement that States Parties uniformly criminalize prostitution and pornography will facilitate international extradition by clearly establishing the common elements of these offenses within the jurisdictions of States Parties.

Sale of Children

Another difficult issue of the negotiations concerned the definition of the term “sale of children.” Some delegations, including the U.S., favored a focused definition of the term, one that would limit the scope of the protocol to situations where the underlying purpose was sexual exploitation of a child. They cited the need for a precise definition so that the acts that should be criminalized could be specified with sufficient clarity. Developing countries generally favored a broader definition of the term.

As a matter of compromise, Article 2(a) broadly defined the term “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(1)(a)(i) specified that the types of conduct to be criminalized in the context of the sale of a children are those involving the offering, delivering or accepting of a child for the purpose of: 1) sexual exploitation of the child, 2) transfer of organs of the child for profit, or 3) the engagement of the child in forced labor. Additionally, Article 3(1)(a)(ii) required penalization in the context of the sale of a child “improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international instructions on adoption.”

The greatest area of U.S. concern, with respect to the definition of sale of children, was the treatment of inter-country adoptions, since many U.S. jurisdictions permit prospective adoptive parents to reimburse birth parents for reasonable expenses, such as medical and legal fees, counseling services, or living expenses, while waiting for the adoption to be completed. The obligation to criminalize “improperly inducing consent, as an intermediary” originated in a joint U.S. and Egyptian proposal drawn directly from Article 4(c)(3) of the Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption. The Hague Convention required that an adoption may only take place if competent authorities of the state of origin have

ensured, *inter alia*, that consent has not been induced by payment or compensation of any kind. During the final negotiating session, both Japan and the U.S. stated their understandings that “applicable international legal instruments on adoption” meant the Hague Convention. Both indicated that since they were not parties to that instrument, they would not be bound to penalize the conduct barred by the Hague Convention.

Subsequent to the adoption of the protocol by the general assembly, the U.S. ratified the Hague Convention. In conformity with the requirements of Article 3(1)(a)(ii), the implementing legislation criminalizes an intermediary’s knowing and willful inducement of consent by offering or giving compensation for the relinquishment of parental rights.

Protocol on the Involvement of Children in Armed Conflict

The children in armed conflict protocol deals realistically and reasonably with the difficult issues of minimum ages for compulsory recruitment, voluntary recruitment, and participation in hostilities. In consistency with the requirements of ILO Convention No. 182, the protocol raises the age for military conscription to eighteen from fifteen years. In addition, it obliges States Parties to raise the minimum age for voluntary recruitment to an age above the current fifteen-year international standard, and mandates that States Parties take all feasible measures to ensure that personnel in their national armed forces who are not yet eighteen do not take a direct part in hostilities. States Parties to the protocol must also prohibit the recruitment and use of persons below the age of eighteen by nongovernmental armed groups.

As with the sale of children protocol, negotiations were conducted in a working group established by the Commission on Human Rights over a six-year period. Throughout the negotiations, the central issues were the minimum age for entry into the military (recruitment) and participation in armed conflict. Many delegations, nongovernmental organizations, the International Committee of the Red Cross (ICRC), the UN high commissioner for human rights, and the Special Representative of the Secretary-General for Children in Armed Conflict urged the prohibition of any military service by those under eighteen. While most states agreed that the minimum age for conscription (compulsory or obligatory military service) should be set at eighteen, the debate focused on voluntary recruitment and participation in hostilities. Nearly half of the UN members permit voluntary recruitment below the age of eighteen.

Voluntary Recruitment

The states that took the position that those below eighteen should not be permitted to volunteer for military service invariably employ compulsory service to meet their military requirements. In contrast, states with a volunteer military

system, such as the U.S., the U.K., and Australia, argued that voluntary recruitment was qualitatively different from compulsory recruitment and, as a matter of principle, could not agree that conscripting eighteen-year-olds was preferable to permitting sixteen- or seventeen-year-olds to volunteer with parental consent. They focused on the value of individual choice from a human rights standpoint and pointed to the unparalleled opportunities of the service, especially in education and training, for minorities and economically disadvantaged teenagers. Informal discussions also revealed that, from a practical standpoint, countries with volunteer militaries have to compete with all other employment sectors for recruits as they were leaving secondary school. In some countries, entry into the work force occurs at age eighteen, in others at sixteen or seventeen.

