

## **Optional Protocol on the Involvement of Children in Armed Conflict**

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### **ABSTRACT**

The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict is a legal instrument aimed at prohibiting the recruitment and use of children in armed hostilities. This chapter provides a historical and legal analysis of the Protocol, exploring its evolution, core provisions, and implementation challenges. The discussion begins by contextualizing the Protocol within two primary international legal frameworks: international humanitarian law and international human rights law. These frameworks, including the Geneva Conventions, the Convention on the Rights of the Child (CRC), and the Rome Statute, establish the minimum standards for protecting children in armed conflicts. Specific attention is given to the Protocol's Articles 1-13, which address the prohibition of child recruitment by both state and non-state entities, establish the minimum age for voluntary and compulsory recruitment, and mandate the demobilization and rehabilitation of former child soldiers. The chapter critically examines the Protocol's limitations, including its non-absolute language and its focus on "direct" rather than "indirect" participation in hostilities, which could allow for the indirect involvement of children in conflict-related activities. The analysis also underscores the essential role of the Committee on the Rights of the Child and civil society in ensuring compliance with the Protocol's standards and promoting its universal ratification. Despite these achievements, ongoing armed conflicts highlight the persistent challenges in safeguarding children's rights, necessitating an intensified commitment to enforcing and strengthening international legal standards.

### **KEYWORDS**

Optional Protocol, child soldiers, armed conflict, international humanitarian law, children's rights, CRC, non-state armed groups, demobilization, international human rights law

## 1. Introduction

Before examining the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, it is essential to note that the legal protection of children during armed conflicts is primarily outlined in two separate bodies of international law: international humanitarian law and international human rights law.

International humanitarian law includes the four Geneva Conventions of 1949 and two Protocols from 1977, supplementary to the Conventions. The Geneva Conventions and their Additional Protocols provide minimum standards of protection and humane treatment for civilians who become victims of armed conflicts, including general protection and provisions explicitly related to children. The protection enshrined in the Convention and Protocols is derived from the vital principle of international humanitarian law: the distinction between civilian objects and military objectives (i.e. legitimate and illegitimate targets).<sup>1</sup> This wartime protection is binding to state entities and non-governmental armed groups. As it relates to the treatment of children, the key Convention is the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which, beyond general protective measures for civilians, offers special protection to children across its 17 articles.<sup>2</sup> It was drafted after one of the darkest chapters in history, the Second World War. The incomprehensible tragedy the War brought into the lives of millions of children worldwide has left its mark on the text of the Convention. The Second World War cruelly victimised children, as their innocence and vulnerability made them particularly susceptible to the hardships inflicted on them. This transgression against one of humanity's most sacred principles—the protection of children who represent our future—left an enduring mark on the collective conscience of humanity. Legally safeguarding children became a paramount concern in the postwar period, prompting the inclusion of child protection provisions in the Geneva Convention relating to civilians. International Humanitarian Law extends its protective measures to children through three fundamental approaches. First, it acknowledges the imperative of affording special safeguards to children owing to their young age, which has become a customary international legal norm. Second, it raises concerns about the involvement of children in military operations. Third, it considers the immaturity of children when they commit offences during armed conflicts. This legal framework differentiates combatants

1 Article 48 of the 1977 Additional Protocol I provides: 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between (...) civilian objects and military objectives'. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 48.

2 Articles 14, 17, 23 to 27, 40, 50, 51, 68, 76, 81, 82, 84, 89 and 132 of the Convention. International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

from non-combatants. The Third Geneva Convention, which focuses on the care and safeguarding of prisoners of war, stipulates that prisoners of war should receive equal treatment from detaining powers, with allowances for potential privileged treatment based on factors such as age, among other criteria (Article 16). Moreover, the detaining power may use the labour of physically fit POWs, considering various criteria, including age (Article 49). Notably, there is no specific age limit for prisoners of war under the Third Geneva Convention, however, age can warrant special treatment because of children's unique vulnerabilities. Recognising the distinct vulnerabilities of children, the Third and Fourth Geneva Conventions of 1949 and their Additional Protocols of 1977 established a comprehensive set of rules to grant special protection to children. More importantly, children who directly participate in hostilities remain entitled to this special form of protection.

International human rights law includes a range of specialised treaties that are particularly relevant to safeguarding children in armed conflicts. The International Covenant on Civil and Political Rights includes various rights such as the right to life and freedom from slavery, torture, and arbitrary arrest. The International Covenant on Economic, Social, and Cultural Rights acknowledges rights to food, clothing, housing, health, and education. The Convention on the Elimination of All Forms of Discrimination against Women is particularly significant. Additionally, there are treaties that address specific themes or groups that include issues such as genocide, torture, refugees, and racial discrimination. In the context of this book, the most notable specialised treaty is the Convention on the Rights of the Child. International human rights law, as embodied in the Convention on the Rights of the Child (CRC) of 1989 and its subsequent Optional Protocol on the Involvement of Children in Armed Conflict (CRC-OP-CAC) of 2000, emphasises safeguarding children from the repercussions of armed conflicts. The CRC-OP-CAC outlines important provisions, such as setting the age limit for compulsory recruitment and direct participation in hostilities at 18 years of age, and mandates that States Parties raise the minimum age for voluntary recruitment to at least 16 years. It unequivocally forbids insurgent armed groups from recruiting individuals under 18 years or involving them in hostilities. Furthermore, the Rome Statute of the International Criminal Court (ICC) introduced a mechanism for holding individuals accountable for war crimes, crimes against humanity, and genocide, specifically focusing on crimes affecting children. For instance, the Statute designates the conscription, enlistment, or use of children under the age of 15 years in both international and internal armed conflicts as war crimes. Together, the CRC, CRC-OP-CAC, and Rome Statute have reinforced the global framework for safeguarding children in armed conflicts.

In international human rights law, the primary obligation to uphold human rights falls on States. This responsibility stems from their exclusive ability to become contractual parties to relevant treaties. Consequently, even sizable influential opposition groups cannot be directly bound by the provisions of human rights treaties. However, it is noteworthy that a reverse dynamic exists regarding the application of international humanitarian law to non-state entities during conflict.

This apparent inconsistency between these legal frameworks highlights that, for practical purposes, non-State entities should be treated as if they are bound by relevant human rights standards. Although human rights laws are applicable both in times of peace and war, certain rights may be temporarily restricted. Many human rights treaties permit States to deviate from their obligations by temporarily suspending the exercise of certain rights during times of war or other public emergencies. Nevertheless, there are specific rights that can never be subject to such derogation, including the right to life, freedom from torture, inhuman or degrading treatment, freedom from slavery, and the non-retroactivity of penal laws. In cases where derogation is allowed, stringent conditions must be fulfilled: the emergency must pose a threat to the nation's life; international bodies must be notified; and measures taken must be proportionate, free from discrimination, and consistent with other international obligations. Entities such as the Commission on Human Rights, the Human Rights Committee, and the Committee on the Rights of the Child meticulously scrutinise any government's claim that derogation is necessary and justified.

