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The Optional Protocol on Children and Armed Conflict

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I. Introduction

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The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ('OPAC') was unanimously adopted by the UN General Assembly on 25 May 2000.¹ It entered into force on 12 February 2002.² OPAC advances the protections afforded by article 38 of the Convention on the Rights of the Child ('CRC', 'the Convention'), and by international humanitarian law generally, to children affected by armed conflict. It does, however, fall short of the 'Straight 18' approach—sought by many advocacy groups—which would categorically prohibit the voluntary and compulsory recruitment of persons under 18 years of age and their participation in hostilities. Although a majority of States Parties to the Working Group pro-pounded this approach,³ as did each of the Committee on the Rights of the Child ('CRC Committee', 'the Committee'),⁴ the UN High Commissioner for Human Rights,⁵ the Special Representative of the Secretary General for Children and Armed Conflict,⁶ and many non-governmental organizations,⁷ ultimately a consensus could not be reached. The elusive nature of any consensus persisted despite the UN High Commissioner for Human Rights urging during the sixth session of the Working Group that states which opposed the 'Straight 18' approach should bear in mind that the protocol was 'optional' and, as such, states should not block a majority consensus on the 'Straight 18 position'.⁸

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This chapter is best read in close conjunction with the commentary on article 38.⁹ After all, dissatisfaction with the sparseness of article 38 spurred efforts to negotiate OPAC. To be clear, the invocation of the age of 15 in article 38 belies the reality that many delegations at the time favoured the minimum age of 18 in the context of direct participation in hostilities and for conscription.¹⁰ Although OPAC was designed to enhance and complement the protections afforded by the Convention, it operates as an independent and

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¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (adopted 25 May 2000 by resolution A/RES/54/263 at the fifty-fourth session of the General Assembly; entered into force 12 February 2002) 2173 UNTS 222 ('OPAC'). On that same date, the UN adopted the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography ('OPSC'). At the time of writing, the OPSC had been ratified by 167 states. A third Optional Protocol (on a Communications Procedure) was adopted on 19 December 2011; it allows children to bring complaints to the CRC Committee if their rights remain unprotected and they have exhausted domestic remedies (to date, this instrument has been sparsely ratified). All references to Optional Protocol in this chapter refer to the OPAC.

² See <http://treaties.un.org> for an update of the number of states that have signed and ratified OPAC.

³ See eg the comments expressed by the following delegations at the end of the sixth session of the Working Group in UN Doc E/CN4/2000/74: Denmark, para 93; Sweden, para 95; UNICEF, para 101; ICRC, para 104; Coalition to Stop the Use of Child Soldiers, para 111; Italy, para 115; Switzerland, para 118; Belgium, para 121; Uruguay, para 127; Ethiopia, para 135; Finland, para 140; Russian Federation, paras 142–43; Portugal, para 148; Turkey, para 155; and Norway, para 158.

⁴ Preliminary draft of art 1 (UN Doc E/CN4/1994/91, annex). See also the view of the CRC Committee as expressed to the Working Group: UN Doc E/CN4/1996/102 para 42, 47; UN Doc E/CN4/1997/96 para 43; and UN Doc E/CN4/2000/74 para 29.

⁵ E/CN4/2000/74 para 23. ⁶ *ibid* paras 25–28.

⁷ Hanson underscores the 'enormous influence of humanitarian groups' in shaping international legal instruments, including OPAC, that engage with child soldiering: Karl Hanson, 'International Children's Rights and Armed Conflict' (2011) 5(1) *Human Rights and International Legal Discourse* 40, 43.

⁸ UN Doc E/CN4/2000/74 para 23. The same position was stressed by delegates during the drafting process. See eg UN Doc E/CN4/1998/102 para 20.

⁹ This commentary also broadly elucidates the background to child soldiering and to the legal regulation thereof.

¹⁰ Hanson (n 7) 41 (noting the declarations filed by Andorra, Argentina, Austria, Colombia, Ecuador, Germany, the Netherlands, Spain, and Uruguay).

separate multilateral treaty under international law. As such the structure for this chapter differs from other chapters in this commentary as its aim is more ambitious, namely to provide interpretative guidance with respect to *every article* under OPAC as opposed to a single article. Thus, this introductory section offers a broad overview of the main features of OPAC and some reflections on the nature of the relationship between this instrument and the CRC Committee. Part 2 of the chapter offers a consolidated account of the drafting history of OPAC, thereby filling a lacuna. Part 3 adopts the more familiar approach of offering a detailed analysis of the meaning of each of the articles under OPAC, while the evaluation section offers some reflections on its significance and the tension created between its underlying protectionist values and the push to recognize children's agency and capacity as reflected in many of the Convention's other provisions.

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A. Main Features of OPAC

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OPAC contains several notable features. By dint of its title, it applies to armed conflict, without distinction as to the international or non-international nature thereof. It applies in principle to national armed forces *and* non-state actors (art 4), albeit not entirely evenly. Article 1 increases the minimum age for children's direct participation in hostilities from 15 (as per Convention para 38(2)) to 18, and thereby harmonizes with the general age of majority set out under the Convention.¹¹ Article 1 textually remains consistent with article 38, however, in that it requires states to take 'all feasible measures' to ensure that members of their armed forces who are not yet 18 do not take a 'direct part' in hostilities.

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Article 2 of OPAC increases the minimum age for compulsory recruitment from 15, under Convention paragraph 38(3), to 18. This is an absolute and unqualified obligation. As discussed in the commentary to article 38, compulsory recruitment includes recruitment by threats, kidnapping, abuse, and abduction; it also includes legal recruitment (colloquially referred to as the draft). Article 3 requires states to increase the minimum age of voluntary recruitment from that set out under Convention article 38, this being 15 years of age. Article 3 fails, however, to specify concretely what this age must be.¹² It is left to states' discretion to determine the minimum age for voluntary recruitment. State Parties must formally assert this minimum age in a binding declaration lodged upon ratification of OPAC. States are further required to take several steps in order to reduce the possibility that recruitment may not be genuinely voluntary, including obtaining the informed consent of a child's parents or guardians; informing the child of the duties involved in military service; and obtaining reliable proof of age. Among states that have filed declarations, approximately three-quarters list minimum ages of voluntary recruitment of 18 or older (the overwhelming majority within this group declare 18).

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Article 4 applies directly to the actions of non-state armed groups. Such application is unusual within the context of a human rights instrument and reveals how residual international humanitarian law connections animate OPAC. Article 4 absolutely prohibits armed groups from using or recruiting persons under the age of 18. Article 4 thereby creates a more exigent standard for non-state armed groups than a state's own armed forces. In light of the fact that non-state armed groups cannot become parties to OPAC, article

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¹¹ UNICEF, *Guide to the Optional Protocol on the Involvement of Children in Armed Conflict* (UNICEF 2003) 4 ('UNICEF Guide').

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¹² One common interpretation is that this means that the minimum age has de facto been raised to 16.

4 requires states to take all feasible measures to prevent such groups from recruiting and using children in hostilities, including the criminalization of such activities under national law. Such recruitment, when implicating persons under the age of 15, falls within the remit of customary international law and conventional international law (notably on this latter note, the Rome Statute of the International Criminal Court).

C41.P45 Article 6 imposes an obligation on states to take all feasible measures to ensure that children who are unlawfully recruited or used in hostilities are demobilized or otherwise released from service. These children are also entitled to appropriate assistance for their physical and psychological recovery, and to social integration, all of which complement their right to reintegration under Convention article 39.

C41.P46 Article 7 expressly requires that states cooperate to achieve the implementation of OPAC, including through the provision of technical and financial assistance. Provision of such assistance must be undertaken in consultation with relevant international organizations. This obligation represents an acknowledgement of the role of international organizations in addressing the participation and use of children in hostilities, while also extending an invitation for them to continue to remain involved. The requirement of collaboration is reinforced by paragraph 7(2) which allows for the creation of a voluntary fund which is presumably aimed at facilitating such efforts.

C41.P47 OPAC additionally contains various procedural provisions whose equivalents are found both in the Convention and indeed in most international human rights treaties. These include a savings clause (art 5), provision for denunciation (art 11) and requirements for amendment (art 12). Article 9 confirms that only states may be parties to OPAC. States can be parties to OPAC without being parties to the Convention. Such is the case for the United States (and for Somalia until it ratified the Convention in 2013). Echoing similar provisions in the Convention, article 8 of OPAC also contains a compliance mechanism which requires states to file periodic reports with the CRC Committee which include details of domestic implementation.

C41.P48 The standards of OPAC represented a compromise that extends greater protections to children who are vulnerable to recruitment and direct use in hostilities by both state and non-state armed groups.¹³ States nonetheless display greater support for a requirement of 18 as the minimum age for membership in armed groups (in practice, rebel groups that challenge state authority) than in their own national armed forces. Within the context of armed forces, moreover, states demonstrate greater support for 18 as the minimum age for conscription or compulsory recruitment than for voluntary enlistment. Among states that still permit voluntary enrolment under the age of 18, a firm consensus is coalescing that such enrollees should not be directly deployed in hostilities. The absence of a specification for a minimum age for indirect participation in hostilities and the exemption of military schools represent further departures from full instantiation of a ‘Straight 18’ world-view. Some observers and advocates may be disappointed that OPAC falls short of the protections of the African Charter and the ILO Convention No 182, but it is important to recall that state parties to these two latter instruments remain in any event bound by their provisions. OPAC does not replace them.

C41.P49 That said, the trend-lines are for law to approach armed forces similarly to armed groups and to view voluntary recruitment as indistinguishable from forcible recruitment.

C41.N13 Hence, the move is to collapse these residual vestiges of differential treatment. Remaining

¹³ UN Doc E/CN4/2000/74 paras 91–160.

distinctions are not accreting; rather, they are eroding. As extensively discussed in the commentary to Convention article 38, adoption of non-binding instruments such as the Paris Commitments and Paris Principles further concretize this push. Interestingly, OPAC itself is gently becoming surpassed by ongoing developments in international law and policy, such as the aforementioned non-binding instruments, which more assertively actuate the ‘Straight 18’ advocacy position. The point is not to argue that soft law supplants hard law but, rather, to look holistically at the future trajectory of law, best practices, and policy.

