

Innocenti Working Paper

**THE OPTIONAL PROTOCOL TO THE
CONVENTION ON THE RIGHTS OF THE
CHILD ON THE SALE OF CHILDREN,
CHILD PROSTITUTION AND CHILD
PORNOGRAPHY AND THE
JURISPRUDENCE OF THE COMMITTEE
ON THE RIGHTS OF THE CHILD**

Ugo Cedrangolo
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Correspondence should be addressed to:

UNICEF Innocenti Research Centre
Piazza SS. Annunziata, 12
50122 Florence, Italy
Tel: (+39) 055 20 330
Fax: (+39) 055 2033 220
Email: florence@unicef.org

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

Ugo Cedrangolo^a

^a (LL.M. Leiden) Human Rights Officer, Human Rights Treaties Branch, Office of the High Commissioner for Human Rights

Summary: The paper discusses the content of the Optional Protocol on the Sale of Children, Child Prostitution and Pornography. It analyzes the provisions of this Optional Protocol to the Convention on the Rights of the Child (herein referred to as the CRC or the Convention), and integrates them with the jurisprudence of the Committee on the Rights of the Child (herein referred to as the Committee).

The paper highlights the main issues covered in the text of this Optional Protocol. These include: definition and criminalization of the offence; jurisdiction, extradition and further matters of criminal procedure; prevention; protection of victims and their rehabilitation; and the importance of international cooperation in the fight against sale of children, child prostitution and child pornography. The paper then more closely examines the Concluding Observations of the Committee on States Parties' reports. Comparing the content of the Protocol with the observations of the Committee enables the identification of gaps between what is required and what has been done. At the same time, such a comparison allows for a discussion of some successful attempts at compliance.

The paper concludes that the Committee's jurisprudence has indeed provided useful guidance to the complex issues of the Protocol and helped in filling some of the gaps contained therein. Concurrently, however, it is found that many challenges remain with respect to the implementation of the Protocol's provisions at national level.

Keywords: The Convention on the Rights of the Child, the Committee on the Rights of the Child, sexual exploitation of children, child abuse images, child prostitution, sexual exploitation through child pornography, prevention, protection, rehabilitation, extradition

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1. INTRODUCTION

Discussion within the United Nation system on issues related to the commercial sexual exploitation of children originated during the 1990's and resulted in the creation of the mandate of the Special Rapporteur on the sale of children, child prostitution and child pornography and the First World Congress against Commercial Sexual Exploitation of Children, held in Stockholm, Sweden, in 1996.

The exploitative use of children in prostitution and pornography as well as sale of children and child trafficking is covered by articles 34 and 35 of the Convention on the Rights of the Child¹ (hereinafter "the Convention"), as follows:

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;*
- (c) The exploitative use of children in pornographic performances and materials.*

Article 35

States parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or the traffic in children for any purpose or in any form.

However, the Commission on Human Rights decided, in 1994, to establish an open-ended working group to prepare guidelines for a possible draft optional protocol to the Convention focusing on the sale of children, child prostitution and child pornography.² A key functional responsibility in this regard would lie with the Committee on the Rights of the Child (hereinafter "the Committee"), one of the seven (eight with the CRPD) UN committees of independent experts monitoring the implementation of the States parties' compliance to the core human rights treaties.³ The Committee, like many organisations working in the field, did

¹ The 1989 Convention on the Rights of the Child is the most widely ratified human rights treaty with 193 States parties. <http://treaties.un.org>

² See CHR resolution 1994/90, 9 March 1994, § 17.

³ The other treaty-bodies are:

- The Human Rights Committee, monitoring the implementation of the International Covenant on Civil and Political Rights 1966 and its optional protocols;
- The Committee on Economic, Social and Cultural Rights, which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights 1966;
- The Committee on the Elimination of Racial Discrimination, monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination 1965;
- The Committee on the Elimination of Discrimination Against Women, which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women 1979;

not support the idea of the adoption of a new instrument, mainly arguing that the Convention on the Rights of the Child already provided for an important framework to deal with such situations and that it would have been better to concentrate the efforts on the implementation of the existing instruments rather than build a new treaty.⁴ Nonetheless, the work of the open-ended working group continued and, on 25 May 2000, the General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child, on the sale of children, child prostitution and child pornography (hereinafter “the Protocol”). The Protocol entered into force on 18 January 2002. By October 2008, it had been ratified by 129 States.⁵

The aim of this paper is to analyze the main provisions of the Protocol as well as to make a first assessment of the Committee’s jurisprudence, three years after the consideration of the first report under this new instrument.⁶

The structure of the analysis generally follows the division in the sections identified by the Committee on the Rights of the Child in its revised guidelines regarding the submission of initial reports under the Protocol. See *CRC/C/OPSC/2*, 3 November 2006. The next chapter concentrates on the articles of the Protocol focusing on the definition of the offences and their criminalization. It also briefly analyzes some issues related to jurisdiction and extradition and other matters of criminal procedure. Chapter III concentrates on the provisions of the Protocol focusing on preventive measures, while Chapter IV analyzes the issues of protection of victims and their rehabilitation. Finally, before the conclusion, a short chapter touches upon the issue of international cooperation in the fight against sale of children, child prostitution and child pornography.⁷

2. PROHIBITION AND RELATED MATTERS

Article 1 of the Protocol provides that: “States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol”. Essentially, this article sets out the scope of the Protocol, which is the prohibition and the criminalization of these offences. The language of this article recalls that of article 1 of the ILO Worst Forms of

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- The Committee Against Torture, which monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment;
 - The Committee on Migrant Workers, monitoring implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990.
 - Committee on the Rights of Persons with Disabilities

In June 2006, the Optional Protocol to the Convention Against Torture entered into force and created the Sub-Committee on Prevention, a new treaty body. Its mandate, however, differs from the other traditional treaty bodies insofar as it is operational and consists mainly in visiting regularly places of deprivation of liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

⁴ See, in particular, the formal statement adopted by the Committee in April 1994 at its sixth session on ‘Cooperation with United Nations bodies – Sale of children, child prostitution and child pornography.’