Currently, approximately 450 million children reside in conflict-ridden environments.<sup>3</sup> Safeguarding children's rights during armed conflicts has emerged as a significant challenge in the realm of international children's law and its enforcement. International legal provisions designed to shield children amid armed conflicts are included in two distinct yet interrelated legal frameworks: international human rights law and international humanitarian law. This chapter explores one such law – international human rights law – and within it, specifically, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

## 2. Historical Background

Throughout history and across various cultures, children have played a significant role in military endeavours. Progress towards ending the use of children for military purposes has been slow, partly because many national armed forces have historically relied on children to fill their ranks. Initial efforts to restrict the involvement of children in armed conflicts began with the adoption of Additional Protocols to the 1949 Geneva Conventions in 1977.<sup>4</sup> These new Protocols prohibited the military recruitment of children under the age of 15 years and their direct participation in

3 The number of children living amid armed conflicts, as calculated by the Peace Research Institute Oslo based on conflict data from the Uppsala Data Program, reveals that in 2022, over 468 million children - more than 1 out of 6 - were living in a conflict zone. Statistical data available at: <https://data.stopwaronchildren.org/> (Accessed: October 1, 2023).

4 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609. Available at: <https://www.refworld.org/docid/3ae6b37f40.html> (Accessed: October 1, 2023).

hostilities. However, they allowed state armed forces and non-state armed groups to recruit children aged 15 years and older for warfare. Another shortcoming of the Protocols was that they did not limit belligerents from using children under the age of 15 years in hostilities when their involvement was not direct, such as in roles like scouts, informants, spies, message carriers, and other support functions.

In addition to the overarching safeguarding of children offered by general human rights and humanitarian legal frameworks, children were also granted protection under the 1989 Convention on the Rights of the Child. The Convention on the Rights of the Child defines a child as someone under 18 years of age. Unfortunately, because the CRC, following the footsteps of the Additional Protocols to the Geneva Conventions, incorporated the same limited standards of protection into the text of the CRC in 1989, advocates for children's rights were left disappointed, as they believed that a treaty establishing the fundamental rights of children should safeguard them from all forms of military involvement.<sup>5</sup> To address this concern, a small group of human rights activists and supportive governments initiated a global campaign for a new treaty, resulting in the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict in 2000.

Of specific significance in ensuring the welfare of children affected by armed conflicts in Article 38 of the CRC is as follows:

- '1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts that are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure the protection and care of children who are affected by an armed conflict.'<sup>6</sup>

From the outset, Article 38 faced substantial criticism for two primary reasons. First, it is the sole provision within the Convention deviating from the overarching

<sup>5</sup> Becker, 2013. p. 11

<sup>6</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. Available at: <https://www.refworld.org/docid/3ae6b38f0.html> (Accessed: October 1, 2023).

age limit of 18 years, despite addressing one of the most perilous situations children can encounter – armed conflict. Additionally, concerning the prohibition of recruitment and participation, it largely confines itself to reiterating Article 77 of Additional Protocol I to the Geneva Conventions. In doing so, it failed to introduce anything new and risked diverting attention from the more robust standards set forth in Additional Protocol II to the Geneva Conventions. Considering this backdrop and in accordance with growing awareness and concern within the international community regarding the severe challenges faced by children affected by armed conflicts, an initiative emerged within the United Nations system only a few years after the CRC came into force. This initiative aimed to increase the minimum age for recruitment and participation in hostilities to 18 years. This endeavour closely aligned with the stance adopted by the International Red Cross and Red Crescent Movement, which in 1993 embarked on developing an action plan to enhance their existing activities in support of children. The 1995 Plan of Action articulated two commitments, the first of which was ‘to promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years’.<sup>7</sup> In that same year, during the 26th International Conference of the Red Cross and Red Crescent, a resolution was passed recommending ‘that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities’.<sup>8</sup> In alignment with numerous other organisations and nations, the International Committee of the Red Cross (ICRC) voiced its endorsement of the creation of an additional protocol to the CRC. The ICRC communicated its stance on global forums, such as the UN Commission on Human Rights and the General Assembly. Furthermore, it actively engaged in the drafting process by producing a comprehensive document outlining the ICRC’s position on several pivotal matters under deliberation.

By 1994, five years after the adoption of the CRC, advocates for children’s rights and supportive governments successfully persuaded the international community to establish a working group within the United Nations Commission on Human Rights. The working group comprised representatives from numerous countries, non-governmental organisations, United Nations agencies, and independent experts, and was tasked with drafting the Optional Protocol concerning children’s involvement in armed conflicts. Subsequently, over six years, the working group engaged in discussions and refined the draft, which culminated in 2000. On 25 May the United Nations General Assembly officially adopted the Optional Protocol by Resolution A/RES/54/263 in its fifty-fourth session of the General Assembly of the United Nations.

7 Plan of Action for the Red Cross and Red Crescent Movement, Geneva 1995. Available at: <https://www.nzdl.org/cgi-bin/library.cgi?e=d-00000-00---off-0aed1-00-0---0-10-0---0---0direct-10---4-----0-11-11-en-50---20-about---00-0-1-00-0-0-11-1-0utfZz-8 00&cl=CL1.1&d=HASH960ce995f08c24f8a85d8a.8&gc=1>. (Accessed: October 1, 2023).

8 Resolution 2 of the 26th International Conference of the Red Cross and Red Crescent in 1995 recommended that parties to conflict ‘take every feasible step to ensure that children under the age of 18 years do not take part in hostilities’.

After securing the initial ten ratifications required for its implementation,<sup>9</sup> the Optional Protocol became legally binding on 12 February 2002. The working group's mission was to initiate negotiations for a new protocol for the Convention aiming to elevate standards concerning the involvement of children in military activities.

Although most states participating in the protocol negotiations were inclined to end the recruitment of children under the age of 18 years in armed forces (often referred to as the *straight-18 principle*), a few countries held opposing views. The dissenting group included Bangladesh, Cuba, Israel, South Korea, Kuwait, Pakistan, the United Kingdom, and the United States. According to Jo Becker, a human rights advocate actively engaged in the negotiation process,

‘governments began a series of annual negotiations in Geneva, but by 1998, negotiations floundered as it became clear that governments that had long used under-eighteens in their national armed forces, notably the United States and the United Kingdom, were not willing to support a new standard that conflicted with their national practice’.<sup>10</sup>

Although some states opposing the change stated that they would not obstruct it, the United States insisted on maintaining its position. A crucial factor in rallying substantial support for the Optional Protocol was a proposal by children's rights advocates for a comprehensive study on the impact of armed conflicts on children. This study was proposed by the Committee on the Rights of the Child and commissioned by the UN General Assembly. Graça Machel, Mozambique's first post-independence Minister for Education and advocate for children's rights, undertook this massive project.<sup>11</sup> In her 1996 presentation to the General Assembly, her report titled “Impact of armed conflict on children” portrayed the harsh realities experienced by countless children entangled in conflicts. This report elucidated the pivotal importance of this issue for international human rights, development, peace, and security. It served as a resounding call for immediate action, highlighting the unconscionable reality of our society, bearing witness to such relentless assaults on children's rights without mounting a robust defence. It is unforgivable that children endure assault, violation, and even death while our conscience remains unprovoked and our sense of dignity remains undisturbed. This situation signifies a fundamental crisis in our civilisation. The Machel Report identified children as the foremost victims of armed conflicts and proposed a series of recommendations, including the appointment of a special representative of the Secretary-General on children and armed conflicts,

9 The first ten States to ratify were the following: Andorra, Austria, Bangladesh, Canada, Democratic Republic of the Congo, Holy See, Iceland, New Zealand, Romania and Sri Lanka.