B. The Committee and OPAC

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Karl Hanson remarks on ‘[t]he active involvement of the CRC Committee with the drafting of the [Optional Protocol],’ a phenomenon which is understandable in light of the Committee’s commitment to the ‘Straight 18’ position.¹⁴ State Parties are to submit a ‘comprehensive report’ to the Committee within two years of OPAC’s entry into force for them, and then to follow up with periodic updating reports.¹⁵ In response, the Committee’s concluding observations include a series of recommendations which are generally structured around the following subheadings—‘General Measures’; ‘Prevention’; ‘Prohibition’; ‘Protection, Recovery and Reintegration’ and ‘International Co-operation’. Although the recommendations of the Committee are tailored to each state, there are patterns that emerge and reflect the concerns of the committee and the measures which it deems appropriate to address those concerns. Thus, for example, within the context of ‘*General Measures*’ the committee invariably lists programmatic directions for states that address issues such as coordination of efforts to implement OPAC and/or the need to develop a comprehensive national strategy; independent monitoring; dissemination and awareness raising; training and data collection.¹⁶ Under the heading of ‘*Prevention*’, it typically demonstrates a concern with the need for appropriate age verification procedures, the regulation of non-state groups, the operation of military schools, and the need for human rights and peace education,¹⁷ while under the heading of ‘*Prohibition*’ it generally recommends the need for appropriate legislative measures to criminalize violations of the Protocol in addition to measures to implement a state’s extraterritorial and extradition obligations and regulate arms control.¹⁸ The CRC Committee’s focus under the heading of ‘*Protection, Recovery and Reintegration*’ invariably extends to a range of measures to protect the rights of child victims and demobilization efforts.¹⁹

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¹⁴ Hanson (n 7) 48.

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¹⁵ *ibid* 41 (noting also that ‘each Concluding Observation is to be read in conjunction with previous Concluding Observations that have been issued for that State party’ and citing CO Turkey, CRC/C/OPAC/TUR/CO/1 and CO Philippines, CRC/C/OPAC/PHL/CO/1 to this effect).

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¹⁶ See eg: CRC CO OPAC Tajikistan, CRC/C/OPAC/TJK/CO/1 paras 6–13; Guinea, CRC/C/OPAC/GIN/CO/1 paras 7–16; United States of America, C/C/OPAC/USA/CO/3-4 paras 6–17; China, C/C/OPAC/CHN/CO/1 paras 6–14; Egypt, CRC/C/OPAC/EGY/CO/1 paras 5–14.

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¹⁷ See eg: CRC CO OPAC Tajikistan, CRC/C/OPAC/TJK/CO/1 paras 14–19; Guinea, CRC/C/OPAC/GIN/CO/1 paras 17–20; United States of America, C/C/OPAC/USA/CO/3-4 paras 18–25; China, C/C/OPAC/CHN/CO/1 paras 15–24; Russian Federation, CRC/C/OPAC/RUS/CO/1 paras 8–13.

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¹⁸ See eg: CRC CO OPAC Tajikistan, CRC/C/OPAC/TJK/CO/1 paras 20–22; Guinea, CRC/C/OPAC/GIN/CO/1 paras 21–26; United States of America, C/C/OPAC/USA/CO/3-4 paras 26–32; China, C/C/OPAC/CHN/CO/1 paras 26–30.

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¹⁹ See eg: Guinea, CRC/C/OPAC/GIN/CO/1 paras 27–30; United States of America, C/C/OPAC/USA/CO/3-4 paras 33–36; China, C/C/OPAC/CHN/CO/1 paras 31–32; Russian Federation, CRC/C/OPAC/RUS/CO/1 paras 20–21; Egypt, CRC/C/OPAC/EGY/CO/1 paras 27–32.

C41.P51 As a general observation, like the CRC Committee’s interpretation of article 38, the approach to OPAC is not particularly muscular or purposive. However, the ambition of the concluding observations need not be to develop a comprehensive jurisprudential framework or a disquisition of the intersections of international humanitarian law with the legal regimes to protect children’s rights.²⁰ Rather, a more modest approach is to offer concrete, pragmatic, and supportive guidance as to how states can better protect children from recruitment and participation in armed conflict. This naturally presupposes that the Committee has to assess the extent to which State Parties are actually domesticating and complying with the requirements of OPAC. However, according to Weissbrodt et al, the aim of OPAC is ‘more at keeping children out of conflict than at addressing the necessary protections of [international humanitarian law] for children in situations of armed conflict’.²¹ Hence, the tone and substance of the Concluding Observations is neither denunciatory nor shrill; nor is it to comprehensively assess the meaning of legal obligations. Rather the tone and substance of the Concluding Observations aim to offer remedial solutions to noted compliance challenges. This means that ‘the Concluding Observations frequently describe deficiencies in and propose changes to domestic law,’²² such as the absence of criminalizing the unlawful recruitment and direct use of children in hostilities. This also means that the CRC Committee ‘more often expresses concern about the potential for violation and provides recommendations . . . thus engag[ing] in little fact-specific analysis of Protocol violations, let alone violations of other instruments’.²³ Weissbrodt et al astutely contextualize this reality along the following lines:

C41.P52 One simple reason for the general absence of robust analysis of humanitarian law in the Concluding Observations under the [Optional] Protocol is that the spheres of humanitarian law and the Protocol are not entirely coterminous. In broad strokes, the Protocol is concerned not just with the treatment of children in conflict, but with pre- and post-conflict procedures to improve children’s welfare. In other words, the Protocol is designed as much to keep children out of armed conflict as to regulate their treatment within it. This goal is narrower than the general obligation of a State under Article 38 of the . . . Convention to ‘respect and ensure respect for rules of international humanitarian law’.²⁴

II. Drafting History

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A. Background

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C41.P53 OPAC was created shortly after Convention article 38 was adopted. Brett suggests that four crucial factors fuelled this celerity. First, certain NGOs ‘refused to let the matter

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²⁰ That said, in its concluding observations on Guatemala, the CRC Committee linked an infringement of OPAC to an infringement of AP2: CO Guatemala, CRC/C/OPAC/GTM/CO/1 para 19. Weissbrodt, Hansen, and Nesbitt, noting this concluding observation, posit that ‘[b]eyond announcing that the practice violates these instruments, however, the Committee provides no explicit analysis’: David Weissbrodt, Joseph Hansen, and Nathaniel Nesbitt, ‘The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law’ (2011) 24 Harvard Human Rights Journal 115, 145.

²¹ Weissbrodt, Hansen, and Nesbitt (n 20) 150.

²² *ibid* 142 (citing CO Bulgaria, CRC/C/OPAC/BGR/Co/1). See also CO United States of America, CRC/C/OPAC/USA/CO/1 paras 29–30 (in which concern was expressed over detention by the United States of children in Iraq and Afghanistan, and their ill-treatment and potential prosecution for violations of international humanitarian law).

²³ Weissbrodt, Hansen, and Nesbitt (n 20) 143.

²⁴ *ibid* 146.

drop'.²⁵ Second, international awareness of the issue was sustained by the ongoing incidence of child recruitment and the persistence of armed conflicts that implicated children.²⁶ Third, the African Charter on the Rights and Welfare of the Child ('ACRWC'),²⁷ adopted in 1990, required states to 'ensure that no child [defined as any person under 18] shall take a direct part in hostilities and refrain from recruiting any child'.²⁸ The final contributory factor was the CRC Committee's ongoing commitment to this issue, reflected in its 1992 theme day dedicated specifically to a discussion on 'Children in armed conflicts'.²⁹

C41.P54 The Committee's theme day was significant because it resulted in a recommendation for a legal instrument which would raise the minimum age for recruitment in armed conflict from 15 to 18.³⁰ The Committee completed a draft optional protocol in 1993,³¹ which was submitted to the UN Commission on Human Rights. In 1994, the Commission established an open-ended Working Group to elaborate its own draft optional protocol.³² The Working Group held six annual sessions³³ between late 1994³⁴ and March 2000, when the final draft was adopted.³⁵ Some forty countries participated, along with thirty UN bodies and agencies, international organizations, and NGOs.³⁶ The text originally drafted by the Committee served as the basis for the new draft protocol.³⁷

C41.P55 The concerns which tempered the original drafting of article 38 predictably arose once again during the drafting of OPAC. The CRC Committee's initial proposal was simply to increase the minimum age for recruitment and participation in armed conflict from 15 to 18. The drafting process nonetheless took on a momentum of its own. At the conclusion of the Working Group's first meeting in 1994, several issues required consideration: the minimum age for participation in hostilities; the issue of direct and indirect participation; voluntary as opposed to compulsory recruitment; the status of children enlisted or admitted into military schools; and the possibility of a prohibition on recruitment by non-government armed entities.³⁸

C41.P56 The contentious nature of these issues persisted throughout the drafting phase. Although some progress was made during the first three sessions, the lack of consensus was palpable and, hence, the fourth session adjourned early. Deadlock ensued on many key issues. At this point, the Chairman circulated a paper setting out his own thoughts on the draft optional protocol; this document was entitled 'Chairman's Perception'.³⁹ At the fifth session, the Chairman recommended that the Working Group meet only for a brief period before adjourning for further initial consultations.⁴⁰ The Working Group adopted

C41.N25 ²⁵ Rachel Brett, 'Child Soldiers: Law, Politics, and Practice' (1996) 4 *International Journal of Children's Rights* 115, 118–19. In 1995, the Council of Delegates of the ICRC endorsed a Plan of Action which aimed to 'promote the principle of non-recruitment and non-participation in armed conflict of children under the age of 18 years': see UN Doc E/CN4/2000/74 para 104.

C41.N26 ²⁶ Brett (n 25) 119.

C41.N27 ²⁷ ACRWC (Opened for signature 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

C41.N28 ²⁸ ACRWC art 22(2). ²⁹ See UN Doc CRC/C/10 paras 61–77. ³⁰ *ibid* para 75.

C41.N31 ³¹ UN Doc CRC/C/16, Annex VII. ³² UN Doc E/CN4/1994/91.

C41.N33 ³³ See UN Docs E/CN4/1996/102; E/CN4/1997/96; E/CN4/1998/102; and E/CN4/1999/73.

C41.N34 ³⁴ For the report of the Working Group at the end of its first session see UN Doc E/CN4/1995/96.

C41.N35 ³⁵ See UN Doc E/CN4/2000/74.

C41.N36 ³⁶ For a complete list of the states, UN bodies, and NGOs that participated in the discussions of the Working Group see UN Doc E/CN4/2000/74 paras 5–12.

C41.N38 ³⁷ UN Doc E/CN4/1994/91 Annex. ³⁸ UN Doc E/CN4/1995/96 para 22.

C41.N39 ³⁹ See UN Doc E/CN4/1998/102 Annex II. ⁴⁰ UN Doc E/CN4/1999/73 paras 5–6.

a draft optional protocol at the sixth and final session in 2000. It did so in part to comply with resolutions of the Commission on Human Rights which required the protocol to be finalized before the Convention's tenth anniversary.⁴¹

C.41.P57 The draft optional protocol was adopted by consensus on 21 January 2000.⁴² All delegations welcomed the fact that the Working Group had achieved agreement on the text. Some, however, continued to express disappointment that consensus had not been possible on firmer provisions regarding children's recruitment and participation in hostilities.⁴³ Despite these concerns, it was recognized that, as adopted, the text promoted the highest standards on which consensus was achievable thereby 'allow[ing] for very broad adherence'.⁴⁴

C.41.P58 The drafting histories of specific provisions of OPAC are set out below.