⁵ UNICEF Innocenti Research Centre, “Legal Frameworks for Combating Sexual Exploitation of Children”, Thematic Paper no 2 for World Congress III Against Sexual Exploitation of Children and Adolescents (internal document), UNICEF IRC, Florence 2008, p.7

⁶ The first report considered by the Committee under the Protocol, was the report of Norway on 3 June 2005 (39th session). As of the end of the 48th session, in June 2008, the Committee has considered 26 reports under the Optional Protocol.

Child Labour Convention (No. 182/1999)⁸ which asks States parties to the Convention to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. Sale and trafficking of children as well as the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances are among the worst forms of child labour listed in article 3 of the ILO Convention.⁹

Article 2 is meant to define the conducts that are prohibited in the Protocol and has to be read hand in hand with article 3, which includes a list of acts that – as a minimum – States parties should fully cover under their legislation. We will now examine each of these three acts as well as several related issues raised so far by the Committee in the consideration of States parties' reports.

a) Sale of children

Sale of children is defined in article 2 as “any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration”. This definition was the outcome of a long debate which resulted in a relatively broad definition, with the advantage of seeking to define this illegal activity for the first time in international law and the disadvantage of giving rise to a certain amount of confusion about the concept. The debate during the drafting process was especially focused on the definition of sale as well as on whether the Protocol should have covered only the sale of children for the purpose of sexual exploitation or rather have a broader scope and include also the sale of children for any other purpose, including the case of illegal adoptions and trafficking in organs.¹⁰

The first years of experience of the Committee in analyzing reports under this Protocol, indeed demonstrate that States parties tend to identify sale of children with other illegal and exploitative activities, notably with trafficking in children.¹¹ This may be perhaps the reason

⁸ By September 2008, 169 countries were parties to ILO Convention 182.

⁹ The full text of article 3 of the ILO Convention 182 states:

For the purposes of this Convention, the term **the worst forms of child labour** comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

¹⁰ See, for instance, Report of the working group in its third session, E/CN.4/1997/97, § 19.

¹¹ According to the definition contained in article 3 (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, *for the purpose of*

why many States parties lack specific legislation covering sale of children since they consider this act covered if they have legislation covering all forms of trafficking. However, the Committee has always been very clear in asserting that, while trafficking is very relevant for this Protocol (it is also mentioned in its preamble) the activities covered in article 3 (1)(a) of the Protocol are different from trafficking and the two terms should not be used interchangeably.

It is important to consider that sale and trafficking – while have common elements and actually may overlap in many cases – are two distinct activities. Trafficking implies by definition the purpose of exploitation, which shall include – at a minimum – “*the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs*”.¹² In the case of sale of children – while the exploitative purpose usually exists (e.g. in the case of sale for sexual exploitation) there may be cases, for example in the case of sale for adoption where, even if the child is transferred through a transaction for remuneration, the act does not have an exploitative character *per se*. The distinction between sale and trafficking is even more difficult when it comes to children since, in this case, the element of coercion and the other means that usually characterize the crime of trafficking are not required.¹³

Thus, it can be concluded that sale of children and trafficking coincide when the sale of the child is made for any consideration involving an exploitative purpose. (Conversely, as mentioned above, one kind of sale that differentiates from trafficking, for instance, is the transfer of a child for adoption in exchange of remuneration, i.e. **the sale for adoption**.) On the other hand, not all cases of trafficking involving children constitute acts of sale of children.¹⁴

While it seems appropriate for the Committee to aim to clarify which acts are specifically covered by the Protocol, it is not clear there is a basis ruling out trafficking from its scope. Trafficking is a common means whereby children become trapped in prostitution networks

exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

¹² See article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children supplementing the Convention against Transnational Organized Crime.

¹³ See article 3(c) of the Palermo Protocol on Trafficking “The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” *even if it does not involve any of the means set forth in subparagraph (a) of this article*”. See above, footnote 12.

¹⁴ It should be noted that the guiding document for the open-ended Working Group tasked with the drafting of the OP, was a proposal submitted by France during the 3rd meeting of the Working Group (see Report of the Working Group contained in E/CN.4/1995/95, § 30 and 32). In this proposal, article 1 read: « A possible Optional Protocol should apply to sexual exploitation and *trafficking in children*. Sexual exploitation must be understood as child pornography and child prostitution ». This original proposal was then modified at the 5th meeting of the working group when the delegation of Cuba proposed to replace the words “sexual exploitation of children” by the words “sale of children, child prostitution and child pornography” (Report of the Working Group, E/CN.4/1995/95, § 37). However, some delegations, such as China, insisted throughout the negotiations on the need for a broad definition of sale of children, which should have included the questions of trafficking and abduction as well. See, for instance, Report of the working group on its fourth session, E/CN.4/1998/103, § 38.

and are sexually exploited and is very relevant in the discussion of States parties' reports under the Protocol as long as it is related to the offences covered thereunder.¹⁵

Article 3 (1) (a) lists a series of acts of sale that, as a minimum, should be covered by States parties legislation.¹⁶ The following sub-paragraphs offer a closer examination of each of these provisions.

Sale for sexual exploitation

Article 3 (1) (a)(i)a. prohibits the offering, delivering or accepting, by whatever means, a child for the purpose of sexual exploitation. While no 'official' definition of sexual exploitation exists in any international instruments, it can be defined as the sexual abuse of children based upon remuneration in cash or kind.¹⁷

One example of an activity that could be analyzed in the context of sale for sexual exploitation is the phenomenon of so-called temporary marriages, still practiced in some regions of the world. Some types of temporary marriages, also called "pleasure" marriages, involve young girls who are given in marriage to rich men in exchange of money; these marriages usually only last few weeks or months, after which these girls are abandoned and deprived of all the rights acquired with marriage. Besides the psychological trauma suffered by them, they are also very often exposed to societal stigmatization and marginalization by their families. Where faced by this issue, the Committee has recommended States parties to prevent and prohibit this practice, including by raising awareness among children themselves and their families about the harmful effects of these marriages on children.¹⁸

Sale for transfer of organs of the child for profit

The transfer of organs of the child for profit is prohibited in Article 3 (1) (a)(i)b. This issue has not been discussed often during the review of States parties' reports, but on several occasions the Committee has noted that States parties' legislation was deficient on this point.¹⁹

¹⁵ One interesting question regarding trafficking, its definition and the relevance with the Protocol, has been discussed recently by the Committee during the consideration of the initial report of the United States of America. The Committee has considered that a too broad definition of trafficking, covering a wide range of criminal acts against children, may cause difficulties, not only in the collection of data, but also in the identification of victims and appropriate strategies to tackle sale of children, child prostitution and child pornography; see concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 7-8.