10 Becker, 2013. p.12.

11 Office of the Special Representative of the Secretary-General for Children and Armed Conflict: Graça Machel and the Impact of Armed Conflict on Children. Available at: <https://childrenandarmedconflict.un.org/about/the-mandate/mandate/the-machel-reports/> (Accessed: October 1, 2023).

with the aim of ensuring that safeguarding children remains a top priority on the international agenda for human rights, peace, security, and development. The report was particularly concerned with the use of younger children as participants in armed conflicts and presented evidence that thousands of children were killed, maimed, and psychologically scarred worldwide each year. Furthermore, it proposed cessation of child recruitment by all armed forces.<sup>12</sup>

There is an undeniable and compelling moral imperative to shield all children while diligently pursuing peaceful conflict resolution and scrutinising the justification for any form of armed strife. The immediate harm inflicted on children, including physical injury, sexual violence, and psychosocial distress, contradicts the values that inspired the establishment of the Convention on the Rights of the Child. This Convention obligates States to uphold a broad spectrum of children's rights, ensure access to health and education, and nurture growth and development within caring and supportive familial and communal environments. Armed conflicts consistently trample these rights. The impact of armed conflicts on children is a concern for everyone and is the responsibility of all governments, international organisations, and every facet of civil society.

In 1998, when negotiations for the new treaty reached an impasse, the Coalition to Stop the Use of Child Soldiers, now known as Child Soldiers International, emerged. The Coalition was founded by five human rights and humanitarian organisations: Human Rights Watch, Amnesty International, Rädde Barnen, Jesuit Refugee Service, and QUNO Geneva. Their primary objective was to campaign for the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and to integrate the straight-18 principle into the new treaty. The Coalition worked in collaboration with a select group of nations that actively advocated for the straight-18 principle on the global stage, including Canada, Denmark, Ethiopia, Finland, Japan, Mozambique, Norway, Portugal, South Africa, Sweden, and Switzerland.<sup>13</sup> The Coalition organised a series of intergovernmental regional conferences with initial financial support from the Canadian government. African and Latin American conferences robustly endorsed the straight-18 principle. However, the European conference supported the end of children's participation in armed conflicts, but not their recruitment, primarily owing to resistance from Austria, France, Germany, Luxembourg, the Netherlands, and the UK, all of which enlisted children aged 16 or 17 years into their armed forces. By 1999, the straight-18 principle garnered significant support from a substantial majority of states, as well as backing from the Committee on the Rights of the Child, the International Committee of the Red Cross, the International Labour Organization, the European Parliament, the Organization of African Unity, and the World Council of Churches.<sup>14</sup>

12 Machel, 1996. p. 41.

13 Becker, 2013. p.14.

14 Brett, 2005. p. 4.



During the final stages of the negotiations, only five states remained opposed to the straight-18 principle: Egypt, Kuwait, Singapore, the UK, and the US. The US eventually yielded after an intervention by Secretary of State Madeleine Albright, although both the US and the UK continued to assert their prerogative to enlist individuals aged 16 (UK) and 17 (US) years. This adjustment paved the way for a compromise between the negotiating parties. The new text of the Protocol would not outright prevent states from recruiting individuals to their armed forces at the age of 16 or 17 years. However, it would mandate that *all feasible measures* be adopted to ensure that children did not participate directly in hostilities. This is one of the weaknesses of the Protocol, as children's protection would have been more effective if the wording was to *take all necessary measures*. The Committee on the Rights of the Child is anticipated to adopt a stringent interpretation when assessing whether States have genuinely adopted all *feasible measures* to attain the stated goal. The second limitation pertains to the level of protection offered to children regarding their engagement in hostilities. According to this provision, children are shielded from *direct* participation in hostilities, which does not preclude them from being used indirectly in armed conflicts. This compromise was a way to ratify the Optional Protocol. As of October 2023, 172 UN Member States have ratified the Protocol, seven have signed but not yet ratified (Haiti signed in 2002, Islamic Republic of Iran signed in 2010, Lebanon signed in 2002, Liberia signed in 2004, Nauru signed in 2000, Somalia signed in 2005, Zambia signed in 2008), and 17 have not signed or ratified the Protocol (among others: Antigua and Barbuda, Barbados, Sao Tome and Principe, Tonga, Trinidad and Tobago, United Arab Emirates).<sup>15</sup>

Since the adoption of the CRC-OP-CAC, there has been a significant increase in the number of countries that have imposed restrictions on enlisting only adults over the age of 18 years, and several countries where the recruitment of children had been a common practice have prohibited the enlisting of children. The prohibition of child recruitment to the armed forces is gradually being eradicated; however, approximately 50 countries continue this practice. Numerous non-state armed groups continue to engage in child recruitment. Annually, the UN Secretary-General releases a list of shame that identifies the state armed forces and non-state armed groups involved in the recruitment and use of children.<sup>16</sup> Owing to the CRC-OP-CAC many states and some non-state-armed groups now acknowledge the harm associated with recruiting children. This progress, combined with the reinforcement of international legal standards, is gradually establishing the straight-18 principle as the prevailing norm. It is noteworthy that States that permit child recruitment tend to be larger, more affluent, and allocate more resources to the military. For instance, Australia, China, France, Germany, Saudi Arabia, and the US have allowed enlistment from the age of 17 years. Brazil, Canada, and the UK are among the few countries that have set

15 Ratification status of the Optional Protocol. Available at: <https://childrenandarmedconflict.un.org/tools-for-action/opac/ratification-status-of-the-optional-protocol/>. (Accessed: October 1, 2023).

16 Children and armed conflict - Report of the Secretary-General (A/77/895-S/2023/363).

the minimum enlistment age even lower at 16 years. Global efforts to eradicate child recruitment are undermined if the world's most influential nations do not adhere to this principle. Children's rights advocates strive for a worldwide ban on all-child recruitment for military purposes and insist on holding those responsible for recruiting children accountable.

