

# Perspective

## Children in conflict: assessing the Optional Protocol

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Children have long been viewed as one of the most vulnerable groups in society. Over the past 50 years, therefore, they have been afforded specific legal protection in times of war and peace. Unfortunately, such standards have often proved weak, and have not been sufficient to ensure that children are not abused or taken advantage of during periods of civil instability. Today, some 300,000 child soldiers are fighting in over 30 wars around the world.

The special status of children in conflict dates back to the 1949 Geneva Conventions and its Additional Protocols of 1977. Twelve years later, these norms were reinforced in the United Nations (UN) Convention on the Rights of the Child (CRC). This has been proclaimed the most comprehensive children's rights treaty in the world, yet it contains a crucial contradiction in regard to children in conflict. While the CRC defined a child as any person under 18, it also set a minimum age of 15 for serving as a combatant, based on previous standards specified in the Additional Protocols. According to Article 38 of the CRC:

States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child; 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; States Parties shall refrain from recruiting any person who

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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; and, 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 protection and care of children who are affected by an armed conflict.

As a result, some countries, including the Nordic states and Switzerland, felt that the agreement did not go far enough in protecting the rights and needs of children. A working group was thus established in Geneva, Switzerland, in 1994 to develop a stronger instrument, now known as the Optional Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child. The working group suffered years of stalemate, however, as the UK and the US, in particular, voiced their objections to 18 being the minimum age for the recruitment of children into armed forces and for their participation in war.

While these governments attempted to derail the Optional Protocol, other international bodies made some headway on the issue. The July 1998 statute of the International Criminal Court (ICC) made it a war crime (under Article 8) to conscript or enlist children below the age of 15 for armed forces or groups or to use them in an active capacity in military hostilities. In June 1999, the International Labor Organization (ILO) adopted Convention 182: the first legal document to recognise specifically that child soldiering is a form of child labour. It prohibits forced or compulsory recruitment of children under 18 for use in armed combat.

The working group finally reached consensus on an Optional Protocol after six years of negotiations—not to mention increased pressure from non-governmental organisations (NGOs). The UN General Assembly adopted the accord in May 2000 and it entered into force on 12 February 2002. As of 1 July, 109 countries have signed the agreement and 33 have ratified it.

The Optional Protocol:

- requires that states ‘take all feasible measures’ to ensure that members of their armed forces under the age of 18 do not participate in fighting;
- prohibits the conscription of anyone under 18 into the armed services;
- compels states to raise the voluntary recruitment age from 15 and to deposit a binding declaration of the minimum age for enrolment into their armed forces; and

- bans the recruitment or use in hostilities of children under 18 by rebel or other non-governmental armed groups, and demands that states criminalise such practices.

## *Strengths of the Optional Protocol*

The Optional Protocol offers five key benefits to governments, international organisations and advocacy groups campaigning for a worldwide ban on child soldiers.

- First, it has established an international standard for the employment of children in conflict that corrects the inconsistency contained in the CRC. Now, child soldiers receive the same level of protection as children in other sectors of society.
- Second, the existence of a legal norm means that states can be held accountable for their actions in regard to the use of children in conflict. Nations that sign and ratify the Optional Protocol will come under increased scrutiny to ensure that they are adhering to its terms. Moreover, they will not want to be singled out as violators of the Optional Protocol. States that have not become parties to the Optional Protocol will face increased pressure (via international public opinion) to stop using children in their militaries.
- Third, the 18 threshold makes it harder for governments and military actors to contend that some children have reached the legal age of recruitment. In the past, it was easier to claim, for example, that a person who was 12 years old was 15.
- Fourth, the existence of an international standard encourages states to implement national laws and policies—in some cases stronger than the Optional Protocol—that prevent children from being used as combatants. In fact, since the adoption of the Optional Protocol, not only have 33 states ratified the treaty, but also some countries have changed their laws and policies to reflect the 18 benchmark—even some non-state actors have made commitments.<sup>1</sup>
- Fifth, the Optional Protocol has raised public and government awareness of child soldiers. For many governments, the issue was not one that was discussed in relation to military strategy, foreign policy or national legislation.

## *Limitations of the Optional Protocol*

While the Optional Protocol is an important achievement, it cannot offer a complete solution to the child-soldier problem. Indeed, by its very nature, the 'Optional' Protocol is a compromise. There are five inherent weaknesses.