The delegates adopted a consensus text based upon a U.S. proposal (Article 3) that obligates states parties to deposit a binding declaration upon ratification. This declaration affirms their agreement to raise the minimum age for voluntary recruitment into their national armed forces from the current international standard of fifteen years. Article 3 further obligates States Parties to maintain safeguards with respect to voluntary recruitment: ensuring that recruitment is genuinely voluntary; requiring informed consent of the person’s parents or legal guardians; informing recruits of the duties involved in military service; and requiring reliable proof of age prior to acceptance into military service.

Article 3 was essential for the U.S., given its longstanding tradition of allowing seventeen-year-olds with parental consent to enter the military and its difficulty in meeting recruiting goals in recent years. The U.S. military currently recruits into active-duty service approximately fifty thousand qualified volunteers at age seventeen each year, provided they demonstrate parental consent and reliable proof of age.

Participation in Hostilities

In contrast to the situation involving voluntary recruitment, several countries that permit recruitment below the age of eighteen also prohibit participation in armed conflict by those under eighteen. Consequently, many delegations argued that states should ensure that participation in armed standard for participation in hostilities is consistent with their actual practice. These delegations pointed out that if individuals under eighteen were permitted to enter the military, states could not possibly ensure that these recruits do not take part in hostilities, since members of the armed forces are lawful subjects of attack under international humanitarian law.

The compromise reached required that States Parties take “all feasible measures” to ensure that members of their armed forces under the age of eighteen do not take a “direct part in hostilities.” The language was drawn from Article 38(2) of the Convention on the Rights of the Child and Article 77(2) of Geneva Protocol I, both of which require that States

Parties take all “feasible measures” to ensure that children under the age of fifteen do not take a “direct part in hostilities.”

The standard recognized that in exceptional cases it will not be “feasible” for a commander to prevent a soldier under the age of eighteen from taking a direct part in hostilities. The term “feasible” has been understood in law of war treaties, including Geneva Protocol I, to mean that which is “practicable or practically possible taking into consideration all circumstances ruling at the time, including humanitarian and military considerations.” Additionally, the standard recognized that there is no prohibition on indirect participation in hostilities or forward deployment.

The term “direct participation in hostilities” has been understood in the context of law of war treaties relating to the law of armed conflict 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.

Many delegations expressed disappointment that the protocol did not bar “indirect” participation in hostilities and that the inclusion of the term “feasible measures” left open the possibility of involving persons under the age of eighteen in hostilities in exceptional circumstances. All delegations, however, acknowledged that the provisions of the protocol constitute a significant enhancement of current international protections for children.

At the conclusion of the working group’s session in January 2000, President Clinton welcomed the compromise, stating that it “fully protects the military recruitment and readiness requirements of the United States.” According to the Department of Defense, the number of service members affected would be minimal since only a small portion of U.S. seventeen-year-old recruits (no more than twenty-five hundred in any given year or 0.25 percent of the total enlisted force) complete training before turning eighteen. Additionally, as the U.S. stated at the final negotiating session, “The standard recognizes that, in exceptional cases, it might not be feasible for a commander to withhold or remove [service personnel under eighteen] from taking a direct part in hostilities.”

Non-State Actors

Another difficult issue of the negotiations on children in armed conflict concerned the treatment of nongovernmental actors. During the negotiations, evidence was presented that in some twenty-eight ongoing situations of armed conflict, persons below the age of eighteen were being forced to take up arms by insurgent groups, often at the threat of gunpoint. States disagreed on how to address this concern. Some delegations, as well as the ICRC, proposed that the protocol should create a binding international legal obligation for such nongovernmental groups. They proposed that the protocol be consistent with the existing humanitarian law that places an equal obligation on each party to an armed conflict, including nongovernmental armed groups in certain circum-

stances. However, other states refused to include obligations for nongovernmental actors in the protocol, not wishing to equate rebel groups with state parties or to confer recognition on such groups.