The recruitment of children and their involvement in hostilities by non-state-armed groups has been a persistent and grave issue for decades, with such groups being primarily responsible for using children in violent conflicts today. Despite these challenges, notable advances have been made since the adoption of CRC-OP-CAC. Since 1999, over 60 armed groups have, independently or through bilateral agreements, made commitments to reduce or ultimately halt the recruitment of children.<sup>17</sup> These commitments have led to changes in internal policies and practices. Additionally, the number of armed groups that have established 18 years as the minimum age for recruitment has increased. Although implementation may exhibit inconsistencies, these commitments illustrate a growing acknowledgement by an expanding array of armed groups regarding the imperative to safeguard children from involvement in military organisations. Although attitudes towards child recruitment vary widely, from dedication to indifference, it is apparent that armed groups now possess greater awareness and acceptance of their international legal responsibilities than they did in the past.

### 3. Core Provisions

#### 3.1. Preamble

The drafters of the Optional Protocol promptly reached a consensus on the phrasing of the Preamble. Consequently, the Optional Protocol is positioned within the framework of human rights laws. The merging of international humanitarian law and international human rights law in the context of child combatants highlights how human rights principles have become integral to the corpus of international humanitarian law.

When the working group began drafting the text of the CRC-OP-CAC, there was a widespread consensus that the practice of using children as soldiers should be completely abolished, and one of the proposed methods to achieve this goal was to raise the minimum recruitment age for the armed forces. Diverse opinions were voiced concerning the working group's mandate and content of the prospective optional protocol. Some participants strongly emphasised the need to uphold the principle that the best interests of the child must be a paramount consideration in all actions involving children. They expressed their readiness to promptly adopt an optional protocol

17 Child Soldiers International, *A Law Unto Themselves? Confronting the Recruitment of Children by Armed Groups*, 2016, p. 15.

in which the minimum recruitment age was firmly set at 18 years, highlighting the importance of establishing this threshold.

However, other participants argued that while every possible effort should be dedicated to maximising children's protection from involvement in armed conflicts, elevating the age limit for recruitment was not the exclusive means to attain this objective. Several delegations cited their own national legislation, which permitted the enlistment of individuals below the age of 18 years in the armed forces under specific conditions and circumstances. Consequently, they believed that such national laws would inevitably clash with the provisions of the proposed protocol envisioned by the Committee on the Rights of the Child. Additionally, it was emphasised that a protocol alone would not immediately resolve the existing predicament of children in armed conflicts.

Discussions on the preamble were the smoothest, and the States Parties arrived at a consensus promptly on all preambular paragraphs, with only minor suggestions for wording changes. For example, the first preambular paragraph originally read:

The first preambular paragraph read as follows:

'Encouraged by the fact that an unprecedented number of States have to date become parties to the Convention, thereby demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child.'<sup>18</sup>

During the fifth meeting on 2 November 1994, delegates from Nigeria, the US, and the Netherlands suggested replacing the phrase *an unprecedented number of States* with an alternative wording. In response, the representative of India proposed substituting *the fact that an unprecedented number of States have to date become parties to* with *the overwhelming support for*. Additionally, a representative from China recommended using the full title of the Convention on the Rights of the Child. During the 17th meeting on 10 November 1994, the working group accepted India's proposal and agreed with the Chairman-Rapporteur's suggestion to remove the word "thereby". These changes were mostly cosmetic in nature and resulted in the final text of the first preambular article.

'Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child.'<sup>19</sup>

18 CHR, 51st, 10/02/1995, E/CN.4/1995/96, Report of the working group on a draft optional protocol to the Convention on the Rights of the Child on the involvement of armed conflict.

19 UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000. Available at: <https://www.refworld.org/docid/47fdfb180.html> (Accessed: October 1, 2023).

### 3.2. Article 1

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

This provision in the Optional Protocol is widely regarded as crucial. Increasing the age threshold for participation in armed conflicts from 15 to 18 years signifies an enhancement of the existing protection offered by international law. This provision served as the catalyst for children’s rights advocates campaigning for the Optional Protocol, specifically to shield all children from the horrors of armed conflicts, particularly their direct involvement in hostilities. This was not an isolated goal, but a global trend to pursue the straight-18 principle. Some legal instruments predating the Optional Protocol had already enshrined this principle. The African Charter on the Rights and Welfare of the Child from 1990 states in its Article 22 that ‘States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child’.<sup>20</sup> The Worst Forms of Child Labour Convention of the International Labour Organization from 1999 also deals with the question of children in the armed forces and prohibits it in its Article 3: ‘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.’<sup>21</sup>

The key problem with the wording of this provision is that it uses the term “all feasible measures to ensure” that children under the age of 18 years do not participate – which does not provide an absolute prohibition of children being used in armed forces. It will be up to the Committee on the Rights of the Child to assess whether States have indeed adopted “all feasible measures” to attain the stated objective. The wording used in the Rome Statute of the International Criminal Court was also considered when drafting the Optional Protocol text. The Rome Statute states that ‘children shall not be used (...) to actively take part in hostilities’, which could have provided significantly stronger protection. However, this was not accepted by several countries (most notably the US and the UK), which continued to assert their prerogative to enlist children under 18 years of age. Most delegations expressed support for establishing a clear age limit of 18 years for participation. Several delegations believed that this age restriction should include both participation in hostilities and all forms of recruitment. This perspective was shared by the Committee on the Rights of the

20 Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). Available at: <https://www.refworld.org/docid/3ae6b38c18.html> (Accessed: October 1, 2023).

21 International Labour Organization (ILO), Worst Forms of Child Labour Convention, C182, 17 June 1999, C182. Available at: <https://www.refworld.org/docid/3ddb6e0c4.html> (Accessed: October 1, 2023).

Child, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF, the United Nations High Commissioner for Human Rights, the Office of the United Nations High Commissioner for Refugees, and the Coalition to Stop the Use of Child Soldiers.<sup>22</sup> They argued that a universal age threshold of 18 years would offer the most comprehensive protection for children, aligning with the general age of the majority outlined in the Convention on the Rights of the Child and most national laws. In the final text, a compromise was reached by using the term *all feasible measures*. This compromise accommodated the concerns and interests of delegations whose national laws and practices allowed the recruitment of children under the age of 18 years.<sup>23</sup>

The other issue with this provision is that it uses the term “direct part in hostilities”. This is a step back – the 1977 Additional Protocol II to the Geneva Conventions had used more robust protection when it unequivocally prohibited any participation by stating that children shall not be permitted to “take part in hostilities”.<sup>24</sup> The Additional Protocol used 15 years as the threshold age; therefore, it can be considered weaker, however, it explicitly prohibits the participation of children in any hostilities. However, the CRC-OP-CAC prohibits direct participation in hostilities and does not prohibit indirect participation, which means that children could continue to participate in military operations as spies, decoys, porters, messengers, transporters, and for gathering information. Furthermore, indirect participation could involve the use of girls for sexual exploitation or forced marriages. However, the scope of the article clearly does not include an exhaustive list of forms of participation, and it ignores the fact that involving children in any frontline activities exposes them to substantial risks of physical harm and emotional trauma. Although the term “direct part in hostilities” was agreed upon and incorporated into the final text, the travaux préparatoires of the Optional Protocol lack specific guidance on the definition of this term and do not distinguish between direct and indirect participation. The Rome Statute of the ICC, Additional Protocol II to the Geneva Conventions, and Cape Town Principles have all used a more comprehensive interpretation of children in armed conflicts and include any participation (whether direct or indirect) to offer the broadest protection possible to children in armed conflicts. The CRC-OP-CAC falls short here, as it only includes a ban on taking a direct part in hostilities and fails to recognise that it is not only children in active military combat that require protection, and children indirectly participating may continue to be exposed to considerable dangers. Most child soldiers are recruited

22 Joint statement entitled “UN bodies call for a prohibition on the recruitment and participation of children under age 18 in armed conflict” by the Committee on the Rights of the Child, the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF, United Nations High Commissioner for Human Rights, Office of the United Nations High Commissioner for Refugees, released to the press on 13 January 2000.