¹⁶ This formulation (i.e. "as a minimum") seems to leave to the Committee the discretion to discuss also types of sale of children other than those listed under article 3 (1) (a) of the Protocol.

¹⁷ The UN Study on Violence against Children, 2006 defines sexual exploitation as "mistreating, abusing and/or taking advantage of someone for personal gain, by involving them in sex work or sexual activity which is illegal or inappropriate.

¹⁸ See, for instance, concluding observations on Syria (CRC/C/OPSC/SYR/CO/1), 29 September 2006, § 23-24. See also concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 17-18; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 24-25;

¹⁹ See, for instance, concluding observations on Qatar (CRC/C/OPSC/QAT/CO/1), 2 June 2006, § 21 and 22; concluding observations on Andorra (CRC/C/OPSC/AND/CO/1), 27 January 2006, § 12-13.

Sale for engagement of the child in forced labour

The issues of sale for engagement of the child in forced labour, contained in Article 3 (1) (a)(i)c, has been generally neglected in the dialogue with States parties so far, with most of the focus being concentrated on issues related in particular to the commercial sexual exploitation of children.

Sale for forced labour has been mentioned, for instance, in relation to a situation of conflict where children had been abducted for several reasons, including for the purpose of forced labour.²⁰ Other times, the Committee has made a general recommendation to States parties to prohibit all acts of sale mentioned in article 3 (1) (a), including the sale for engagement of the child in forced labour.

Another issue that has been discussed in the context of the sale of children for the purpose of forced labour has been the use of children in camel racing,²¹ activity that the Committee and some observers (e.g., UNICEF) consider harmful to the health, safety or morals of children, thus meeting all the elements of the worst forms of child labour.²²

Article 3 (a) of ILO Convention 182 on the Worst Forms of Child Labour includes among the “worst forms of child labour” also forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict. It is perhaps in relation to this provision that the issue of recruitment of children in armed conflict has been discussed by the Committee within the context of this Protocol,²³ and notably during the consideration of the initial report of the Sudan; in that case, the Committee noted that recruitment of children continued to occur in the country, *including with the promise or in exchange of money, goods or services*²⁴ and recommended to the State party to take all necessary measures to prevent, prohibit and punish “*any act or transaction, which include the offering, delivering or accepting a child, whereby a child is transferred by any person or group of persons to another for the purpose of recruitment in armed conflict*”.²⁵

While for both the camel racing and the involvement in armed conflict, it may be argued that in some cases the coercive element may not be obvious in the sense that the child may voluntarily join the armed forces – or groups – or enter into the camel racing activity, it has been the Committee’s position that such a choice cannot be defined as voluntary if it is made,

²⁰ See concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 37.

²¹ For the issue of camel racing in the concluding observations of the Committee, see: Concluding observations on Sudan (CRC/C/OPSC/SDN/1), 21 June 2007, § 33 and 34; Concluding observations on Qatar (CRC/C/OPSC/QAT/1), 2 June 2006, § 31-32 and 35-36

²² See article 3 (d) of the 1999 Convention on the Worst Forms of Child Labour.

²³ The recruitment of children in armed conflict and their use in hostilities is the object of the other Protocol to the Convention on the Rights of the Child, on the involvement of children in armed conflict.

²⁴ Emphasis added to highlight the commercial element identified by the Committee in this case.

²⁵ Emphasis added. Concluding observations on Sudan (CRC/C/OPSC/SDN/1), 21 June 2007, § 35 and 36.

as in most cases, under necessity, threat or coercion, or due to poverty, indoctrination, manipulation, neglect or absence of opportunities.

Sale for adoption

Article 3 (1) (a) (ii) provides that States parties should criminalize the act of improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption. This provision obliges States parties to only prohibit and punish the acts of the intermediary in an illegal adoption, while it would appear that there is no obligation to sanction the “buyer” and the “seller” in this transaction. In practice, however, the Committee has so far been very clear in recommending to States parties to criminalize all actors involved and all activities in the context of sale of children for the purpose of adoption. This interpretation of the Committee also finds justification in another provision of article 3, namely its paragraph 5, which places an obligation on States parties to 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*”.²⁶ Many countries interpret the term “applicable international legal instruments” as referring to the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.²⁷

b) Child prostitution

Article 3 (1) (b) provides that States parties criminalize “Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2”, i.e. “the use of a child in sexual activities for remuneration or any other form of consideration”. The inclusion in the definition of sexual activities for “any other consideration” leaves the door open to other types of child prostitution other than the classical example of sexual activities provided in exchange of money.

An issue that has often been raised by the Committee, usually in the context of child prostitution, is the increase of the phenomenon of sex tourism involving children. While sex tourism is not identified as a separate offence under article 3,²⁸ it is referred to in the

²⁶ See, for instance, concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 25-26; concluding observations on Syria (CRC/C/OPSC/SYR/CO/1), 29 September 2006, § 28-29; concluding observations on Guatemala (CRC/C/OPSC/GTM/CO/1), 8 June 2007, § 25-26; concluding observations on France (CRC/C/OPSC/FRA/CO/1), 5 October 2007, § 18-19. Quite detailed concluding observations on the issue of illegal adoption and prevention of sale for adoption have been adopted by the Committee for the USA; see concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 29-30.

²⁷ Of course, also the provisions of the Convention, and notably article 21, have to be considered as applicable international legal instruments.

²⁸ It should be noted, however, that sex tourism appeared as a separate offence in some versions of the draft Optional Protocol. See, for instance, the Annex to the report of the working group on its second session, E/CN.4/1996/101. Some delegations, Costa Rica and Brazil for instance, considered the inclusion of a definition and prohibition of sex tourism of utmost importance; see E/CN.4/1996/101, § 35-36 and report of the working group on its fifth session E/CN.4/1999/74, § 58.