C.41.S6 B. Children's Participation in Hostilities

C.41.P59 Article 1 of the draft optional protocol reads as follows:

C.41.P60 States Parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take part in hostilities.⁴⁵

C.41.P61 This proposal had only satisfied a handful of parties at the first session of the Working Group. The observer for Sweden, for example, proposed the deletion of the words 'take all feasible measures' in order to create an absolute prohibition on children's participation in hostilities.⁴⁶ In contrast, the US representative suggested the threshold be set at 17, rather than 18 years,⁴⁷ whilst the Japanese representative suggested that the prohibition ought to be limited to 'direct' participation.⁴⁸

C.41.P62 These and other suggestions made during the first session of the Working Group led to the consideration of a number of alternative drafts of article 1 at the second session in 1995.⁴⁹ Some states supported retaining an age limit of 18,⁵⁰ but the representatives of Pakistan and the United States continued to favour 17.⁵¹ Similarly, consensus was lacking with respect to the words 'direct participation in armed conflicts', as opposed to 'participation in hostilities'.⁵² Some delegations preferred the reference in Convention article 38 to direct participation, while others considered that the prohibition on participation in hostilities ought not to be qualified in any way.⁵³

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⁴¹ See Commission on Human Rights resolutions 1998/76 and 1999/80 para 17(b).

⁴² UN Doc E/CN.4/2000/74 para 90.

⁴³ See eg the comments of the following delegations in UN Doc E/CN.4/2000/74: Denmark, para 93; Sweden para 95; UNICEF, para 101; ICRC, para 104; Italy, para 115; Switzerland, para 118; Belgium, para 121; Uruguay, para 127; Ethiopia, para 135; Finland, para 140; Russian Federation, para 142–43; Portugal, para 148; Turkey, para 155, and Norway, para 158.

⁴⁴ *ibid* para 90. ⁴⁵ UN Doc CRC/C/16 Annex VII, art 1.

⁴⁶ UN Doc E/CN.4/1995/96 para 76. ⁴⁷ *ibid* para 77. ⁴⁸ *ibid* para 76.

⁴⁹ See UN Doc E/CN.4/1996/102 para 90. The options for article 1 were:

- State parties shall take all feasible measures to ensure that persons who have not attained the age of [18 or 17] years do not take a [direct] part in [hostilities or armed conflicts] and without prejudice to international humanitarian law;
- State parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take part in hostilities unless under the law applicable to the child majority is attained earlier; or
- State parties shall take all feasible measures to ensure that persons who have not attained the age of 18 years do not take a direct part in hostilities unless under the law applicable an earlier age is established in accordance with article 38 of the Convention.

⁵⁰ *ibid* para 93. ⁵¹ *ibid* para 94. ⁵² *ibid* paras 97–100.

⁵³ UN Doc E/CN.4/1996/102 paras 27–28.

C41.P63 The same issues divided the delegates at the end of the third session.⁵⁴ In 1988, during the fourth session, ‘participants agreed that the key issue of the draft optional protocol was that of the age limit for participation on hostilities.’⁵⁵ The ‘vast majority of delegations expressed their support for a clearly designated limit of 18 years for participation’⁵⁶ in any form; the US, Korean, and Kuwaiti representatives, however, were not prepared to accept a limit of 18 years.⁵⁷

C41.P64 At the sixth session, the UN High Commissioner for Human Rights, the Special Representative of the Secretary General for Children and Armed Conflict, and a representative of the CRC Committee each expressed support for a limit of 18 years.⁵⁸ The Working Group thus had before it three options with respect to article 1:

- C41.P65 1. the suggestion in the Chairperson’s Perception paper that State Parties take all feasible measures to ensure that persons under 18 do not take a direct part in hostilities;⁵⁹
- C41.P66 2. a US proposal allowing for persons above 15 years of age to volunteer for armed service and for states to deposit a binding declaration upon ratification containing the age at which such persons could participate in armed conflict;⁶⁰ and
- C41.P67 3. a joint proposal by Canada and Norway, as amended by Sweden, that ‘State parties shall ensure that persons who have not attained the age of 18 years do not participate in hostilities as members of their armed forces’.⁶¹

C41.P68 Some delegations referred to their national legislation and practice which allowed for the recruitment of persons under 18, and appealed for greater flexibility to accommodate national interests.⁶² Ultimately, consensus remained elusive. As a compromise, the middle ground offered in the Chairperson’s Perception paper was adopted.⁶³

C41.P69 A number of delegates were dissatisfied with this outcome. Ethiopia is one example. The Ethiopian observer stated that the Ethiopian delegation had consistently supported a strong optional protocol that would raise the minimum age for children’s recruitment and participation in hostilities to 18, without any qualification as to direct or indirect participation. The Ethiopian delegate, however, also recognized that, in the absence of consensus, such a formulation was not attainable.⁶⁴

C. Recruitment of Children by State Armed Forces

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Article 2 of the CRC Committee’s original draft provided that:

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States Parties shall refrain from recruiting any person who has not attained the age of 18 years into their armed forces.⁶⁵

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At the first session of the Working Group it became apparent that issue of recruitment would be contentious. The United States, for example, proposed replacing the word ‘recruiting’ with the words ‘involuntary induction of’, while the Netherlands preferred ‘compulsory conscription’.⁶⁶ The Nigerian representative suggested the insertion of ‘with the exception of the recruitment of students into military schools’,⁶⁷ while the Australian representative proposed an alternative text altogether, which stated:

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⁵⁴ See UN Doc E/CN4/1997/96 para 81.

⁵⁵ UN Doc E/CN4/1998/102 para 19.

C41.N58

⁵⁶ *ibid* para 19. ⁵⁷ *ibid* para 69.

⁵⁸ UN Doc E/CN4/2000/74 paras 23, 25, and 29.

C41.N59

⁵⁹ UN Doc E/CN4/1998/102 Annex II.

C41.N60

⁶⁰ UN Doc E/CN4/2000/WG13/2/Add1 Annex, art 2.

⁶¹ UN Doc E/CN4/2000/74 para 57.

C41.N63

⁶² *ibid* para 58.

⁶³ *ibid* para 59.

⁶⁴ *ibid* para 135.

C41.N66

⁶⁵ CRC/C/16 Annex VII, art 2.

⁶⁶ <IB>E/CN4/1995/96 paras 89, 90.

⁶⁷ *ibid* para 96.

C.41.P73 States Parties shall ensure that every child who of his or her own free will chooses to enlist in their armed forces before reaching the age of 18, does so with the full and informed consent of his or her parents, legal guardians or other individuals legally responsible for him or her and to this end shall take all appropriate legislative and administrative measures.⁶⁸

C.41.P74 At its second session, the Working Group considered three options for article 2: these sought to deal with forced recruitment, measures aimed at ensuring that recruitment was genuinely voluntary, and the recruitment of persons under 18 to military schools.⁶⁹ Despite numerous proposals, consensus proved unattainable. Some delegates believed that ‘the minimum age for both compulsory and voluntary recruitment into the armed forces should be set at 18 years’ and ‘did not agree to earlier recruitment even with parental consent’. They added that ‘many volunteers would in fact have been coerced by factors such as the need for physical protection, their lack of food and/or other more subtle manipulations’.⁷⁰ Other delegations favoured a distinction between voluntary recruitment and compulsory recruitment,⁷¹ and argued that voluntary recruitment should be permissible as of age 16 on the basis that ‘young school leavers looked upon the armed forces as a valuable source of employment, training and continuing education’.⁷² The Pakistani delegate, for example, argued that voluntary recruitment mitigated high unemployment rates and any increase in the minimum age for voluntary recruitment would create social problems. He also highlighted that, in practice, recruits underwent significant training and were therefore unlikely in any case to participate in hostilities until after they were 18.⁷³ Other delegates countered that ‘voluntariness was not accepted as a reason for making exceptions to a minimum age of 18 years under ILO Convention 138’.⁷⁴

C.41.P75 Despite universal agreement that compulsory recruitment of persons under 18 should be prohibited, delegates remained divided over the appropriate age for voluntary recruitment.⁷⁵ They also failed to reach consensus over the precise status of children in military schools. Some delegations considered that if such children were to be considered part of the armed forces, then they should be subject to the same age limits as voluntary recruits. Alternatively, a clause could be added to the protocol to confirm that ‘students attending such establishments operated by or under the control of the armed forces were not members of the armed forces’.⁷⁶

C.41.P76 When these issues were discussed during the fourth session, these lingering concerns thwarted any possibility of consensus on the voluntary recruitment of children.⁷⁷ Article 2 of the draft optional protocol was therefore left in unresolved form.⁷⁸

C.41.P77 At the sixth and final session, a number of proposals were once again considered.⁷⁹ Delegates remained divided over such issues as the appropriateness of a ‘Straight 18’ formula; the inclusion of an opt in/opt out clause; or indeed whether to include any reference to the age for voluntary recruitment.⁸⁰ Although it was generally recognized that a threshold of 18 years was the best way to avoid children’s participation in hostilities,

C.41.N99

⁶⁸ *ibid* para 104. Other proposals also were made during the first session of the Working Group. See generally *ibid* paras 88–126. The proposals presented, however, illustrate the divergence of views among delegations.

⁶⁹ See UN Doc E/CN.4/1996/102 para 103. ⁷⁰ UN Doc E/CN.4/1997/96 para 26.

⁷¹ *ibid* para 28. ⁷² *ibid* para 31. ⁷³ *ibid* para 59. ⁷⁴ *ibid* para 32.

⁷⁵ *ibid* paras 87–99. ⁷⁶ *ibid* para 103.

⁷⁷ UN Doc E/CN.4/1998/102 paras 27–31, 71–74.

⁷⁸ *ibid* Annex I art 2. The proposal in the Chairman’s Perception paper differed in that it determined 17 to be the appropriate minimum age for voluntary recruitment (see *ibid* Annex II art 2).