23 Helle, 2000.p. 805.

24 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Accessed: October 1, 2023).

from the most impoverished, least educated, and socially marginalised segments of society. They are coerced or threatened into becoming soldiers by the government, paramilitary forces, or rebel forces under a looming spectrum of violence or death, as they are perceived as easily manipulated and intimidated. These recruited children are used in various roles, including combat, laying mines and explosives, espionage, messaging, guarding, scouting, cooking, carrying loads, serving as attendants, and sexual exploitation. Owing to sexual abuse, children may contract HIV/AIDS or other sexually transmitted diseases, and many girls face the risk of unsafe abortions or early motherhood. When conflict situations de-escalate and end, many children become physically disabled and/or psychologically scarred. Having been subjected to an extended militarised way of life, deprived of education, and stigmatised by their former communities, many have struggled to adapt to a peaceful society. As neither the Optional Protocol provides guidance regarding the term direct participation nor preparatory proceedings, it can only be inferred from other sources. The reporting guidelines of the Committee on the Rights of the Child regarding the Optional Protocol offer a potential source of insight.<sup>25</sup> The Committee requests that States elaborate in their reports on the interpretation of “direct participation” as it applies to their legislation and practices. This finding suggests that a more expansive or narrower definition of the term should be used. Additionally, States are called upon to provide details about the actions taken to prevent the deployment or retention of armed forces members under the age of 18 years in areas with ongoing hostilities, as well as the challenges encountered in implementing these measures.

Although the text of Article 1 of the CRC-OP-CAC has its drawbacks, it does leave an important obligation to States Parties, that is, to adopt measures to fulfil their obligations stemming from Article 1. These measures can include legislative, administrative, or other forms of action. This may involve steps to prevent individuals under the age of 18 years in the armed forces from being sent to or retained in areas of active hostilities. The reporting guidelines do not provide any additional indications. However, in its concluding observations of reports submitted under the CRC, the Committee has recommended that States Parties establish a comprehensive strategy to ensure the non-involvement of children in armed conflicts.<sup>26</sup> This strategy should include proactive preventive measures and ensure the effectiveness of the measures taken.<sup>27</sup>

### 3.3. Article 2

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

25 CRC Committee, Guidelines regarding initial reports of States Parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (UN Doc. CRC/OP/AC/1, 200).

26 For example: CRC Committee, Concluding Observations: Papua New Guinea (UN Doc. CRC/C/Add. 229, 2004), para. 56.

27 CRC Committee, Concluding Observations: Pakistan (UN Doc. CRC/C/Add. 217, 2003), para. 68.

Prior to the adoption of the CRC-OP-CAC, the protection against compulsory recruitment was enshrined in Article 38 of the CRC, which states that

‘States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.’<sup>28</sup>

This level of protection was rather weak with respect to children between 15 and 18 years, as States Parties were only required to prioritise the oldest individuals. Therefore, the CRC-OP-CAC and Article 2 serve as significant complements to the prohibition against participation in hostilities. Preventing children’s recruitment into the armed forces is a crucial safeguard against their involvement in hostilities. Although negotiations for the Optional Protocol did not result in the establishment of a universal straight-18 principle, the Protocol represents an advancement over previous international legal standards. It set a minimum age of 18 years for compulsory recruitment by government authorities. Furthermore, it elevated the benchmark for voluntary recruitment by government forces to those above 15 years of age. Moreover, it unequivocally prohibits the recruitment of all individuals under the age of 18 years by non-state groups. In this context, recruitment includes any method by which an individual becomes a member of either a national armed force or an armed group. Therefore, Articles 2, 3, and 4 of the CRC-OP CAC are interconnected.

This Article of the Optional Protocol explicitly prohibits the compulsory recruitment of individuals under 18 years of age. This represents an elevation in international legal standards that previously allowed recruitment from the age of 15 years. Once an individual reaches the age of 18 years, they may be subject to compulsory recruitment into the armed forces. The protocol designates the person’s birthday as the beginning point for this consideration. It is noteworthy that the Protocol uses the term persons under the age of 18 years rather than children. According to Article 1 of the Convention on the Rights of the Child, a child is defined as any individual below the age of 18 years unless the child reaches the legal majority earlier according to the applicable law. Therefore, the prohibition of compulsory recruitment specified by the Optional Protocol pertains to adults under 18 years of age.

The obligation of the States stemming from Article 2 is to ensure that individuals under the age of 18 years are not subject to compulsory recruitment to their armed forces. Consequently, the prohibition against compulsory recruitment is directed at authorities overseeing the recruitment process rather than at individuals under 18 years. Unlike in Article 1 (*take all feasible measures*), the obligation outlined in Article 2 (*shall ensure*) is absolute and constitutes an outcome-based requirement.<sup>29</sup>

28 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

29 Helle, 2000. p. 801.

Challenges arise when States lack a robust birth registration system, a situation often observed in developing countries. In such instances, States should refrain from recruiting anyone who could potentially be under the age of 18 years.

### **3.4. Article 3**

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

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

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

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.

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

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

Article 3 raises the minimum age for voluntary recruitment by at least one year, as indicated in the declaration that States are required to submit upon ratifying the new Protocol. In simple terms, the minimum age for voluntary recruitment was raised from 15 to 16 years, which was undoubtedly a step in the positive direction.<sup>30</sup> However, this article considerably weakens the protections enshrined in Article 2. Determining whether a child has been voluntarily or mandatorily recruited can be

30 Article 38 of the CRC: ‘States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.’



complex, which is why a straight-18 principle should have been adopted in Article 3. The straight-18 approach was endorsed by the Committee on the Rights of the Child. (It is noteworthy that although the text itself does not follow the straight-18 principle, the CRC continues to endorse it. In its Concluding Observations regarding the report submitted under the Optional Protocol by New Zealand, the CRC Committee suggested that the State Party explore the potential for raising the minimum age for voluntary recruitment to 18 years.)<sup>31</sup> In contrast, some States contended that, in accordance with practices in many countries, 17 or 16 years should be the minimum age for voluntary recruitment. Additionally, it was argued that enforcing an 18-year age limit undermines a significant ancillary objective of military service, which is the education of young individuals. The lower age limit for voluntary recruitment and exemption from military schools was justified by many delegations as necessary to ensure an adequate pool of qualified applicants for their national armies. Moreover, a system based on voluntary services by individuals under 18 years of age was preferable to one of the compulsory services for those above that age. Military schools are one of the few opportunities for young people in economically disadvantaged countries to gain access to higher education. Article 3 embodies a compromise between these two viewpoints. Safeguards designed to ensure recruitment are genuinely voluntary, and no child under the minimum age is recruited; however, the practical implementation of these safeguards can be challenging. For instance, in numerous conflict-affected developing countries, the requirement to provide reliable proof of age may be difficult to fulfil, considering the limited existence of birth registration systems in those areas. The wording of the provision is not absolute, unlike Article 2, and as such, it facilitates options of bypassing the age limits set for recruitment. This departure from the straight-18 principle pursued by many delegations significantly diminishes the prospects of safeguarding children from involvement in armed conflicts.