However, even if it is not a separate crime under the Protocol, when a State party has introduced a specific crime of “sex tourism”, the Committee has welcomed that. See, for instance, concluding observations on Morocco (CRC/C/OPSC/MAR/CO/1), 27 January 2006, § 15-16.

Preamble of the Protocol as well as in article 10, which deals with international cooperation. It is clear that sexual exploitation in travel and tourism is directly connected to the offences covered by the Protocol since it often involves child prostitution and may be also related to child pornography and, to some extent, sale of children.²⁹ For the above reasons, the Committee has often recommended to States parties to strengthen their efforts to prevent and combat sex tourism, in particular by promoting responsible tourism through awareness campaigns specifically directed at tourists as well as cooperating closely with travel operators, NGOs and civil society organizations.³⁰

Another issue that has been raised in the context of child prostitution is the fact that some countries use different age limits in their Penal Codes for some of the offences covered by the Protocol, and notably child prostitution. That would mean, for instance, that if the age limit for child prostitution is set at 16 years, children aged 16 and 17 would not be victims of the offences, but could rather be treated as perpetrators and criminalized if, in the specific penal system, prostitution is considered illegal. In some countries this is linked to the fact that the so-called age of sexual consent is set at a lower age than 18. On the other hand, where prostitution is legal, this may mean that the exploitation of children over what is often called the age of consent – e.g. those aged 16 and 17 – is not a crime. In all such cases, the Committee has consistently asked States parties to set at 18 years - irrespective of the age of sexual consent - the age limit used for defining a child for all the offences covered by the Protocol.³¹ Unfortunately, children used in prostitution are often criminalized in practice even when the age for committing child prostitution is set at 18 years. We will look more closely at this problem when discussing issues related to the protection of victims in chapter IV below.

c) Child pornography

Under article 3 (1) (c) of the Protocol, States parties are asked to criminalize the “Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2”. Article 2 defines child pornography as “any representation, by whatever means, of a child engaged in real or simulated explicit

²⁹ The issue of sex tourism in the context of this Protocol was discussed at length during the negotiations in the working group. Several delegations stressed that sex tourism was strictly linked with the offences covered by the Protocol and insisted on the importance to include provisions on extraterritoriality, extradition and international cooperation. Other delegations considered that sex tourism was beyond the mandate given by the Commission on Human Rights in resolution 1994/90. See for more details Report of the working group on its fourth session, E/CN.4/1998/103, § 33.

³⁰ See concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 16-17; concluding observations on Costa Rica (CRC/C/OPSC/CRI/CO/1), 2 February 2007, § 22-23; concluding observations on Guatemala (CRC/C/OPSC/GTM/CO/1), 8 June 2007, § 33-34; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 20-21; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 18-19; concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 27-28.

³¹ See, for instance, concluding observations on Syria (CRC/C/OPSC/SYR/CO/1), 29 September 2006, § 14-15 and 19-20; concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 10-11; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 26-27; concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 37.

sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”.³²

The Committee has been very concerned during these first years of consideration of State party’s reports about the widespread distribution of child pornography and its easy accessibility through the Internet. It has strongly and consistently recommended States parties and the international community as a whole to urgently tackle this issue, which is reaching alarming levels. Specific recommendations issued by the Committee in this respect focused on the adoption of adequate legislation tackling child pornography, including by criminalizing its possession and by adopting specific legislation on the obligations of internet service providers in relation to child pornography on the Internet.³³

One point that has often been at the center of the discussion between the Committee and the States parties’ delegations, is the issue of the criminalization of possession of child pornography. From a careful reading of article 3 (1) (c), it would appear that States parties would be bound to punish the possession of child pornography only when this possession is “for the above purposes” i.e. finalized to the producing, distributing, disseminating, importing, exporting, offering or selling.³⁴ This interpretation would be also supported by the fact that the Protocol mostly deals with issues related to commercial exploitation of children and thus the possession of pornographic material involving children would not come under its scope if not linked with a commercial element resulting from the possession. The Committee, however, seems to have taken a sort of “protective approach” interpreting this provision extensively. As emblematic example of the Committee’s jurisprudence in this sense comes from the concluding observations on the initial report of Chile; despite the fact that in Chile “storage” (almacenamiento) of child pornography was criminalized, the Committee

³² Many delegations, including the European Union and the United States, insisted that they interpreted the term “any representation” in article 2 (c) to mean visual representation. See Report of the Working Group on its sixth session, E/CN.4/2000/75, § 23.

³³ See for instance, concluding observations on Turkey (CRC/C/OPSC/TUR/CO/1), 2 June 2006, § 17-19; concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 10-11; concluding observations on Costa Rica (CRC/C/OPSC/CRI/CO/1), 2 February 2007, § 14-15; concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 23-24; concluding observations on France (CRC/C/OPSC/FRA/CO/1), 5 October 2007, § 16-17; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 22-23.

³⁴ With respect to possession of child pornography, relevant Council of Europe instruments may provide perspective. The Council of Europe Convention on Cybercrime (2001) prohibits, in its article 9 (1) (e), “possessing child pornography in a computer system or on a computer-data storage medium”. However, article 9 (4) provides that “Each Party may reserve the right not to apply, in whole or in part, paragraphs 1, sub-paragraphs d. and e, and 2, sub-paragraphs b. and c”.

Article 20 (1)(e) of the 2007 Council of Europe Convention on the Protection of Children against sexual exploitation and sexual abuse criminalizes possession of child pornography, and goes a little further than the Cybercrime Convention. In fact, there is still a clause providing that states parties may reserve the right not to apply, in whole or in part, paragraph 1.a and e related to the production and possession of pornographic material (article 20 (3)), but only if it is a material:

- consisting exclusively of simulated representations or realistic images of a non-existent child;
- involving children who have reached the age set in application of Article 18, paragraph 2, where these images are produced and possessed by them with their consent and solely for their own private use.