⁷⁹ See UN Doc E/CN.4/2000/74 para 60. ⁸⁰ *ibid* para 61.

some delegates felt that an opt-out clause would allow flexibility regarding voluntary recruitment.⁸¹ Ultimately, consensus could not be achieved, so it was agreed to adopt a text which allowed for a gradual increase of the minimum age for voluntary recruitment and included safeguards to ensure that a child's decision to join armed forces was genuinely voluntary.⁸²

C41.P78

As with article 1, a number of stakeholders expressed dissatisfaction with the final text of article 3. The United Nations Children's Emergency Fund ('UNICEF') is one example.⁸³ The International Committee of the Red Cross ('ICRC') for its part lamented that the 'protection against forced recruitment was also considerably weakened by the provision which permitted voluntary recruitment below the age of 18 years'.⁸⁴ Italy also expressed its concern—debatable, to be sure, on the merits—that 'article 3 allowed States to recruit children as of the age of 15'. Other States, including Ethiopia, Uruguay, Switzerland, Belgium, the Russian Federation, and Portugal, expressed similar sentiments.⁸⁵ In contrast, the United States considered that article 3 dealt with the issue realistically and therefore effectively.⁸⁶

C41.S8

D. Recruitment and Use of Children by Armed Groups

C41.P79

The initial draft of the CRC Committee did not seek to regulate the use and recruitment of children by non-state actors. During the first session of the Working Group, however, this issue became the subject of extensive discussion which led to several proposals to extend the provisions of OPAC to such actors.⁸⁷ Among the motivations was to recognize the prevalence of non-international armed conflict and the implication of children in armed groups.⁸⁸

C41.P80

At the same time, many delegations remained cautious and sought to avoid equating armed groups with State Parties so as to avoid affording legal recognition to such groups.⁸⁹ On the one hand, it was argued that states could not realistically guarantee that armed groups would abide by the protocol, in particular, those groups fighting against the state.⁹⁰ On the other hand, it was accepted that states should be required to take all feasible measures to ensure that armed groups complied with the protocol. On this basis, the need to include a reference to non-governmental armed entities in the protocol was broadly acknowledged.⁹¹

C41.P81

After a number of proposals, the following wording was prepared at the end of the second session:

C41.P82

States Parties shall take all feasible measures including any necessary legislation to prevent the recruitment of persons under the age of 18 years [minors] subject to their jurisdiction by non-governmental armed groups [which are parties to] [involved in] an armed conflict.⁹²

C41.P83

Support for the inclusion of such a clause continued during the third session, where it was noted that 'non-governmental armed groups were susceptible to international pressure and reference was made as an example to an armed opposition group which ... declared

C41.N83

⁸¹ *ibid* para 62. ⁸² *ibid* para 63. ⁸³ *ibid* para 101. ⁸⁴ *ibid* para 105.

C41.N86

⁸⁵ See *ibid* para 135, 128, 119, 124, 141, and 148. ⁸⁶ *ibid* para 131.

C41.N88

⁸⁷ UN Doc E/CN.4/1995/96 paras 155–88. ⁸⁸ UN Doc E/CN.4/1996/102 para 31.

C41.N89

⁸⁹ *ibid*.

C41.N90

⁹⁰ In any event, under settled public international law states are responsible for the conduct of non-state actors over which they exercise effective control.

C41.N92

⁹¹ UN Doc E/CN.4/1996/102 para 32. ⁹² *ibid* para 124.

its willingness to abide by the recruitment standards in the Convention'.⁹³ The concern lingered, however, that 'implied recognition should not be given to non-governmental armed groups and that it would preferable to see the issue covered in the preamble to the draft optional protocol rather than in its operative part'.⁹⁴ Some delegates further highlighted the importance of realism regarding the measures which governments might be able to take in light of the fact that 'non-governmental armed groups were already beyond the pale of the law'.⁹⁵ These concerns resurfaced in the fourth session.⁹⁶

C41.P84 At the sixth session, the Working Group was presented with three options,⁹⁷ each of which sought to prohibit the recruitment of persons under 18 by non-governmental armed groups whilst refraining from conferring legal status upon them. Some delegates contended that since non-state parties could not be bound by an international treaty, the matter would be most appropriately dealt with at the domestic level. Others argued that OPAC should address non-state actors directly and provide for the criminalization of actions undertaken in violation thereof.⁹⁸

C41.S9 E. Reservations

C41.P85 Draft article 4 tersely stated that 'no reservation is admissible to the present Protocol'.⁹⁹ Throughout the drafting process a number of alternative proposals were made,¹⁰⁰ including article 5 of the Chairman's Perception paper which provided that 'a reservation incompatible with the object and purpose of the present Protocol shall not be permitted'.¹⁰¹ This language, to be sure, does no more than repeat settled customary international law and international treaty law. At the sixth session of the Working Group, the Chair proposed an article to the effect that 'no reservation to the present Protocol shall be permitted'.¹⁰² A number of delegations opposed this proposal. In response, the Chairperson suggested the deletion of this article, a position which the Working Group ultimately accepted.¹⁰³ As a result, the text of OPAC neither allows for nor prohibits reservations. The issue is therefore governed by the Vienna Convention on the Law of Treaties ('VCLT'),¹⁰⁴ which provides states with a general power to enter reservations to any treaty so long as that reservation is not incompatible with the treaty's object and purpose.

C41.P86 A very small number of reservations have been stated following OPAC's entry into force. Oman, for example, made reservations to OPAC upon accession thereto. Oman's reservations extended to OPAC its antecedent reservations to the Convention, most notably:

C41.P87 A reservation is entered to all the provisions ... that do not accord with Islamic law or the legislation in force in the Sultanate.

C41.N99

⁹³ UN Doc E/CN4/1997/96 para 35. ⁹⁴ *ibid* para 37. ⁹⁵ *ibid* para 37.

⁹⁶ UN Doc E/CN4/1998/104 paras 32, 33. ⁹⁷ UN Doc E/CN4/2000/74 para 35.

⁹⁸ *ibid* para 37. ⁹⁹ UN Doc CRC/C/16 Annex VII art 4; E/CN4/1995/96 para 129.

¹⁰⁰ See: UN Doc E/CN4/1997/96 Annex art 4; E/CN4/1998/102 paras 78–83.

¹⁰¹ UN Doc E/CN4/1998/102 Annex II art 5. ¹⁰² UN Doc E/CN4/2000/74 para 76.

¹⁰³ *ibid* paras 77–79.

¹⁰⁴ VCLT (Opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Art 19 states:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) or (b), the reservation is incompatible with the object and purpose of the treaty.

C41.P88 The governments of Finland, Germany, Hungary, Norway, Poland, Spain, Sweden, and the United Kingdom each lodged objections¹⁰⁵ to the Omani reservations. These objections are broadly based on uncertainty regarding the extent to which the Omani government considered itself bound by the provisions of OPAC, in particular those which it considers not to accord with Islamic law. The Finnish objection reads as follows:

C41.P89 [A] reservation which consists of a general reference to religious or other national law without specifying its contents does not clearly define to other parties to the Convention the extent to which the reserving State commits itself to the Convention and creates serious doubts as to the commitment of the receiving State to fulfil its obligations under the Convention. Such reservations are, furthermore, subject to the general principle of treaty interpretation according to which a party may not invoke the provisions of its domestic law as justification for a failure to perform its treaty obligations.

C41.P90 Given the comments of certain CRC Committee members¹⁰⁶ and states¹⁰⁷ during drafting, it might be expected that the Committee would weigh in on the matter. The Committee's response to Oman's reservations has been to express concern but not to chastise. The Committee noted in its initial Concluding Observations that:

C41.P91 The Committee regrets the broad nature of the State party's reservation and that no progress has been made in withdrawing, or limiting, its extent since the consideration of the State party's second periodic report in 2006. The Committee reiterates its previous recommendation that the State party review its reservations with a view to withdrawing them, or limiting their extent ... The Committee further recommends that the State party seek inspiration from other countries which have either withdrawn similar reservations or not entered any reservations to the Convention.¹⁰⁸

C41.P92 Turkey entered a self-described declaration that it would only implement the provisions of OPAC to States Parties which it recognizes and with which it has diplomatic relations, and that it would interpret article 3(5) in accordance with its own constitution. Cyprus objected to the first of these declarations (which Cyprus called a reservation) on the basis that it:

C41.P93 creates uncertainty as to the States Parties in respect of which Turkey is undertaking the obligations in the Protocol and raises doubt as to the commitment of Turkey to the object and purpose of the Convention ... and ... Protocol.¹⁰⁹

C41.P94 In response, the CRC Committee stated that it:

C41.P95 regrets the restrictive nature of the State party's reservation to the Convention ... and that no progress has been made in withdrawing, or limiting, its extent ... [and reiterates] ... its previous recommendation that the State party review its reservation with a view to withdrawing it.¹¹⁰

C41.N106 ¹⁰⁵ Available at <http://treaties.un.org/>. ¹⁰⁶ UN Doc E/CN4/1996/102 para 44.

C41.N107 ¹⁰⁷ See eg the comments of Australia and Portugal: UN Doc E/CN4/1998/102 paras 55, 44.

C41.N108 ¹⁰⁸ CO Oman, CRC/C/OPAC/OMN/CO/1 paras 5–6.

C41.N109 ¹⁰⁹ Available at <http://treaties.un.org/>. Israel has objected to a declaration, putatively 'of a political nature' in respect of the State of Israel, made by Syria upon Syria's accession.

C41.N110 ¹¹⁰ CO Turkey, CRC/C/OPAC/TUR/CO/1 paras 5–6.

C41.S10

III. Analysis of Specific Articles

C41.S11

A. Article 1: Participation in Hostilities

C41.S12

Article 1

C41.P96

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.

C41.S13

1. The Obligation to Take All Feasible Measures

C41.P97

When it comes to state armed forces, article 1 *raises* the minimum age for *direct participation in hostilities* from 15, as set out in Convention paragraph 38(2), to 18. At a general level, article 1 aligns with article 22(2) of the African Charter¹¹¹ and article 3 of ILO Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.¹¹² To be clear, pursuant to article 1, states are under an obligation to take ‘all feasible measures’ to ensure that members of their armed forces under 18 do not take a ‘direct part’ in hostilities. This arguably falls short of the standard found in the African Charter (‘all necessary measures’). The content of the obligation to take ‘all feasible measures’ is comprehensively discussed in the commentary on article 38. Under international humanitarian law, ‘feasible’ connotes that which is practicable, to wit, that which is capable of being accomplished or carried out.

C41.P98

The CRC Committee’s work sheds some light on the types of practical measures expected of states to ensure compliance with article 1. As a minimum, appropriate legislation is required of states to comply with the object and purpose of OPAC which includes criminalization of the recruitment of children under 18 years by the armed forces, non-state armed groups, and private military and security companies.¹¹³ Measures must also be taken to ensure ‘coordination among the various ministries, agencies and committees’ responsible for implementation of OPAC;¹¹⁴ education and training must be provided to all relevant professional groups including members of the armed forces and international peacekeeping forces and ‘all military codes, manuals and other military directives’ must be in accordance with OPAC.¹¹⁵ The Committee has also stressed the importance of ‘compulsory, consistent and systematic verification of the age of individual recruits’ by armed forces to ‘effectively prevent the recruitment of children into the armed forces’.¹¹⁶

C41.N15

¹¹¹ ACRWC art 22(2) provides that ‘States parties ... shall take all necessary measures to ensure that no child [defined as every human being below the age of 18] shall take a direct part in hostilities and refrain in particular from recruiting any child’.

¹¹² (Adopted on 17 June 1999, entered into force 19 November 2000) ILO 87th sess, (‘Worst Forms of Child Labour Convention’). Art 3(a) thereof includes within the scope of the ‘worst forms of child labour’ the following: ‘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’. The tenth paragraph of the Preamble to OPAC welcomes ‘the unanimous adoption in June 1999 of [the Worst Forms of Child Labour Convention] which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict’.