The safeguards included in Article 3 require, first, that recruitment be voluntary, but no definition is provided for voluntary recruitment; therefore, it is difficult to ensure that this requirement is satisfied. Second, recruitment must be conducted with informed consent from parents or legal guardians. Parental consent, in this case, should be irrelevant because, particularly in zones of military conflict, parents may be financially motivated to encourage their children to join the armed forces. Parental consent is required; however, it is not specified whether such consent needs to be documented or whether oral consent is sufficient, which is another potential point of failure of these safeguards. The third safeguard is that individuals must be fully informed about the responsibilities associated with military service, which means that those expressing a desire to volunteer should have a clear understanding of their prospective duties in the armed forces. This requirement calls for transparency so that potential volunteers can make informed decisions. Fourth, individuals must provide reliable proof of their age before being accepted into the national

31 CRC Committee, Concluding Observations: New Zealand (UN Doc. CRC/C/OPAC/CO/2003/NZL, 2003), para. 7.

military service. This may involve the presentation of birth certificates and affidavits. However, considering the challenges many developing countries face regarding birth registration systems, this requirement is difficult to control.

### 3.5. Article 4

- ‘1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.’

Article 4 prohibits the recruitment of children by non-state entities, whether forcibly or voluntarily, and involving them in hostilities, whether directly or indirectly. This provision demonstrates a positive intent on the part of States to regulate the conduct of non-state entities, thereby addressing situations of non-international armed conflicts. The ICRC strongly supported the inclusion of the issue of non-state entities in the new Protocol, recognising that the impact on children involved in non-international armed conflicts is as severe and traumatising as in international conflicts. The widespread presence of child soldiers in internal armed conflicts highlights the need to address such situations. A clause aimed at preventing the recruitment and use of children by armed groups was a pivotal aspect of the Optional Protocol. This is particularly significant, considering that most contemporary armed conflicts are internal in nature, involving various warring factions, and that the majority of child soldiers are forcibly conscripted by non-state armed groups. Securing adherence from non-state entities will undoubtedly be a challenging endeavour, particularly because these armed groups typically operate outside the bounds of legality.<sup>32</sup>

The wording of Article 4 is not flawless; instead of the stronger “shall not”, the text uses the phrase “should not”, which indicates a moral obligation rather than a legal one under international law. The wording of Article 4(1) is reflective of the conventional perspective that international human rights law primarily obligates States and allows them to be parties to treaties, whereas the behaviour of non-state entities is regulated by domestic law. This provision underlines the international community’s strong stance without conferring legal status on these non-state armed groups. Although the Article does not provide any legal status to these non-state-armed groups, it imposes a duty on States to regulate their actions. The Optional Protocol, along with other international legal instruments, can be employed as a tool to engage non-state groups in dialogue, aiming to secure commitments that enhance child protection and ensure the safety of humanitarian workers. This engagement

32 Sheppard, 2000. p. 37.

includes negotiations for granting humanitarian workers access to children and advocating respect for their rights. Moreover, it can facilitate arrangements for the early release and demobilisation of child soldiers, even in the absence of a formal peace agreement. We have seen this already occur in various nations, non-state armed factions have provided verbal or written pledges to release and demobilise children or to abstain from recruiting and employing child soldiers. On multiple occasions, these commitments were extended to United Nations representatives. Consequently, this has led to the liberation of children under the custody of these armed groups, with them being entrusted to child protection organisations.

The obligations derived from Article 4 are with the States. The States Parties are obliged to prevent the recruitment and utilisation of individuals under the age of 18 years by armed groups separate from the armed forces of the State. In its reporting guidelines, the Committee on the Rights of the Child requests that States provide details on the armed groups operating within or originating from the State's territory, or having a sanctuary within that territory.

### **3.6. Article 5**

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

Article 5 of the Optional Protocol introduces a safeguarding clause. This clarifies that the Protocol should not be interpreted as preventing a State Party from enacting laws or adhering to international instruments and international humanitarian law that better promote the realisation of children's rights. Consequently, the Optional Protocol enables States to commit to standards that exceed those outlined in the Protocol through national legislation and other international treaties in accordance with the general principles of international law. These provisions should be detailed in the reports submitted by the States Parties. For instance, States that opt to implement a straight-18 policy regarding recruitment, or are parties to the African Charter on the Rights and Welfare of the Child, are bound by these higher standards. A safeguard clause similar to that found in Article 41 of the CRC is also applicable. Article 41 of the CRC states that ‘Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child, and which may be contained in: (a) The law of a State party; or (b) International law in force for that State’.<sup>33</sup> These safeguards in the CRC and the CRC-OP-CAC refer to situations in which a State policy surpasses the stipulated minimum requirements. Several States Parties have included such policies in their declarations, enabling their implementation on a national scale through legislative measures. It is essential to highlight that in cases

33 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations.

where a State is bound by multiple legal obligations, a fundamental tenet of international law dictates that the State should prioritise the obligation that offers the highest level of protection for human rights and the best interests of the child.

### 3.7. Article 6

- ‘1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.’

This is a key provision for CRC-OP-CAC. The initial paragraph addresses the aspects of enforcing and upholding the Protocol, whereas the subsequent paragraph focuses on the dissemination of the Protocol. The third point, which holds significant importance, underscores the necessity for the demobilisation and rehabilitation of child soldiers. Article 6 of the Optional Protocol mandates that States Parties revise and enforce their domestic laws and procedures. In accordance with Article 4 of the CRC, States must adopt suitable legislative, administrative, and other actions to implement the rights acknowledged in the Convention. Advocates of child protection and rights play a crucial role by providing legal expertise to ensure that domestic legislation aligns with the provisions of the Optional Protocol. The process of reforming national laws can present opportunities for broader changes and updates to child rights laws. Activities such as training government, military, and law enforcement officials, along with the development of a national action plan, can fortify the implementation process and foster partnerships between government entities and civil society.