In the end, a compromise text emerged under which States Parties shall take “all feasible measures” to prevent the recruitment and use in hostilities of persons under the age of eighteen by nongovernmental armed groups, including by the enactment of legislation to ensure that such recruitment is punishable as a criminal offense under national law. The drafters used the phrase “all feasible measures” in recognition of states’ frequent lack of state control or influence over armed groups operating in their territory. Governments also recognized that in some cases other states provide support for, or exert influence over, such groups, and that, in certain situations, armed groups recruit from the territory of states that are not parties to the conflict. For this reason, Article 7 of the protocol, further obligates States Parties to cooperate internationally “in the prevention of any activity contrary to the protocol,” including the recruitment and use of persons under eighteen in hostilities by nongovernmental actors.

Signature and Ratification of the Protocols

Another issue that prompted controversy in the negotiations of both protocols concerned the proposal of the U.S. that each protocol be subject to ratification or accession by a state, even if it was not a party to the Convention on the Rights of the Child. Developing countries generally supported the U.S. proposal, pointing to the importance of achieving the widest possible adherence for the protocols to make it clear that they spoke for the entire world community. Several European delegations argued that only States Parties to an instrument should be allowed to become parties to an optional protocol to that instrument.

The U.S. proposal was accepted in the armed conflict negotiations, after the UN Office for Legal Affairs issued an opinion supporting the U.S. view. The opinion concluded that:

There is no necessary legal impediment to an instrument which is entitled ‘optional protocol’ being open to participation by States which have not also established, or which do not also establish, their consent to be bound by the convention, to which that instrument is said to be an ‘optional protocol.’

The opinion further stated that the U.S. proposal was similar to the ratification provision in the 1967 protocol relating to the status of refugees which, pursuant to Article V, is open to accession by all states parties to the Convention on the Status of Refugees, and any other state that is a member of the UN.

Nonetheless, two weeks after the conclusion of the negotiations on the children in armed conflict, several European delegations blocked consensus *ad referendum* adoption of the

sale of children protocol because of a similar ratification provision. They insisted that the protocol either be subject to ratification by States Parties to the convention or that Non-States Parties agree to be bound by the rules and principles embodied in the convention. Other delegations, including nearly all the Latin American delegations, objected that it would send the wrong political message if Non-States Parties to the convention were permitted to become party to the children in armed conflict protocol but not to the sale of children protocol. They stated that the two matters—children in armed conflict and the sale of children—were equally important.

The issue was not resolved until the reports of the working groups were adopted at the meetings of the commission on human rights. There, the states agreed to include similar provisions on ratification in the protocols—the children in armed conflict protocol would be subject to ratification by any state, while the sale of children protocol would be subject to ratification by any state party or signatory to the convention. This arrangement met U.S. requirements as the U.S. had signed the convention in February 1995.

Conclusion

ILO No. 182 and the protocols speak to an international sense of justice and provide a clear starting point for action. They reflect a worldwide consensus that the test of morality for each society is what it does for children. There is simply no excuse for children being enslaved, trafficked, forced to toil in hazardous and dangerous work, exploited in the commercial sex and drug trade, or abducted into militias for armed conflict.

No one country can fight this battle. Our nations must join together and ensure that the protections provided in these instruments become a reality in the lives of children around the world. Governments and the international community must continue to work together in order to implement these instruments, prosecute offenders, dismantle the networks of trafficking and abduction, care for the young victims, ensure that children have access to schools, and enhance international cooperation. Each of our nations must join this battle and put an end to these abuses.

Material in this paper was previously published in the American Journal of International Law. Reproduced with permission from 93 AJIL 943–48 (1999), ©The American Society of International Law; and reproduced with permission from 94AJIL 789–96 (2000), ©The American Society of International Law.