¹¹³ See eg: CRC CO OPAC Guinea, CRC/C/OPAC/GIN/CO/1 para 22(a); United States of America, CRC/C/OPAC/USA/CO/3-4 para 27(a); Tajikistan, CRC/C/OPAC/TJK/CO/1 paras 7, 21(a); Vanuatu, CRC/C/OPAC/VUT/CO/1 para 12; Malawi, CRC/C/OPAC/MWI/CO/1 para 19.

¹¹⁴ See eg: CRC CO OPAC Tajikistan, CRC/C/OPAC/TJK/CO/1 para 9; Malawi, CRC/C/OPAC/MWI/CO/1 para 7.

¹¹⁵ CRC CO OPAC Tajikistan, CRC/C/OPAC/TJK/CO/1 para 21(c).

¹¹⁶ CRC CO OPAC Malawi, CRC/C/OPAC/MWI/CO/1 para 15. See also: Guinea CRC/C/OPAC/GIN/CO/1 para 18 (stressing that where a person’s age is in doubt, that person should not be recruited).

In this respect the creation of an effective birth registration process as required under article 7 of the Convention is considered a vital safeguard against recruitment in violation of OPAC.¹¹⁷

C41.S14

2. *Direct Part in Hostilities*

C41.P99

The prohibition on the participation of persons under 18 only extends to ‘direct’ participation in hostilities. The meaning of ‘direct’ is also exhaustively discussed in the commentary on article 38. This qualifier imbricates some causality between the activity engaged in and the harm to the enemy.¹¹⁸ Whether to qualify the obligation through directness constituted a particularly contentious topic during the drafting of OPAC. A number of delegations urged an unqualified prohibition. At the second session of the Working Group, some delegations drew on field experience to argue that in practice it is difficult to clearly differentiate between direct and indirect participation, noting in particular that ‘what might involve participation of a merely indirect nature might later by will or as a matter of necessity evolve into direct participation’.¹¹⁹ The Working Group’s attention was also drawn to Additional Protocol 2 to the Geneva Conventions of 1949 (‘AP2’), which imposes an absolute prohibition on children’s participation in proscribed non-international armed conflict without distinguishing between direct and indirect participation.¹²⁰ Ultimately, the Working Group failed to reach a consensus.

C41.P100

Notwithstanding some support for the prohibition to extend to ‘armed conflicts’ (based on the ambiguity of the term ‘hostilities’), the prohibition on participation applies only to hostilities.¹²¹ While consistent with the terminology used in Convention paragraph 38(2), this text departs from the terminology of the Worst Forms of Child Labour Convention.

C41.P101

In sum, then, textually article 1 permits *indirect* participation of children in hostilities through deployment in national armed forces. Moreover, the prohibition on direct participation under article 1 applies only to members of a state’s armed forces and *does not extend to non-state armed forces*, which are subject to an absolute prohibition under article 4. However, the CRC Committee tends to bypass the terminology of direct or indirect and, hence, prefers a simple ban on the involvement or participation of children in armed conflict. This is illustrated in its concluding observations for the United States. Upon ratification of OPAC the United States entered an ‘understanding’ that ‘the phrase “direct part in hostilities”’:

C41.N117

¹¹⁷ See eg: CRC CO OPAC China CRC/C/OPAC/CHN/CO/1 para 19; Cambodia CRC/C/OPAC/KHM/CO/1 para 15 (recommending efforts to ensure the birth registration of all children, including through mobile units, as a measure to prevent the recruitment of children, including children living in remote areas and villages and children in street situations); Brazil CRC/C/OPAC/BRA/CO/1 para 17 (urging ‘the State party to effectively prevent the recruitment of children into the armed forces by establishing and systematically implementing safeguards to verify the age of individual recruits on the basis of objective elements, such as birth certificates, school diplomas and, in the absence of documents, a combination of elements, including a medical examination, to determine the age of the child’).

C41.N118

¹¹⁸ Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 516, para 1679. See also comments from the ICRC during the drafting of Convention article 38, noting that ‘it can be reasonably inferred from the present article 20 of the draft convention [ultimately, article 38] that indirect participation for example gathering and transmitting military information, transporting weapons munitions and other supplies is not affected by the provision’: UN Doc E/CN4/1987/WG1/WP4, 2.

C41.N119

¹¹⁹ UN Doc E/CN4/1996/102 para 28. See also, UN Doc E/CN4/1997/96 para 25.

C41.N120

¹²⁰ UN Doc E/CN4/1996/102 para 29. ¹²¹ UN Doc E/CN4/1996/102 para 30.

C.41.P102 (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and

C.41.P104 (ii) does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment...¹²²

C.41.P105 However, the CRC Committee has shown no tolerance for this approach and recommended that the United States ‘review its restrictive understanding of OPAC, in particular, the concept of “direct part in hostilities” and “minimum age of voluntary recruitment” in order to ensure that no child under the age of 18 years is exposed to a situation of armed conflict or any other activities in the context of armed conflict’.¹²³

B. Article 2: Compulsory Recruitment

C.41.S15

Article 2

C.41.S16

C.41.P106 *States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.*

C.41.P107 Article 2 raises the minimum age for the compulsory recruitment of children into state armed forces from 15, under Convention article 38(3), Additional Protocol 1 to the Geneva Conventions of 1949 (‘AP1’) article 77(2), and AP2 article 4(3)(c), respectively, to 18. As discussed in the commentary on Convention article 38, compulsory recruitment includes forcible recruitment (by abduction or threats) or legal/statutory recruitment (the draft). Brett contends that whilst article 2 is to be welcomed, its value is not to be overstated since it largely accords with existing state practice.¹²⁴ Moreover, the focus on precluding the compulsory recruitment by draft of persons under the age of 18 may divert the conversation from restricting the draft for persons over the age of 18. In other words, the focus on children leaves untouched the state’s extant ability to draft adults. Similarly, the focus on demobilizing, disarming, and reintegrating child soldiers post-conflict may redirect attention from addressing the effective demobilization, disarmament, and reintegration of all soldiers, including very young adults.

C.41.P108 Unlike article 1 which imposes an obligation on states to take ‘all feasible measures’ the obligation under article 2 is to ‘ensure’ that no child is subject to compulsory recruitment by a state’s armed forces. This is an onerous obligation which provides no discretion for states to argue, for example, that the security of the state requires the compulsory recruitment of children, or that the state lacks the resources necessary to prohibit compulsory recruitment. Indeed, the CRC Committee has repeatedly stressed the need for states to allocate the ‘necessary human, technical and financial resources to effectively ensure the coordination, monitoring and evaluation of the actions carried out to implement the provisions of the [OPAC] in different sectors and at all levels’.¹²⁵

C.41.P109 In terms of the specific measures required of states to ensure no child is compulsorily recruited by a state’s armed forces, the recommendations of the Committee outlined above concerning the prohibition on direct participation are relevant. In brief, a state must adopt legislation that prohibits compulsory recruitment, raise awareness, and

C.41.N123

¹²² See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=en accessed.

¹²³ CO United States of America, CRC/C/OPAC/USA/CO/3-4 para 9. ¹²⁴ Brett (n 31)125.

¹²⁵ See eg: CO Guinea, CRC/C/OPAC/GIN/CO/1 [8(b)]; CO Vanuatu, CRC//C/OPAC/VUT/CO/1 para 8; Malawi, CRC/C/OPAC/MWI/CO/1 para 9; Nepal, CRC/C/OPAC/NPL/CO/1 para 10.

educate all relevant personnel including children about this prohibition, ensure coordination among those entities responsible for the implementation of OPAC, and develop an effective birth registration process to ensure the age of a person can be verified accurately.

C.41.S17

C. Article 3: Armed Forces, Voluntary Recruitment and Military Schools

C.41.S18

Article 3

C.41.P111

(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.*

C.41.P112

(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.*

C.41.P113

(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:*

C.41.P114

(a) *Such recruitment is genuinely voluntary;*

C.41.P115

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

C.41.P116

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

C.41.P117

(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 State Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.*

C.41.P118

(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.*

C.41.S19

D. Paragraph 3(1): The Minimum Age for Voluntary Recruitment

C.41.P119

Article 3 is a unique—albeit at times confusing—paragraph which obliges states to increase the minimum age of voluntary recruitment from 15, the floor established by paragraph 38(3) of the Convention, without specifying precisely what this increased age must be.

C.41.P120

Whether children are capable of ‘volunteering’ remains an unresolved question—and it may simply be unresolvable as a generic matter.¹²⁶ Many human rights advocates and state delegates paradoxically advocate for children’s rights of expression, association, and representation but also deny that children have the capacity or maturity to volunteer to join armed forces. This belies a deeper question, to wit, from which evidentiary sources do we know what we know about child volunteerism? Certain disciplines, which have thus far not been given sustained attention by international law and policy makers, suggest that children may exercise greater agency, autonomy, reflection, and decision-making, even in situations of armed conflict, than is assumed to be the case.¹²⁷ Ethnographic and anthropological accounts constitute an informative example in this regard.

C.41.N126

¹²⁶ cf discussion earlier in the commentary to CRC art 38.

C.41.N127

¹²⁷ Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP 2012) 50–60. See also David M Rosen, *Child Soldiers in the Western Imagination: From Patriots to Victims* (Rutgers University Press 2015)

C₄₁.P₁₂₁ Article 3(1) is intended to allow for a gradual increase of the minimum age for voluntary recruitment and the use of ‘shall’ indicates that the obligation is absolute.¹²⁸ No party appears to have suggested during drafting that the minimum age should be any lower than 16.¹²⁹ With this in mind, it appears that paragraph 3(1) has obliquely increased the minimum age for voluntary recruitment under international law to 16.¹³⁰ This interpretation assumes that the minimum increment by which the minimum age may be increased is one year. This assumption is buttressed by reference to the French version of article 3(1).¹³¹ In any event, turning to state practice, no state has made a declaration to recruit voluntarily a 15 year-old.

C₄₁.P₁₂₂ The CRC Committee could potentially draw on this collective failure of states to justify a minimum age of less than 16 as evidence that 16 is now the minimum threshold for voluntary recruitment. However, its unequivocal preference is to focus on upping that minimum age to 18 irrespective of the text of article 2. Again, the treatment of the United States provides an illustration of the Committee’s obstinacy on this issue. The United States entered a declaration upon ratification of OPAC that ‘the minimum age at which the United States permits voluntary recruitment into the Armed Forces of the United States is 17 years of age’.¹³² Such a declaration is entirely consistent with OPAC. However, the Committee in its observations for the United States recommended that ‘the State party review its restrictive understanding of the Optional Protocol in particular the concept of . . . “minimum age of voluntary recruitment” in order to ensure that no child under the age of 18 years is exposed to a situation of armed conflict or any other activities in the context of armed conflict.’¹³³

C₄₁.S₂₀ E. Paragraphs 3(2), (3), and (4): The Minimum Age Declaration and Volunteerism

C₄₁.S₂₁ 1. *The Minimum Age Declaration*

C₄₁.P₁₂₃ Paragraph 3(2) contains both procedural and substantive elements. With respect to the former, it requires states to deposit a binding declaration upon ratification setting out the minimum age at which voluntary recruitment is permitted. In line with the underlying aim of article 3 to increase the minimum age for voluntary recruitment, paragraph 3(4) allows states to increase the minimum age at any stage and declare accordingly. It appears that a state can increase but not decrease this minimum age.