Additional measures include spreading awareness of the rights and responsibilities outlined in the Optional Protocol. As per Article 6(2), States Parties commit to ensuring that the principles and provisions of the Protocol are widely disseminated and promoted among both adults and children. This dissemination obligation can be viewed as one of the methods of implementing the Protocol. In a customary sense, the word *undertake* implies a commitment to initiate or perform an action without necessitating its completion. Hence, this obligation is less stringent than using the term *shall*. It encompasses the duty to inform all segments of society about the Protocol, including adults and children, using suitable means. In the context of children, school curricula can serve as an effective avenue for dissemination while ensuring relevant training for peacekeeping personnel, other military personnel, and various

professional groups working with and for children.<sup>34</sup> Furthermore, it is advisable to publish and circulate both initial reports and concluding observations. This can stimulate debates, raise awareness, and contribute to the implementation and monitoring of the Protocol.

The third paragraph contains further obligations guaranteeing the demobilisation and reintegration of children who have been recruited or used in armed conflicts. Children released from the armed forces or groups should be promptly transferred to civilian care, with child protection agencies actively involved in providing healthcare, counselling, and other forms of support. The primary focus should be on tracing and reuniting children with their families. States Parties are obligated to adopt all practical steps to ensure that children within their jurisdiction who have been recruited or used in armed conflicts in violation of the Protocol are demobilised or released from their service. Additionally, when necessary, they provide these individuals with suitable support for their physical and psychological recovery and successful reintegration into society. The Optional Protocol does not explicitly define the terms recovery or reintegration. Broadly, reintegration can be described as the process of helping former soldiers transition back to civilian life. Reintegration programmes are support initiatives designed to enhance the potential of ex-combatants and their families to reintegrate economically and socially into civilian society. These programmes include various forms of assistance, such as cash aid or in-kind compensation, vocational training, and income-generating activities.<sup>35</sup>

Recognising the necessity of rehabilitating and reintegrating children has been a relatively recent development in international law, notably articulated in Article 39 of the CRC: ‘States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts’.<sup>36</sup> However, it was not until the adoption of the Optional Protocol that a binding international agreement explicitly imposed an obligation to demobilise, rehabilitate, and reintegrate children who had been recruited or used in armed conflicts. To address resource constraints in fulfilling this commitment, the Optional Protocol mandates States to collaborate through technical and financial assistance, whereas international programmes should be devised for long-term support.

### **3.8. Article 7**

‘1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance.

34 Vandewiele, 2005.p. 4.

35 Mahling Clark, 1995. p. 50.

36 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.

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

Article 7 delineates the actions that States Parties are required to take to facilitate the reintegration of children who have been recruited or utilised in armed conflicts. This article discusses its implementation through international collaboration. The first section addresses cooperation between states, while the second section explores various avenues for achieving this collaborative effort. States Parties must offer technical and financial support as well as assistance in areas such as education, life skills, vocational training, healthcare, psychosocial support, family tracing, and community development initiatives. These approaches are the most efficient for reintegrating children and establishing a stable community environment. Children engaged in armed conflicts must receive support to overcome the challenges they encounter in postwar settings. Reconciliation plays a crucial role in this process. To achieve this, States Parties must collaborate and cooperate in the execution of the Protocol. Such cooperation can take various forms, including technical assistance and financial support. Implementation of reintegration initiatives should occur in cooperation with child protection organisations and other international institutions (UNICEF, WHO, UNDP, UNHCR).

### **3.9. Article 8**

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

2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with Article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.’

Article 8 of the Optional Protocol addresses the reporting procedure and is divided into three paragraphs. Monitoring of Protocol implementation is entrusted to the

Committee on the Rights of the Child, as established under Article 43 of the CRC. This article states,

‘For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided’.<sup>37</sup>

The Committee comprises 18 members from diverse nations and legal backgrounds, all of whom are distinguished by their strong moral principles and expertise in the realm of human rights. The body plays a pivotal role in overseeing and assessing adherence to the CRC. The Committee convenes three times annually in Geneva, Switzerland, for four weeks.<sup>38</sup> This period comprises three weeks of plenary sessions, followed by one week of pre-session activities aimed at preparing for the upcoming Committee session. During the latter week, preparations are made to assess the progress of States Parties in fulfilling their obligations under the CRC and the Optional Protocol. It is noteworthy that the Committee can only receive or consider information pertaining to countries that have ratified or acceded to the Optional Protocol. The Committee adopts a non-confrontational approach, seeking to engage with States Parties in a constructive dialogue. The objective is to accurately evaluate children’s situations within a country through collaborative and positive interactions. The Committee formulated comprehensive guidelines for the preparation of these reports under CRC-OP-CAC. As per Article 8, Paragraph 1 of the Optional Protocol, State parties are required to provide a report to the Committee on the Rights of the Child within two years of the Protocol’s entry into force for the respective State Party. This report contains comprehensive details of the measures taken to implement the Optional Protocol. Reporting guidelines offer in-depth instructions on the specific content of a comprehensive report. The report should include copies of key legislative documents, judicial rulings, and relevant instructions for both civilian and military armed forces. Additionally, detailed statistical data, indicators referenced in the report, and pertinent research findings should be incorporated. States Parties should also elucidate how the implementation of the Optional Protocol aligns with the overarching principles of the Convention on the Rights of the Child, which encompass non-discrimination (Article 2 of the CRC), the best interests of the child (Article 3 of the CRC), the right to survive and develop (Article 6 of the CRC), and the right to have their views heard and taken seriously (Article 12 of the CRC). Furthermore, the report should delineate the preparation process, including the engagement of governmental and non-governmental organisations or bodies in its drafting and dissemination. After the first comprehensive report, States are required to submit periodic reports on the execution of the Protocol. Article 8(2) distinguishes between States that are

37 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

38 Theytaz Bergman, 2010. p.21.

Parties to the CRC and those that are not Party to this Convention. Both categories of States can become Parties to the Protocol; therefore, both are obligated to provide periodic reports. In accordance with Article 8, Paragraph 3 of the Optional Protocol, the Committee has the authority to seek additional information from States Parties concerning the implementation of the Protocol.

### **3.10. Article 9**

- ‘1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to Article 3.’

As the Optional Protocol establishes rights and obligations beyond those set out in the CRC, it is considered an agreement independent of the Convention, necessitating a separate process for ratification or accession, as outlined in this article. There are two means by which a State can become Party to the Optional Protocol: ratification or accession. Both acts signify the State’s willingness to be legally bound by the terms of the Protocol. Although accession carries the same legal weight as ratification, the procedures for these acts differ. In the case of ratification, a State initially signs and subsequently ratifies the treaty. In contrast, there is no signature requirement prior to accession. For human rights treaties, such as the Optional Protocol, there is typically no fixed timeframe during which the instrument is open for signature. Many States opt to sign the Protocol relatively soon after its adoption as a demonstration of public support, whereas accession may take longer because of a State’s particular domestic procedural requirements. The act of signing the Protocol does not create a legally binding obligation, nor does it commit a State to proceed with ratification. However, it imposes the obligation to refrain from actions that would undermine the purpose and objectives of the Protocol. Once a State becomes a Party to the Optional Protocol, it is legally obliged to implement the treaty, including amending domestic laws to align with the Protocol’s provisions. The relationship between the Optional Protocol and domestic law depends on the legal system of the State. Most States automatically incorporate international treaties into national law upon ratification, often with constitutional provisions that prioritise ratified international treaties over existing domestic laws. In the case of conflict, an international treaty takes precedence. These States typically follow a civil law system. However, dualist States must enact specific legislation to make the treaty enforceable at the domestic level. These States typically follow a common law system. Irrespective of whether a country follows a monist or dualist system, certain provisions of the Optional Protocol require distinct



implementation of legislation to ensure that States Parties can fulfil their obligations under the treaty.<sup>39</sup>