recommended to strengthen the law in this regard, and to provide for the criminalization of the simple possession, since “storage” implied a further commercialization of the product.³⁵ Likewise, in the case of Costa Rica, the Committee recommended to ensure that possession of child pornography be fully covered under Costa Rican criminal law and to include in this crime the possession of child pornography in a computer system or on a computer-data storage medium.³⁶

d) Jurisdiction and Extradition

Article 4 concerns the extent of jurisdiction over acts of sale of children, child prostitution and child pornography. It provides that States parties shall establish their jurisdiction over these offences when they are committed in their territory or on board of a ship or aircraft registered in that State (paragraph 1). It also provides that each State Party “may” establish its jurisdiction according to the principles of active personality (the alleged offender is a national of that State or a person who has his habitual residence in its territory) and passive nationality (the victim is a national of that State). Despite the permissive rather than obligatory nature of this paragraph, the Committee has often inquired as to whether States parties prosecute their nationals for crimes covered by the Protocol committed abroad, in particular in the context of the phenomenon of sexual exploitation in travel and tourism “sex tourism”. In this respect, the Committee has expressed concern over the application by some States of the principle of double criminality to the offences covered by the Protocol, whereby an offence committed abroad can be punished in another country only if it is criminalized in both countries, i.e. the country where the offence was committed and the country which is assuming jurisdiction over that offence.³⁷ For the same reason, the Committee has welcomed the abolishment by a State party, of the double criminality requirement with respect to sexual offences, especially for the advantages that this brings for potential prosecution of crimes related to child sex tourism.³⁸

A closely related part of article 4 is its paragraph 3, which establishes that each State Party shall establish its jurisdiction over sale of children, child prostitution and child pornography “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 (emphasis added).*” This paragraph is almost identical to article 5 (2) of the Convention

³⁵ Concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 23-24. See also concluding observations on Republic of Korea (CRC/C/OPSC/KOR/CO/1), 6 June 2008, § 30-31.

³⁶ See concluding observations on Costa Rica (CRC/C/OPSC/CRI/CO/1), 2 February 2007, § 14-15 and 24-25.

³⁷ See Concluding observations on Andorra (CRC/C/OPSC/AND/CO/1), 27 January 2006, § 14-15; concluding observations on Qatar (CRC/C/OPSC/QAT/CO/1), 2 June 2006, § 23 and 24; concluding observations of Iceland (CRC/C/OPSC/ISL/CO/1), 2 June 2006, § 15 and 16; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 28-29.

The issue of double criminality was also discussed during the drafting of the Protocol in the working group. Some delegations wanted to keep a reference to the “double criminality rule” while others, such as China, France, the Islamic Republic of Iran, the Syrian Arab Republic and Switzerland objected to its inclusion. See in this respect, Report of the working group on its fourth session, E/CN.4/1998/103, § 69 and 70.

³⁸ Concluding observations on Denmark (CRC/C/OPSC/DNK/CO/1), 29 September 2006, § 17-18.

Against Torture (CAT)³⁹, with the exception of the last part of paragraph 3. The formulation of this article is a bit unclear, but it seems that the scope of article 4 (3) of the Protocol is more limited than the scope of article 5 (2) of CAT and that the principles of conditional universal jurisdiction⁴⁰ enshrined thereto do not seem to be established in this Protocol.⁴¹ For example, States parties would not have to establish their jurisdiction in all cases where the extradition is denied for a reason other than ‘on the ground that the offence has been committed by one of its nationals’.

Extradition is dealt with by article 5 of the Protocol in a very detailed manner. It establishes that the offences covered by the Protocol be included in all extradition treaties, and in the absence of a specific treaty, States may use the Protocol as a legal basis for extradition. With respect to extradition, for instance, the Committee has objected to the practice of some States to limit it to the existence of bilateral agreements or conditions of reciprocity.⁴²

e) Other criminal law and procedure matters

Article 3 (3) of the Protocol establishes that, given the grave nature of the offences, States parties shall make them punishable by appropriate penalties. So far, the Committee has not entered much into this issue. This has probably been on purpose, most likely to avoid that countries permitting capital punishment in their legal system, use this provision to justify the death penalty for these crimes. However, the Committee did raise the issue during the consideration of the report of Andorra, for instance, since the low penalties for sex crimes against minors constituted a limitation for the exercise of Andorran courts of extra-territorial jurisdiction in cases of crimes committed abroad.⁴³

Article 3 (4) is a provision which is almost unique to this Protocol. It establishes the liability of legal persons for the offences established therein. Obviously, such liability of legal persons may be criminal, civil or administrative depending of the legal system existing in the State parties, since many countries consider that criminal responsibility can only be personal and cannot extend to legal persons such as enterprises or firms. However, the Committee has referred to this provision only in a limited number of cases.⁴⁴

³⁹ Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.

⁴⁰ Conditional universal jurisdiction is defined, according to some authors, as the “narrow” notion of universal jurisdiction. According to this interpretation, only the State where the accused is in custody may prosecute him and therefore, the presence of the accused on the territory is a precondition for the establishment of jurisdiction. Differently, under a broader version of the universality principle (so-called absolute universal jurisdiction), a State may prosecute persons accused of international crimes regardless of their nationality, the place where the crime was committed, the nationality of the victim and of the author, and even irrespective of the fact that the author is in custody or present in the State. See, for instance, Cassese in *International Criminal Law*, Oxford press, 2003, page 285-286.

⁴¹ See also article 5 (5) of the Protocol.

⁴² See, for instance, concluding observations on Qatar (CRC/C/OPSC/QAT/CO/1), 2 June 2006, § 25-26.

⁴³ Concluding observations on Andorra (CRC/C/OPSC/AND/CO/1), 27 January 2006, § 16-17.

⁴⁴ See, for instance, concluding observations of Iceland (CRC/C/OPSC/ISL/CO/1), 2 June 2006, § 13 and 14.

A rationale similar to that of article 3 (4), i.e. to give an additional practical tool to States parties to combat these unlawful activities, is behind article 7 of the Protocol, which deals with the issues of the seizure and confiscation of goods and materials, and closures of the premises, used to commit the offences covered by the Protocol. While this is a significant provision, it has not been raised often by the Committee during the consideration of States parties' reports. It would be important for the Committee in the future to make more use of it, especially in order to assess what kind of follow-up is given to police operations targeting child prostitution or pedo-pornographic networks.

3. PREVENTION

The Committee has placed a substantial emphasis during the consideration of States parties' reports on the issue of prevention, and notably on the importance of adopting a holistic approach 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.⁴⁵ Along the same lines, the Committee has often stressed, in accordance with article 9 (1) of the Protocol, the importance of paying particular attention to the protection of children who are especially vulnerable to these practices, such as children in street situations, children belonging to minorities, migrant children, children living in remote areas and those living in poverty.