C₄₁.N₁₂₉

¹²⁸ Recall also CRC art 38 and its priority principle, that is, that when recruiting children between 15 and 18 years of age, states should endeavour to give priority to the eldest.

¹²⁹ eg in the fourth session the representatives of the United Kingdom, Pakistan, and Islamic Republic of Iran all expressed their preference for the 16 years option: UN Doc E/CN.4/1998/102 para 73.

¹³⁰ Hanson (n 7) 53. See also Matthew Happold, ‘The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict’ (2000) 3 Yearbook of International Humanitarian Law 226, 238.

¹³¹ Hanson (n 7) 54, observes: ‘[w]hereas the English version only obliges States to “raise the minimum age”, the French text of Art. 3(1) [OPAC] is more explicit: “Les États Parties relèvent *en années* l’âge minimum de l’engagement volontaire dans leurs forces armées nationales par rapport à celui fixé au paragraphe 3 de l’article 38 de la Convention’.

¹³² See: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&cclang=_en.

¹³³ CRC CO OPAC United States of America, CRC/C/OPAC/USA/CO/3-4 para 9.

C.41.P124

Among states that have filed article 3(2) declarations, approximately three-quarters list minimum ages of voluntary recruitment of 18 or older (a large majority within this group declare 18).¹³⁴ A generalized practice, therefore, is emerging (at least if the metric is to undertake a head-count of states). Chile (in 2008), Paraguay (in 2006), Poland (in 2013), and Luxembourg (in 2013) adopted the minimum age of 18 for voluntary recruitment, *thereby amending their earlier declarations*. Examples of states who, as of November 2018 declare ages lower than 18 include: 17-and-a-half years (Malaysia); 17 years (Australia, Austria, Azerbaijan, Cabo Verde, China, Cuba, Cyprus, France, Germany, Guinea-Bissau, Ireland (with a further exception to 16 in the case of apprentices), Israel, Italy, Netherlands (as military personnel on probation), New Zealand, Saudi Arabia, and the United States); the ‘1st January of the year they become 17 years old’ (Brazil, for military service); 16-and-a-half years (Singapore); and 16 years (Bangladesh, Belize, Canada, Egypt, El Salvador, Guyana,¹³⁵ India, Pakistan, and the United Kingdom). It is noteworthy that certain of these states have large armed forces. Some states also mention military schools in their declarations and note that OPAC age limitations do not apply to them (discussed below).

C.41.P125

Paragraph 3(2) also requires a state to provide a description of all the procedural safeguards it has adopted to ensure that recruitment is genuinely voluntary and neither forced nor coerced. Although states will enjoy a margin of discretion with respect the safeguards they adopt, as a minimum they must be guided by the safeguards listed in paragraph 3(3).

C.41.S22

2. *The Obligation to Maintain Safeguards*

C.41.P126

Although OPAC does allow for voluntary recruitment of persons under 18, paragraph 3(3) requires states to maintain safeguards to ensure that:

C.41.P127

- recruitment is genuinely voluntary;

C.41.P128

- recruitment is carried out with the informed consent of the child’s parents or legal guardians;

C.41.P129

- the child is fully informed of the duties involved in such service; and

C.41.P130

- the child provides reliable proof of age prior to acceptance into national military service.

C.41.S23

(a) **That Recruitment Is Genuinely Voluntary**

C.41.P131

As outlined in the commentary on article 38, the very concept of ‘voluntary recruitment’ of children remains contentious. This was certainly the case during the drafting of OPAC. In fact, many speakers suggested that the very notion of voluntary recruitment is an oxymoron and was not ‘a free choice but the result of indoctrination, incitement to vengeance, poverty, destitution, severe pressure, the prospect of physical protection or simple immaturity’.¹³⁶ On the other hand, an alternative conception exists in which children may be constructed as social navigators making the best out of a bad situation; or as electing to enter armed forces for deliberate and motivated occupational, patriotic,

C.41.N134

¹³⁴ See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en#EndDec. Some State Parties do not have armed forces and, hence, have nothing to declare (although they may make declarations regarding national police, customs, gendarmerie, etc). Some states, to be clear, set higher ages. Afghanistan, for example, permits voluntary recruitment of persons aged 22 to 28; several states list the age of 19.

C.41.N135

¹³⁵ On 18 November 2010 Guyana raised its declared minimum age to 16 from the previous benchmark of 14.

C.41.N136

¹³⁶ UN Doc E/CN4/1998/102 para 28. See also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Brill 1999) 660.

social, economic, educational, and career interests.¹³⁷ Children themselves may lie about their age in order to join fighting forces: such was reportedly the case in Libya among children who associated with armed groups challenging Muammar Qaddafi's dictatorship.¹³⁸ Finally, for children living in abusive, exploitative, or poverty-stricken families, volunteering for military service may be a logical and tangible path to independence, emancipation, freedom, and starting a new life. In such contexts they may make informed choices but not necessarily in circumstances of their own choosing.

C.41.P132 The Convention itself, by virtue of articles 5 and 12, actually places great emphasis on the evolving capacities and agency of children. Moreover, the focus on volunteerism as relevant only to children obscures the realities that many adults who enter armed forces—often 18 to 25 year olds—do so in response to the strikingly similar social and economic contexts that lead children to 'volunteer' into armed groups. Unlike children, however, the decision-making of adults is not subject to the same protectionist review. The result is that so much hay is made out of a simple birthday. Thus, an excessive focus on the artificiality of chronology may leave unaddressed the thorny reality that agency and development operates along a continuum rather than a bright-line.

C.41.P133 In any event, OPAC accepts the idea the children can volunteer to be a member of an armed force, *even though the CRC Committee refuses to do so*, and article 3(3)(a) insists that states must adopt measures to ensure that any recruitment of a child is in fact 'voluntary'. Not surprisingly the Committee's work offers no insight into what types of measures might be appropriate because for the Committee the idea of 'voluntary' recruitment of a child is an oxymoron. Ultimately, states will again enjoy a level of discretion in identifying the measures which they determine to be appropriate for this purpose. The other measures outlined under paragraph 3 also offer some guidance, especially the requirement that a child be fully informed of the duties associated with being a member of a state's armed forces. It must also be the case that a state must bear the onus of demonstrating that the recruitment of a child is genuinely voluntary. This will require evidence that a child's decision was not the result of coercion or a motivation to enlist because of a failure on the part of the state to take the measures necessary to secure, for example, the child's right to an adequate standard of living or right to an education.

C.41.S24 (b) **The Informed Consent of Parents**

C.41.P134 The requirement that states must obtain parental or guardian consent assumes that a child's parents are not only alive but are living with or in regular contact with their child—a reality that is often not the experience of children living in developing countries and/or conflict zones. It is also a puzzling requirement within a broader Convention framework that seeks to protect children's rights vis-à-vis society, which includes their parents. Indeed, if a child is capable of fully understanding the duties associated with armed service and sufficiently mature to genuinely volunteer his or her services, there remains a question as why parental consent would also be required. As the commentary on articles 3 and 5 of the Convention in this collection demonstrates, the influence of parents over a child will diminish as the child's capacities evolve. Moreover, these provisions anticipate

C.41.N138

¹³⁷ See Drumbl (n 127); Hanson (n 7) 40 ('[p]revailing interpretations of international human rights law [within the context of armed conflict] assume that persons younger than 18 are unable, by definition, to exercise agency. This view is confronted with results from empirical studies in anthropology that draw attention to the agency of young people during armed conflict').

¹³⁸ Drumbl (n 127) 31–32.

the potential for a child of sufficient maturity to be capable of determining his or her best interests independently of parental or other adult influences. In such circumstances, a requirement to obtain parental consent to join an armed force seems not just superfluous but unjustifiably paternalistic. Worse still, if a child lacked the maturity to genuinely understand the consequences of volunteering for a state's armed forces, relying on the informed consent of his or her parents would be deeply problematic. On this note, it is important not to understate the complexities of parental consent. Parents and local officials may push their children to join armed forces. Some elders in Sierra Leone, for example, encouraged children to join the Civil Defence Force so as to defend communities (and the government) from Revolutionary United Front rebel attacks; other children, however, came forth proudly on their own to fight the rebels and protect the villages.

C4t.P135

Notwithstanding the problematic nature of parental consent, states are still required to meet this 'safeguard' under article 3(3) of OPAC. As a minimum, it would require a state to fully inform parents of the duties and risks associated with membership of an armed force. A state would also be required to make an assessment as to whether the parents views were motivated by a concern for the best interests of their child (as required under article 18 of the Convention) or alternative interests. A question arises as to what happens when a child of sufficient maturity provides his or her genuine consent to enlistment but this is opposed by his or her parents. The text of article 3(3) of OPAC suggests that each of the safeguards must be satisfied independently. On such a reading, the failure to obtain parental consent would outweigh the views of the child and preclude the voluntary enlistment of the child. However, this is a position that rests uneasily with the interpretation of articles 3, 5, and 12 of the Convention and the need to respect and recognize the evolving autonomy of a child even where his or her views conflict with those of his or parents.

C4t.S25

(c) Fully Informing a Child

C4t.P136

States are required to 'fully inform' a child of the duties involved in military service. The CRC Committee has not addressed this requirement in any great detail and its comments tend to be rather general. For example, in its observations for Brazil it expressed its concern that 'specific information on the duties and obligations involved in military service' was not made available to volunteers and recommended that the state '[m]ake information available to the volunteers and to their parents or legal guardians in order to ensure that the recruitment of children into the armed forces is genuinely voluntary and made on the basis of an informed decision'.¹³⁹ Although this direction grants states a level of discretion, it would require the provision of both oral and written information, communicated in a language which the child understands. The requirement that the information must enable a child to make an informed decision also requires that an *accurate and detailed representation* of the duties and responsibilities involved in being a member of the armed forces is provided to a child. There can be no sugar coating as to the nature of life in the armed forces and a child would need to be made fully aware of not only the types of work they are likely to perform but also the risks inherent in being a member of an armed force including the reality that they would be a legitimate military target in the event of a conflict.

C4t.N139

¹³⁹ CO Brazil, CRC//C/OPAC/BRA/CO/1 para 18(c), 19(c).