### **3.11. Article 10**

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

Article 10 addresses the entry into force of the CRC-OP-CAC, both in general and for each State Party. According to Article 10(1), the Protocol comes into force three months after the deposit of the tenth instrument of ratification or accession. After securing the initial ten ratifications required for its implementation, the Optional Protocol became legally binding on 12 February 2002. The first ten States to ratify were Andorra, Austria, Bangladesh, Canada, the Democratic Republic of the Congo, the Holy See, Iceland, New Zealand, Romania and Sri Lanka. Interestingly, at the time of drafting the text of the CRC-OP-CAC, the United States proposed to replace the word with the word twenty-fifth.<sup>40</sup> Article 10(2) specifies that for each State that ratifies or accedes to the Protocol after coming into force, the Protocol becomes effective one month after the deposition of its own instrument of ratification or accession. This one-month period is relatively brief, particularly since States must adopt adequate measures immediately after becoming a Party to the Protocol to ensure that they do not inadvertently violate its provisions.

### **3.12. Article 11**

- ‘1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties of the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year, the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.
2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any

39 UNICEF and Coalition to Stop the Use of Child Soldiers, 2003. Guide to the Optional Protocol on the Involvement of children in Armed Conflict, New York, UNICEF and Coalition to Stop the Use of Child Soldiers, 2003.

40 CHR, 51st, 10/02/1995, E/CN.4/1995/96.

matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.’

A State is not obliged to stay a Party to the Protocol; it has the option to denounce the Optional Protocol, which entails making a formal announcement of withdrawal, at any point, through written notice to the Secretary-General of the United Nations. Subsequently, the Secretary-General is responsible for informing both the other States Parties of the Convention and all the States that have signed the Convention. These denunciations become effective one year after the Secretary-General receives the notification. However, if the State Party renouncing the Protocol is involved in an armed conflict at the end of that year, denunciations will not occur until the armed conflict ends. This final provision is intended to prevent States from denouncing the Protocol solely to avoid immediate compliance with its provisions. This sentence was included in the final text at the insistence of the observer for the ICRC, who proposed inserting the last sentence of the first paragraph at the preparatory meeting of the working group.<sup>41</sup> In the context of armed conflicts, no distinction is made between international and internal armed conflicts. It is noteworthy that denunciations do not absolve the State Party of its obligations under the Protocol concerning any actions that occurred prior to the date on which the denunciations became effective.<sup>42</sup>

### **3.13. Article 12**

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

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

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

<sup>41</sup> Ibid.

<sup>42</sup> Vandewiele, 2005. p. 25.

Article 12 of the Optional Protocol outlines the procedures for making amendments. The proposed amendments to the Optional Protocol can be presented to the Secretary-General. The Secretary-General then relays these proposed amendments to the States Parties of the Optional Protocol and requests feedback on whether they support convening a conference of States Parties to review and adopt the proposals. If at least one-third of the States Parties express their agreement within four months, a conference is convened to vote on the proposed amendments. Any amendment endorsed by a majority of the States Parties in attendance and voting at the conference is presented to the United Nations General Assembly for approval. Once the General Assembly approves the amendment and secures the acceptance of a two-third majority of States Parties, the amendment becomes effective only for those States Parties that have accepted it. Disappointingly, the Protocol does not allow the adoption of amendments that would be binding to all States Parties through a majority vote. For instance, this would enable most States to establish a higher age limit for voluntary recruitment applicable to all States. The amendment process, although lengthy and intricate, mirrors the procedure outlined in Article 50 of the CRC.

### **3.14. Article 13**

- ‘1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.’

Finally, Article 13 addresses practical considerations. In this article, the Arabic, Chinese, English, French, Russian, and Spanish versions of the text are of equal authenticity and will be stored in the UN archives of the United Nations. This mirrors the CRC; its Article 54 contains the same provision. This signifies that the Protocol’s text holds equal weight in all United Nations official languages, making these six languages equally authoritative for interpreting the text. This was the smoothest article to agree upon in the preparatory proceedings of the CRC-OP-CAC. During the session of the working group, no formal amendments to this article were submitted.

## **4. Conclusion**

Children inevitably bear the brunt of armed conflicts. Every child deserves a childhood free from violence. Countless children find themselves entangled in conflicts where they are not simply bystanders, but direct targets. Some are the casualties of general attacks on civilians, whereas others suffer from deliberate acts of genocide. Many children endure the consequences of sexual violence and myriad deprivations inflicted by armed conflicts, which exposes them to hunger and disease.

Armed conflicts frequently result in shattered societies, where at-risk children may be lured into joining the armed forces or groups as a means of sustenance and recognition, and they may struggle to regain a normal life without specific assistance. These collective concerns led the international community to a shared standard, culminating in the Convention on the Rights of the Child. This Convention is a unique instrument that has garnered almost universal ratification. Several States and organisations have been discontent with the level of protection offered by the Convention, and this dissatisfaction led to the adoption of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Optional Protocol signifies a noteworthy stride towards prohibiting the recruitment of children into armed forces and groups and their involvement in hostilities. Although the Optional Protocol is a commendable achievement, child soldiers continue to be used at alarming rates. Admittedly, the final text of the Protocol fell short of expectations. It is apparent that its content resulted from a compromise and was considerably less robust than many expected. The Committee on the Rights of the Child compensated for some of these deficiencies by adopting a rigorous interpretation of the text. Notwithstanding these shortcomings, the Protocol undoubtedly represents progress and reinforces existing international law standards regarding the protection of children against recruitment and involvement in hostilities, and plays a crucial role in effectively addressing the plight of children ensnared in the turmoil of war.

It is noteworthy that the Protocol places an obligation on States not only to ensure the effective enforcement of its provisions, but also to facilitate the demobilisation of child soldiers and support their rehabilitation and reintegration into society. The transition to civilian life can be challenging for both children and their communities. Beyond addressing the basic needs of children, including food and shelter, it is crucial to consider their emotional and developmental requirements.

In recent years, amid the ongoing and newly ignited armed conflicts, the toll on children has remained alarmingly high. The blatant and systematic disregard for international humanitarian and human rights laws continues to compromise the protection of children. It is imperative to fortify compliance with international humanitarian and human rights obligations through unwavering commitment, resolute determination, and concrete actions. Words alone are inadequate to safeguard our children. Urgent action is necessary to secure the present and bestow upon them a future devoid of fear, conflict, and exploitation.

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