A good example of the link between poverty, vulnerability and risk of becoming victims of the offences covered by the Protocol, can be found in the concluding observations of the Committee on the initial report of Sudan, where the Committee, aware of the particular situation in the country, noted how *“the conflict situation combined with extreme poverty, drought and famine has contributed to the significant number of street children and internally displaced children who are particularly vulnerable to all forms of exploitation”* and expressed concern that for the above reasons *“children may resort to prostitution and/or forced into early marriages as a means for survival in exchange of food, money or basic goods.”*⁴⁶

Another important aspect of prevention contained in the Protocol⁴⁷ and often raised by the Committee in its dialogue with the States parties, is the need of raising awareness among the public at large and specifically among children and their parents, about the harmful effects of sale of children, child prostitution and child pornography. For instance, the Committee has often underlined the importance of the involvement of the community and, in particular, children, child victims and their families, in developing and implementing campaigns of

⁴⁵ See concluding observations on Morocco (CRC/C/OPSC/Mar/CO/1), 27 January 2006, § 34-35; concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 21-22; concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 17-18; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 21-22.

⁴⁶ See concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 17-18. See also concluding observations on Morocco (CRC/C/OPSC/Mar/CO/1), 27 January 2006, § 32-33; concluding observations on Syria (CRC/C/OPSC/SYR/CO/1), 29 September 2006, § 25-26; concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 21-22.

⁴⁷ Article 9, paragraph 2.

information and education as well as training programmes.⁴⁸ Particular attention has been given by the Committee to dissemination and raising awareness, in countries where these issues remain a taboo and where public discussion on them is particularly difficult for religious, societal, traditional or other reasons.⁴⁹

Other issues mentioned by the Committee in the context of preventive measures are: the need to gather statistical data; the budget allocated for programmes and projects to combat them or for the recovery and reintegration of victims.⁵⁰ The existence and effective functioning of a functional system of birth registration has also been highlighted as a fundamental precondition to avoid that children fall into a juridical limbo and may become more vulnerable to the offences covered by the Protocol.⁵¹

Finally, paragraph 5 of article 9 imposes on States parties an obligation to take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the Protocol. While this situation has not yet arisen during the review of States parties reports,⁵² the Committee has welcomed in some instances the production and dissemination of material advertising the unlawful character of especially child prostitution. This has happened, in particular, in the context of some good practices undertaken in the fight against sex tourism involving children.⁵³

4. PROTECTION OF THE RIGHTS OF CHILD VICTIMS

a) Protection of child victims and witnesses at all stages of the criminal justice process

Article 8 of the Protocol deals with the protection of children victims of the practices prohibited under the Protocol throughout the entire criminal justice process. In particular, it requires that States parties – taking in to account the principles of child participation and best interests – take measures which recognize both the special vulnerability of children who have been exposed to these crimes and their special needs as victims/witnesses. These measures

⁴⁸ See, for instance, concluding observations on Morocco (CRC/C/OPSC/MAR/CO/1), 27 January 2006, § 9-10.

⁴⁹ See, for instance, concluding observations on Kazakhstan (CRC/C/OPSC/KAZ/CO/1), 27 January 2006, § 11-12; concluding observations on Turkey (CRC/C/OPSC/TUR/CO/1), 2 June 2006, § 28-29; concluding observations on Guatemala (CRC/C/OPSC/GTM/CO/1), 8 June 2007, § 16-17; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 20-21;

⁵⁰ Concluding observations on Morocco (CRC/C/OPSC/MAR/CO/1), 27 January 2006, § 11-12; concluding observations on Qatar (CRC/C/OPSC/QAT/CO/1), 2 June 2006, § 15-16;

⁵¹ See concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 19-20; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 22-23;

⁵² The issue of publicity on Chilean newspapers with advertisements of “chicas de compañía” and similar, was indeed mentioned only incidentally during the consideration of the initial report of Chile in January 2008. During the discussion it was also pointed out that the issue of advertisements in newspapers and other media was not an issue specific to Chile but virtually a worldwide problem. No specific concerns or recommendations were made in the concluding observations.

⁵³ See, for instance, concluding observations on Costa Rica (CRC/C/OPSC/CRI/CO/1), 2 February 2007, § 22-23 and concluding observations on France (CRC/C/OPSC/FRA/CO/1), 5 October 2007, § 12-13; concluding observations on Spain (CRC/C/OPSC/ESP/CO/1), 5 October 2007, § 21-22; concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 27.

may include: the use of child-sensitive procedures, including interview rooms designed for children; ensuring that trials take place as soon as possible, unless delays are in the child's best interest; and seeking to avoid direct contact between child victims and witnesses and the alleged perpetrators at any point in the justice process (for instance introducing a system of audio and video recording of the declarations of victims).⁵⁴ With respect to the overall issue of protection of child victims/witnesses in the criminal justice process, the Committee regularly reminds to States parties that the provisions of article 8 should be read in conjunction with those contained in the 2005 ECOSOC "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime", which go even further into details to list all the rights that children should have when they come in contact as victims of witnesses with the criminal justice system.

Particularly significant is also the provision related to the protection of the child's privacy and identity, which include the prohibition to disseminate information that could lead to the identification of the child victim (article 8 (1)(e)). Furthermore not only child victims, but also their families and witnesses or persons and organizations acting on their behalf, are entitled to protection from intimidation and retaliation (article 8 (1)(f)).

It should be underlined that, in the initial versions of the draft Protocol, it was expressly foreseen to include a provision stating that the acts of child victims of sale of children, child prostitution and child pornography directly related to these offences shall not be criminalized.⁵⁵ However, many delegations opposed its inclusion, since this would have created substantial problems of harmonization in their domestic legislation.⁵⁶ As a result, the paragraph was first moved from the section dealing with the protection of child victims to the article on criminalization and subsequently removed from the text altogether.⁵⁷

However, the issue of avoiding the criminalization and the double victimization of child victims is nonetheless among the most common concerns raised by the Committee in its dialogue with States parties. In this respect, the Committee has clearly and consistently maintained the position that child victims of the offences covered by the Protocol should not be – as such – either criminalized or penalized and that all possible measures should be taken to avoid their stigmatization and social marginalization.⁵⁸ This has probably been one of the most debated issues so far discussed during the consideration of States parties' reports,

⁵⁴ See, for instance, concluding observations on Morocco (CRC/C/OPSC/MAR/CO/1), 27 January 2006, § 28-29; concluding observations on Denmark (CRC/C/OPSC/DNK/CO/1), 29 September 2006, § 21-22.