C₄₁.S₂₆ (d) **Reliable Proof of Age**

C₄₁.P₁₃₇ The requirement that a child must provide reliable proof of his or her age presumes that the state in question has an effective birth registration system as required under article 7 of the Convention. The failure to have such a system remains a constant concern for the CRC Committee. For example, in its report for Malawi is expressed its concern ‘that in practice age verification of army recruits is not reliable owing to the ... lack of an effective birth registration system’ and warned that this creates the risk of recruitment of children under 18 years of age ‘owing to the discretion of the recruiting officer, missing birth certificates or the falsification of birth certificates’.¹⁴⁰ It therefore recommended that ‘to ensure the compulsory, consistent and systematic verification of the age of individual recruits by recruitment officers to effectively prevent the recruitment of children into the armed forces ... the State party expedite birth registration processes to ensure the easy identification and protection of children at all times.’¹⁴¹ The Committee has also stressed the need to ‘ensure birth registration of all children, including through mobile units, as a measure to prevent the recruitment of children including children living in remote areas and villages and children in street situations’.¹⁴²

C₄₁.S₂₇ (e) **Additional Measures**

C₄₁.P₁₃₈ The safeguards listed in paragraph 3(3) are the minimal measures which states are required to take. Additional measures might include a probationary period during which a child could decide whether to commit to long-term military service. Another measure might take the form of a general provision allowing a person under 18 to leave the armed forces at any time without any impediment to his or her discharge. These options, however, need to be weighed against the impressions they generate that children, in particular older adolescents, are incapable, immature, and irresponsible. Finally, the use of inappropriate incentives to induce children to volunteer for the armed forces should be prevented. An inappropriate incentive might be defined as a promise to provide a child with something which the state is already obligated to provide under the terms of the Convention, but which in the circumstances would only be granted when the child volunteers for the armed forces.

C₄₁.S₂₈ **F. Paragraph 3(5): Military Schools**

C₄₁.P₁₃₉ During drafting, several states opined that OPAC should not limit the participation of children in military schools. Paragraph 3(5) reflects this concern. It provides that the obligation to raise the minimum age of voluntary recruitment under paragraph 3(1) does not apply to schools operated by or under the control of the armed forces. Such schools may include children as of the age of 15. This exemption is not absolute, however, and applies only to military schools which are operated in accordance with Convention articles 28 and 29. These articles require that such schools be guided by the principle of equal opportunity for all children and that discipline shall be administered in a manner consistent with the child’s dignity. Moreover, the aim of education in these schools must promote the development of a child’s respect for: human rights; the principles of the UN Charter;

C₄₁.N_{14a}

¹⁴⁰ CO Malawi, CRC//C/OPAC/MWI/CO/1 para 14. See also: CO Nepal, CRC/ C/OPAC/NPL/CO/1 para 15–16; China, CRC/C/OPAC/CHN/CO/1 para 19; Guinea, CRC/C/OPAC/GIN/CO/1 para 18.

¹⁴¹ CO Malawi, CRC//C/OPAC/MWI/CO/1 para 15.

¹⁴² CO Cambodia, CRC/C/OPAC/KHM/CO/1 para 15.

and the preparation of the child to lead a responsible life in a free society in the spirit of understanding peace, tolerance, equality of sexes, and friendship among all peoples.

C.41.P140

During drafting, the ICRC delegate warned of the potential for paragraph 3(5) to be relied upon by states to circumvent their obligations on recruitment by enrolling children of any age in military schools.¹⁴³ The CRC Committee has emphasized that education provided in military schools must be in full compliance with OPAC,¹⁴⁴ a requirement that extends to limiting the military training given to students and ensuring that all students retain civilian status.¹⁴⁵ Nonetheless, it may be that individuals below the age of 18 who are enrolled in military schools—cadets, in other words—may be deemed to be members of the armed forces and, therefore, perceived to be legitimate military targets under international humanitarian law. In order to avoid this outcome, states would be required to maintain a distinction between students in military schools, who are not members of the armed forces, and persons under 18 who volunteer for military service in accordance with article 3, who are members of the armed forces.

C.41.P141

The Committee has indicated its preference that military schools be supervised by ministries of education rather than ministries of defence.¹⁴⁶ It has also recommended that states ‘ensure a clear prohibition of training on the use of firearms in military schools’;¹⁴⁷ that ‘children attending military schools have adequate access to independent complaints and investigations and are free to leave such schools at any point in time’;¹⁴⁸ that enrolment of children in military schools is restricted to children ‘above 15 years or older, in line with the minimum age of enrolment [in the armed forces]’;¹⁴⁹ and that states ‘establish a comprehensive registration system of all pupils enrolled in military schools which collects data disaggregated by sex, age, socio-economic background and geographical location’.¹⁵⁰

C.41.N143

¹⁴³ UN Doc E/CN4/2000/74 para 107.

C.41.N144

¹⁴⁴ See eg: CO Guinea, CRC/C/OPAC/GIN/CO/1 para 20; CO Egypt, CRC/C/OPAC/EGY/CO/1 para 20(a); CO United States of America, CRC/C/OPAC/USA/CO/3-4 para 13; CO Bangladesh, CRC/C/OPAC/BGD/CO/1 paras 17–18; CO Czech Republic, CRC/C/OPAC/CZE/CO/1 paras 14–15; CO Italy, CRC/C/OPAC/ITA/CO/1 paras 15–16; CO Kyrgyzstan, CRC/C/OPAC/KGZ/CO/1 para 14; CO Sri Lanka, CRC/C/OPAC/LKA/CO/1 para 27; CO Mexico, CRC/C/OPAC/MEX/CO/1 para 18; and CO Azerbaijan, CRC/C/OPAC/AZE/CO/1 paras 15–16.

C.41.N145

¹⁴⁵ See eg CO Brazil CRC/C/OPAC/BRA/CO/1 para 21(a) (recommending that the USA ‘[e]nsure that children who are enrolled in the reservist training course or in preparatory military schools are considered as civilians until they turn 18, are exempt from receiving military training, in particular on the use of firearms, and are not subject to military discipline or punishment’).

C.41.N146

¹⁴⁶ See UN Doc E/CN4/1997/96 para 45. See eg: CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 17(a); CO Chile, CRC/C/OPAC/CHL/CO/1 para 11; CO United States of America, CRC/C/OPAC/USA/CO/1 para 20; CO Argentina, CRC/C/OPAC/ARG/CO/1 paras 10–11; and CO Mexico, CRC/C/OPAC/MEX/CO/1 para 18.

C.41.N147

¹⁴⁷ See eg: Brazil, CRC/C/OPAC/BRA/CO/1 para 21(a); CO Egypt, CRC/C/OPAC/EGY/CO/1 para 20(f).

C.41.N148

¹⁴⁸ See eg: Brazil, CRC/C/OPAC/BRA/CO/1 para 21(c); CO Egypt, CRC/C/OPAC/EGY/CO/1 para 20(e).

C.41.N149

¹⁴⁹ CO Egypt, CRC/C/OPAC/EGY/CO/1 para 20(a). Caution must be exercised here because increasing the minimum age for enrolment in military schools to 18 might impact the ability of children aged 15 to 17 to continue with their schooling, in that certain children may lack the financial resources or family support to further their education other than in military schools.

C.41.N150

¹⁵⁰ CO Egypt, CRC/C/OPAC/EGY/CO/1 para 20(b).

C.41.S29 **G. Article 4: Recruitment by Armed Groups**

C.41.S30

Article 4

- C.41.P142 (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.*
- C.41.P143 (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.*

C.41.S31

1. Overview

C.41.P145 Article 4 of OPAC addresses recruitment by non-state armed groups.¹⁵¹ As outlined in the drafting history, some delegations were reluctant to include such a provision for fear that it would be instrumentalized by non-state armed groups to elevate their legal status. These concerns were ultimately overshadowed by a perceived need for OPAC to acknowledge in its operative part the significant role played by non-state armed groups in the recruitment and use of children in hostilities.

C.41.P146 Article 4 is unusual among international human rights law provisions in that it applies to non-state actors. Normally, international human rights law—unlike international humanitarian law—governs only state actors. This application to some extent demonstrates the hybrid nature of OPAC (as is also the case with the Convention).

C.41.S32

2. Paragraph 1: The Obligations of Armed Groups

C.41.P147 Paragraph 4(1) prohibits armed groups from recruiting or using persons under 18 years of age in hostilities. This prohibition extends to participation of *any kind*, to wit, whether direct or indirect. Paragraph 4, therefore, is broader in scope than its equivalents in articles 1 and 2. Armed groups are thus treated differently than states and are subject to more stringent requirements. In a sense this is unsurprising in that non-state armed groups were not involved in the drafting process; moreover, it is rationally in the interests of states to impose limitations on the ability of their non-state counterparts to recruit or use persons under 18.

C.41.P148 Grammatically speaking, paragraph 4(1) does not adopt absolute language. Non-state armed groups ‘should not’, as opposed to ‘shall not’, recruit or use persons under 18 in hostilities. The choice of language, however, perhaps reflects the reality that non-state armed groups cannot become party to OPAC and are therefore unable to be legally bound by its terms.¹⁵²

C.41.P149 The end result, in any event, is unevenness in OPAC and claims that states have deployed it to stanch the supply of fighters to those very movements that may contest their

C.41.N152

¹⁵¹ The role of non-state armed groups is also acknowledged in the eleventh paragraph of the Preamble to OPAC, which condemns ‘with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State and recognizing the responsibility of those who recruit train and use children in this regard’.

¹⁵² cf Seira Yun, ‘Breaking Imaginary Barriers: Obligations of Armed Non-State Actors Under General Human Rights Law—The Case of the Optional Protocol to the Convention on the Rights of the Child’ (2014) 5 *Journal of International Humanitarian Legal Studies* 213 (arguing that the use of the term ‘should’ still creates a direct human rights obligation on armed non-state actors). See also Sarah Hafen, ‘Incentivizing Armed Non-State Actors to Comply with the Law: Protecting Children in Times of Armed Conflict’ [2016] (3) *Brigham Young University Law Review* 989 (examining the use of Deeds of Commitment developed by an NGO, Geneva Call, to encourage non-state groups to commit to the standards under OPAC).

authority. Recall that while some armed groups may challenge legitimate governments and terrorize the public, others may revolutionarily challenge atrocious régimes. Armed groups, moreover, are not static: some may begin for laudatory ends but devolve into self-serving instigators of violence while others may initially serve crimogenic purposes but then assume the role of liberation or emancipation movements.

C.41.P150 Paragraph 4(1) effectively invites non-state armed groups to commit themselves publicly to eschew the recruitment and enlistment of persons under the age of 18 and to reference OPAC in this regard.

C.41.P151 The meaning of the phrase ‘armed groups that are distinct from the armed forces of a State’ is not defined or explained in the drafting history. During drafting, the representative of Japan expressed concern over its ambiguous nature but ultimately joined the consensus on the understanding that each State Party was to define this phrase reasonably in its own domestic context.¹⁵³ As discussed earlier, however, these terms do have widely accepted meanings in international law and policy. Armed forces mean official state militaries; armed groups refer to non-state entities distinct from those forces such as rebel movements, dissident factions, and insurgents. What both entities share in common, however, is a certain presumed ability to engage in armed conflict. On this note, even cutting-edge instruments such as the Paris Principles fail to cover children associated with entities—such as organized gangs, sex trafficking rings, and drug cartels—that fall short of the capacity to engage in armed conflict.¹⁵⁴ These entities, however, may inflict systematic violence and criminal offenses against group members and the public at large. In Mexico, for example, children have served as assassins for drug cartels.¹⁵⁵ A hazy line is often all that separates militarized armed groups from criminal syndicates. Recruitment into such syndicates and gangs may compare to recruitment into armed groups. So, too, might the reasons why some children join them. The overwhelming focus on militarized children thereby runs the risk of diverting attention from the needs of criminalized children.