- First, the Optional Protocol does not solve the problem of voluntary recruitment of individuals under 18. Children are allowed to join national armed forces as long as they are at least 16 and have proper documentation and parental permission. In addition, some countries promise food and money, for instance, to entice under-18s to sign up ‘voluntarily’.
- Second, the Optional Protocol stipulates that states should ‘take all feasible measures’ to ensure that soldiers under 18 do not play a ‘direct part in hostilities’. This language is deliberately vague to allow national armed forces to determine what is meant by ‘all feasible measures’ and ‘direct part in hostilities’. Children under 18 are, therefore, still engaged in conflicts without violating the provisions of the Optional Protocol.
- Third, the Optional Protocol undermines the spirit of the CRC. Language was inserted that allowed states that had not ratified the CRC—Somalia and the US<sup>2</sup>—to ratify the Optional Protocol. Routinely, when a protocol is attached to an existing treaty, a country cannot be a party to it without first ratifying the parent agreement.
- Fourth, while governments are allowed to recruit under-18s into their militaries, non-state groups are prohibited from doing so. Non-state actors were not involved in the negotiations and hence had no say in the provisos that were established. How to encourage them to adhere to the Optional Protocol is thus a key problem.
- Fifth, the monitoring, verification and enforcement provisions of the Optional Protocol are inadequate. States parties must submit reports on the efforts that they have made to implement the accord. But there is no verification of these reports, no external monitoring of progress, and no enforcement or punitive mechanisms to respond to cases of non-compliance.

### *Beyond the Optional Protocol*

The Optional Protocol has established legal norms with regard to the use of children in conflict. Ratification of this document alone, however, will not end such a horrific practice. As mentioned earlier, the ICC statute and ILO Convention 182 also address the problem, as do other regional agreements, including the 1990 African Charter on the Rights and Welfare of the Child. These international, regional, sub-regional and national accords can reinforce the 18 threshold and achieve objectives that go beyond the provisions of the Optional Protocol. Universal non-use and non-recruitment of children should remain the goal of the international community.

Since 1999, the UN Security Council has adopted resolutions that specifically address the protection of children in armed conflict, has incorporated child protection into operational mandates, has made special provision for the disarmament, demobilisation and reintegration of former child combatants, and has encouraged state ratification of the Optional Protocol.<sup>3</sup> Moreover, UN Secretary-General Kofi Annan has appointed a Special Representative for Children in Armed Conflict and an annual report is produced on the status of children in war.

Advocates must encourage countries that have a history of using child soldiers to ratify the Optional Protocol and, subsequently, they must help them to implement consistent and complementary policies. Communities recovering from armed conflict, for example, require significant education about child soldiers and need assistance in helping former child combatants to reintegrate into society. Governments, for their part, should ban arms sales and military training to states and groups that employ children in their ranks, and the supply of foreign aid should be made conditional on adherence to the Optional Protocol.

Finally, if the international community is serious about ending the use of child soldiers in combat, naming and shaming (via verification and monitoring) those countries that violate the Optional Protocol, as well as other legal arrangements, must become common practice. The Watchlist on Children in Armed Conflict is one non-governmental endeavour that aims to do this. But NGOs have little power to enforce international treaties and standards. Governments must do a better job of holding states accountable for violations of international law.

## *Conclusion*

There have been some successes in the past few years to address the child-soldier problem. Certainly, the negotiation of the Optional Protocol and its entry into force is one example. Although the child-soldier issue has received increased attention and has been the target of government and international action, there is still a long way to go. The Optional Protocol will mean nothing if states sign and ratify the document but fail to implement its provisions. Governments, therefore, should not be complacent. Rather, they should aim to universalise the 18 standard and assist affected societies. Only through a concentrated, co-ordinated and sustained response will the world become free of the scourge of child soldiering.

## *Endnotes*

<sup>1</sup> For example, in December 1999, the government of Colombia altered its domestic legislation to prevent children under the age of 18 from participating in military service. In May 1998, representatives of the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka made an oral commitment to the United Nations (UN) Special Representative for Children in Armed Conflict, Olara Otunnu, not to recruit children under 18 and not to use children under 18 in hostilities. However, evidence points to violations of this commitment since autumn 1998.

<sup>2</sup> The United States Senate ratified the Optional Protocol on 19 June 2002, more than two years after former US President Bill Clinton signed it.

<sup>3</sup> Specific UN resolutions dealing with the issue of children and armed conflict include United Nations Security Council resolutions 1261, 1279, 1314 and 1379. See [www.un.org/special-rep/children-armed-conflict/UnDocs.htm](http://www.un.org/special-rep/children-armed-conflict/UnDocs.htm).