⁵⁵ See, for instance, Report of the Working Group on its second session, E/CN.4/1996/101, page 30.

⁵⁶ See, for instance, Report of the Working Group on its second session, E/CN.4/1996/101, § 50 where the representative of China expressed concern that a provision of decriminalization of child victims might have led to conflict with national legislation and § 51 where the representative of the United States, while discussing the issue of decriminalization of child victims under 18, stated that his delegation "had a fundamental problem with the text, since it gives immunity to persons under the age of 18 years for acts which are liable to punishment under domestic legislation". See also E/CN.4/1997/97, § 70, where the representative of ROK declared that "in the legislation of his country only children under the age of 14 were not penalized for prostitution".

⁵⁷ See Report of the Working Group on its third session, E/CN.4/1997/97, § 73.

⁵⁸ See, for instance, concluding observations on Morocco (CRC/C/OPSC/MAR/CO/1), 27 January 2006, § 23-24.

insofar as many countries seem to have inadequate legislation and contradictory provisions, especially with respect to children used in prostitution and child victims of trafficking.⁵⁹

b) Recovery and reintegration of victims

One of the most significant provisions of this Protocol is contained in article 9 (3) and deals with the obligations incumbent on States parties to take measures to ensure appropriate assistance to child victims, including their full social reintegration and their full physical and psychological recovery.⁶⁰ Particular importance has been placed on the availability and accessibility of such services, which should reach all children throughout the country. Furthermore, to make these services of some use, it is of utmost importance that the persons who work with victims be equipped with the necessary legal and psychological training to be able to deal with the very delicate issues involved in their rehabilitation.⁶¹

Another provision that is directly linked to the entire process of rehabilitation of child victims is contained in article 9 (4), which provides for the rights of victims to have access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.

On the issue of the protection of victims, the Committee has recently raised the matter of refugee status and adopted a very interesting position during the consideration of the initial report of Chile. Noting that Chile did not have a proper refugee legislation in line with international human rights and refugee law, the Committee expressed its concern that this legislative lacuna may affect children trafficked for the purpose of sexual exploitation, who may be eligible for refugee status under 1951 Convention, insofar as they could be deprived of the protection and care they would need.⁶²

Also linked to the question of protection of victims, though it has undisputedly also elements of prevention, is the availability for victims of complaints procedure mechanisms that are accessible and child friendly. In this respect, the Committee has often recalled that helplines, for instance, are an important tool in the fight against sale of children, child prostitution and child pornography.⁶³ These helplines should be 3-digit, free of charge and working around the

⁵⁹ See, for instance, concluding observations of Iceland (CRC/C/OPSC/ISL/CO/1), 2 June 2006, § 13 and 14; concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 29-30; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 32-33; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 29-30; concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 36-37; concluding observations on Republic of Korea (CRC/C/OPSC/KOR/CO/1), 6 June 2008, § 40-41.

⁶⁰ See, for instance, concluding observations on Costa Rica (CRC/C/OPSC/CRI/CO/1), 2 February 2007, § 18-19; concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 31-32; concluding observations on Guatemala (CRC/C/OPSC/GTM/CO/1), 8 June 2007, § 22-23; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 31-32.

⁶¹ Article 8 (4) of the Protocol. See, for instance, concluding observations on Syria (CRC/C/OPSC/SYR/CO/1), 29 September 2006, § 21-22; concluding observations on Viet Nam (CRC/C/OPSC/VNM/CO/1), 29 September 2006, § 17-18; concluding observations on Bulgaria (CRC/C/OPSC/BGR/CO/1), 5 October 2007, § 29-30.

⁶² Concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 33-34.

⁶³ See, for instance, concluding observations of Iceland (CRC/C/OPSC/ISL/CO/1), 2 June 2006, § 20 and 21; concluding observations on Denmark (CRC/C/OPSC/DNK/CO/1), 29 September 2006, § 26-27; concluding

clock. Likewise, the usefulness of a complaint mechanism established within an independent monitoring body, such as an Ombudsman for children, has been also stressed.⁶⁴

5. INTERNATIONAL ASSISTANCE AND COOPERATION

Article 10 of the Optional Protocol is devoted to international assistance and cooperation. The first paragraph of this article deals with mainly international cooperation in criminal matters, including multilateral, regional and bilateral arrangements. The Committee encourages States parties, for instance, to enter into bilateral and multilateral agreements, 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.⁶⁵ One positive example in this area has been identified by the Committee when discussing the initial report of the United States of America,⁶⁶ in this case the Committee considered as a good practice the cooperation between the State of New Mexico and the Mexican state of Chihuahua in the fight against trafficking.⁶⁷

The second paragraph of article 10 encourages States Parties to promote international cooperation to assist child victims in their physical and psychological recovery, social reintegration and repatriation, if appropriate. This is particularly important if we think of the transnational character of many of the illicit activities covered by the Protocol and of the fact that child victims of these offences may find themselves outside their country of origin. It is therefore of outmost importance that a concerted approach towards child victims be discussed, approved and implemented at the international level.

The third paragraph stresses the need to address, at the international level, the root causes of these offences, such as poverty and underdevelopment, and to adopt a holistic approach, addressing their contributing factors. An indication of what is meant by contributing factors to the offences covered by the Protocol, is found in one of the preamble paragraph of the Protocol where are indicated 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 in children.

observations on Kyrgyzstan (CRC/C/OPSC/KGZ/CO/1), 2 February 2007, § 23; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 38-39; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 36-37.

⁶⁴ See, for instance, concluding observations on Sudan (CRC/C/OPSC/SDN/CO/1), 8 June 2007, § 21-22; concluding observations on Bangladesh (CRC/C/OPSC/BGD/CO/1), 8 June 2007, § 36-37; concluding observations on Chile (CRC/C/OPSC/CHL/CO/1), 1 February 2008, § 17-18.

⁶⁵ This is particularly the case for bilateral agreements aimed at tackling cross-border trafficking. See, for instance, concluding observations on China (CRC/C/OPSC/CHN/CO/1), 30 September 2005, § 18-19. The reference to sex tourism appears only in this article and in the Preamble of the Protocol.

⁶⁶ The United States are not a party to the Convention on the Rights of the Child, but they have signed it in 1995. However, they could become a party to the Protocols to the Convention since in both of them there is a provision allowing all states which have **either signed** or ratified the Convention to become a party.

⁶⁷ Concluding observations on the USA (CRC/C/OPSC/USA/CO/1), 6 June 2008, § 40.

Finally, paragraph 4 calls upon “rich” countries (“in a position to do so”) to provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programs.⁶⁸

6. CONCLUSION

This brief analysis of the provisions of the Optional Protocol on the sale of children, child prostitution and child pornography, as well as of the first three years of the Committee’s jurisprudence, suggests that, despite the initial resistance encountered at different levels, the decision to complement the Convention on these issues has proven to be worthwhile. The Protocol may be seen to represent a significant step forward with respect to the definition and the criminalization of sale of children, child prostitution and child pornography. In addition, as it has been illustrated throughout this paper, the Protocol is not only a criminal law instrument. It also contains important elements of prevention of sale of children, child prostitution and child pornography as well as of protection, reintegration and recovery of victims. The Committee, with a robust and in some cases innovative jurisprudence, has provided useful guidance to the many thorny issues of the Protocols, including by filling some of the gaps reflected within it.

However, these initial years of the Committee’s jurisprudence also show that there are still many challenges remaining, especially with respect to the implementation of the Protocol’s provisions at national level, the growing incidence of child pornography through the Internet and sexual exploitation in travel and tourism, as well as the tendency to criminalize in some countries child victims of child prostitution. It is certain that the Committee will continue to provide useful guidance, identify challenges and contribute to a better implementation of the Protocol, as it continues to discuss it separately, or in the context of the implementation of the Convention when States parties will include information related to the Protocol in periodic reports under the Convention.

⁶⁸ See, for instance, concluding observations on Iceland (CRC/C/OPSC/ISL/CO/1), 2 June 2006, § 25 and concluding observations on Spain (CRC/C/OPSC/ESP/CO/1), 5 October 2007, § 38.

References

- Cassese Antonio, International Criminal Law. Oxford: Oxford University Press, 2003.
- UN, Convention on the Rights of the Child, 1989.
- Council of Europe, Convention on Cyber Crime, 2001.
- Council of Europe, Convention on the Protection of Children against sexual exploitation and sexual abuse, 2007.
- ILO, Convention No.182 on the Elimination of the Worst Forms of Labour, 1999.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol), 2000.
- Optional Protocol to the Convention Against Torture, 2006.
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 2000.
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000.
- UN Commission of Human Rights, Resolution 1994/90, 9 March 1994.
- UN Committee on the Rights of the Child, Annex to the report of the working group on its second session, E/CN.4/1996/101.
- UN Committee on the Rights of the Child, Concluding observations on Andorra: 27 January 2006, CRC/C/OPSC/ AND /CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Bangladesh: 8 June 2007, CRC/C/OPSC/ BGD /CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Bulgaria: 5 October 2007, CRC/C/OPSC/BGR/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Chile: 1 February 2008, CRC/C/OPSC/CHL/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on China: 30 September 2005, CRC/C/OPSC/CHN/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Costa Rica: 2 February 2007, CRC/C/OPSC/CRI/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Denmark: 29 September 2006, CRC/C/OPSC/ DNK /CO/1.
- UN Committee on the Rights of the Child, Concluding observations on France: 5 October 2007, CRC/C/OPSC/FRA/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Guatemala: 8 June 2007, CRC/C/OPSC/GTM/CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Iceland: 2 June 2006, CRC/C/OPSC/ ISL /CO/1.
- UN Committee on the Rights of the Child, Concluding observations on Kazakhstan: 27 January 2006, CRC/C/OPSC/ KAZ /CO/1.

UN Committee on the Rights of the Child, Concluding observations on Kyrgyzstan: 2 February 2007, CRC/C/OPSC/KGZ/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Morocco: 27 January 2006, CRC/C/OPSC/MAR/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Qatar: 2 June 2006, CRC/C/OPSC/QAT/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Republic of Korea: 6 June 2008, CRC/C/OPSC/KOR/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Spain: 5 October 2007, CRC/C/OPSC/ESP/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Sudan: 8 June 2007, CRC/C/OPSC/SDN/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Sudan: 21 June 2007, CRC/C/OPSC/SDN/1.

UN Committee on the Rights of the Child, Concluding observations on Syria: 29 September 2006, CRC/C/OPSC/SYR/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Turkey: 2 June 2006, CRC/C/OPSC/TUR/CO/1.

UN Committee on the Rights of the Child, Concluding observations on the USA: 6 June 2008, CRC/C/OPSC/USA/CO/1.

UN Committee on the Rights of the Child, Concluding observations on Viet Nam: 29 September 2006, CRC/C/OPSC/VNM/CO/1.

UN Committee on the Rights of the Child, Report of the Working Group on its first session, E/CN.4/1995/95.

UN Committee on the Rights of the Child, Report of the Working Group on its second session, E/CN.4/1996/101.

UN Committee on the Rights of the Child, Report of the Working Group on its third session, E/CN.4/1997/97.

UN Committee on the Rights of the Child, Report of the Working Group on its fourth session, E/CN.4/1998/103.

UN Committee on the Rights of the Child, Report of the Working Group on its fifth session, E/CN.4/1999/74.

UN Committee on the Rights of the Child, Report of the Working Group on its sixth session, E/CN.4/2000/75.

UN Committee on the Rights of the Child, Revised guidelines regarding the submission of initial reports under the Protocol: 3 November 2006, CRC/C/OPSC/2.

UNICEF, “Legal Frameworks for Combating Sexual Exploitation of Children”, Thematic Paper no 2 for World Congress III Against Sexual Exploitation of Children and Adolescents, UNICEF Innocenti Research Centre, Florence 2008