C.41.S33 *3. Paragraph 2: States’ Obligations Regarding the Prohibition on the Use and Recruitment of Children by Armed Groups*

C.41.P152 Paragraph 4(2) requires states to take all feasible measures to prevent the recruitment and use of persons under 18 by non-state armed groups. It was recognized during drafting that since non-state armed groups could not be a party to OPAC, a need arose to ensure that states were obliged to regulate their practices. The obligation to take ‘all feasible measures’ reflects the fact that states are not capable of exerting complete control over armed groups. Accordingly, an obligation on states to undertake measures beyond merely those which are feasible would have been impossible to enforce and unrealistic in practice.

C.41.P153 The commentary to article 38 discusses the meaning of the obligation to take ‘all feasible measures’. One specific measure which states are required to take under paragraph 4(2) is to adopt laws to prohibit and criminalize the use and recruitment of persons under

C.41.N153 ¹⁵³ UN Doc E/CN4/2000/74 para 112.

C.41.N154 ¹⁵⁴ Paris Principle 2.3 defines armed groups as referring to ‘groups distinct from armed forces as defined by Article 4 of the Optional Protocol’. Art 4 does not provide a definition, however, as noted earlier. Ostensibly, the fact that OPAC relates to the involvement of children in armed conflict intimates that armed groups are able to engage in such conflict.

C.41.N155 ¹⁵⁵ Drumbl (n 127) 43.

18 by armed groups—a point which is routinely made by the CRC Committee.¹⁵⁶ While the nature of this obligation appears unambiguous, the precise form of the relevant legislation and the penalties contained therein are left to the discretion of each State Party.¹⁵⁷ The Committee has simply insisted on the obligation to prosecute and punish members of non-state armed groups¹⁵⁸ and ‘[i]ntroduce sanctions proportionate to the seriousness of this crime’.¹⁵⁹ Despite this insistence on the part of the Committee, as a matter of practice, as the ICRC pointed out during the sixth session that:

C.41.P154 criminal repression under domestic law was likely to be of limited effect because those who took up arms against the lawful government of a country already exposed themselves to the most severe penalties of the law and . . . the capacity of a Government to enforce its domestic law was often very limited in situations of non-international armed conflicts.¹⁶⁰

C.41.P155 The obligation to take ‘all feasible measures’ also presumably requires states to identify those children who are most vulnerable to recruitment and use in hostilities by non-state armed groups and then to take appropriate steps to protect them. This is supported by the eleventh paragraph of the Preamble to OPAC which recognizes ‘the special needs of those children who are particularly vulnerable to recruitment and use in hostilities contrary to the present Protocol owing to their economic or social status or gender’. As was pointed out to the Working Group by certain NGO participants, displaced children are particularly vulnerable especially when separated from their families.¹⁶¹ Similarly, children from poor and disadvantaged backgrounds are also more susceptible.¹⁶² States must take measures to counteract these social conditions in order to fulfil their obligations under article 4. The work of the CRC Committee certainly supports this view. In its report on Tajikistan for example, it recommended that the State Party focus on the potential recruitment by non-state groups of refugee and asylum seeker children¹⁶³ and ‘develop a strategy to tackle the growing problem of increased extremism, radicalization and recruitment into armed groups. It also recommends that the State party increase its efforts to ensure the rehabilitation and reintegration of children who return from territories where armed conflicts are currently in progress.’¹⁶⁴

C.41.S34 *4. Paragraph 3: The Legal Status of Parties to a Conflict*

C.41.P156 Paragraph 4(3) was designed to allay the concerns of some delegates that the reference to non-state armed groups in paragraph 4(1) might be interpreted as granting or suggesting legal recognition of their status. Such recognition could have broader ripple effects not only in terms of international humanitarian law entitlements, but also entitlements generally under international law. Paragraph 4(3) provides that the application of article 4 shall not affect the legal status of any party to an armed conflict. The effect of this is

C.41.N155

¹⁵⁶ See eg: CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 21(a); CO Guinea, CRC/C/OPAC/GIN/CO/1 para 22(a); CO Vanuatu, CRC/C/OPAC/VUT/CO/1 para 12; CO United States of America, CRC/C/OPAC/USA/CO/3-4 para 30.

¹⁵⁷ See the comments of the Japanese representative to this effect during the sixth session: UN Doc E/CN.4/2000/74 para 113.

¹⁵⁸ See eg: CO Colombia, CRC/C/OPAC/COL/CO/1 para 27(d); CO Nicaragua, CRC/C/OPAC/NIC/CO/1 para 16; CO Sierra Leone, CRC/C/OPAC/SLE/CO/1 para 24; CO Sudan, CRC/C/OPAC/SDN/CO/1 para 24; and CO Thailand, CRC/C/OPAC/THA/CO/1 para 18.

¹⁵⁹ CO Guinea, CRC/C/OPAC/GIN/CO/1 para 22(b).

¹⁶⁰ UN Doc E/CN.4/2000/74 para 108.

¹⁶¹ UN Doc E/CN.4/1998/102 para 34.

¹⁶² *ibid* para 35.

¹⁶³ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 13.

¹⁶⁴ *ibid* para 15.

unequivocal. Non-state armed groups cannot claim that their obligations under paragraph 4(1) confer on them any legal status or personality beyond that to which they already may be entitled.

H. Article 5: Savings Clause

C.41.S35

C.41.S36

C.41.P157

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.

C.41.P158

Article 5 of OPAC serves the same function as Convention article 41. Article 5 was uncontentious during drafting: the final text is almost identical to the original draft article proposed by the CRC Committee.¹⁶⁵ It acts as a savings clause and ensures that nothing in OPAC shall be construed as precluding the application of other domestic or international provisions which are more conducive to the realization of children's rights. So, for example, States Parties to the African Charter would be bound by this regional instrument's more exigent requirements.

C.41.P159

On 29 October 1998, the UN Secretary General announced that states contributing to UN peacekeeping operations should not dispatch civilian police or military observers under the age of 25 and that troops should ideally be over 21 but in any case, never younger than 18.¹⁶⁶ This requirement precludes the possibility of military volunteers under the age of 18 from participating in UN peacekeeping operations and exceeds the standards of OPAC.

C.41.S37

I Article 6: National Implementation, Dissemination, and Reintegration

C.41.S38

Article 6

C.41.P160

(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.

C.41.P161

(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.

C.41.P162

(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.

C.41.S39

1. Overview

C.41.P163

Each of the three paragraphs of article 6 addresses a distinct issue. Paragraph 6(1), which deals with State Parties' obligations to implement and enforce OPAC, is akin to Convention article 4. Paragraph 6(2), which obliges states to make the provisions and principles of the Convention widely known, echoes Convention article 42. Finally,

C.41.N165

¹⁶⁵ See UN Doc E/CN/4/1995/96 para 127.

C.41.N166

¹⁶⁶ *Report of the Secretary General on Children and Armed Conflict* (19 July 2000) UN Doc S/2000/712 para 40; UNICEF *Guide* (n 11) 8.

paragraph 6(3) aligns with Convention article 39 to require states to demobilize and re-integrate children recruited or used in hostilities in contravention of OPAC.

C.41.P164 It is perhaps surprising that none of these issues were discussed in detail by the Working Group. In fact, it was not until the Chairman's Perception paper, which proposed an article on dissemination, that any draft of OPAC even contemplated a specific article to deal with these themes.¹⁶⁷ In its final session, the Working Group considered a detailed proposal from Canada and Norway which formed the basis of the final text.¹⁶⁸

C.41.S40 *2. Paragraph 6(1): The Obligation to Take All Necessary Measures for the Implementation of OPAC*

C.41.S41 (a) **All Necessary Measures**

C.41.P165 Although paragraph 6(1) plays a similar role to Convention article 4, its text does contain some phraseological differences. The obligation to 'undertake all appropriate legislative, administrative and other measures for the implementation', which appears in article 4, contrasts facially with the requirement in paragraph 6(1) that '[e]ach State Party shall take all necessary legal administrative and other measures to ensure the effective implementation and enforcement' of the Protocol. A question exists as to whether the phrase 'necessary measures' under OPAC is qualitatively different to the phrase 'appropriate measures' which appears in the Convention. There is nothing in the drafting history to suggest that states even considered this distinction. However, the ordinary meaning of the phrase 'necessary' tends to imply that the measure must be designed to achieve its objective. Put simply it must be effective. This is consistent with the interpretation offered in this commentary with respect to the meaning of 'appropriate measures' under article 4 of the Convention. States will certainly retain a measure of discretion in deciding what measures are necessary (or appropriate) to secure the rights of the child under OPAC. This discretion however remains subject to the caveat that such measures are effective.

C.41.P166 This discretion must also be informed by the two additional factors. First, the text of the provisions under OPAC itself which invariably guide and direct the types of measures required of states. For example, as discussed above in relation to articles 1 to 4, states will need to adopt age verification procedures and legislative measures that criminalize, prosecute, and punish recruitment of children contrary to OPAC.¹⁶⁹ Moreover, articles 6 (2) and (3) which are discussed below, require measures to raise awareness of OPAC and ensure the demobilization, recovery, and reintegration of child soldiers work while

C.41.N169

¹⁶⁷ Art 6 of the Chairman's Perception paper stipulated that 'State parties undertake to make the principles and provisions of the present protocol widely known by appropriate and active means to adults and children alike': see UN Doc E/CN.4/1998/102 Annex II.

¹⁶⁸ UN Doc E/CN.4/2000/74 para 46.

¹⁶⁹ This obligation to prosecute extends to members of state armed forces and non-state groups. This issue was actually controversial during drafting. Canada and Norway recommended that states criminalize the recruitment of children by state armed forces. In response, it was argued that states should not be deemed capable of violating their own laws and, for this reason, administrative rather than criminal measures would be more appropriate in the context of state agents' violation of OPAC: UN Doc E/CN.4/2000/74 para 48. While this requirement ultimately was excluded from the final text, the importance of avoiding potential impunity for state agents should be underscored. States clearly did agree that steps must be taken to criminalize violations of OPAC and thereby create accountability for both state and non-state actors. The Committee shares this view and has advocated for the criminalization of the recruitment by state armed forces, just as it has for recruitment by armed groups: CO Nepal, CRC/C/OPAC/NPL/CO/1 para 22(b); CO Colombia, CRC/C/OPAC/COL/CO/1 para 27(d); CO Nicaragua, CRC/C/OPAC/NIC/CO/1 para 16; CO Sierra Leone, CRC/C/OPAC/SLE/CO/1 para 24; CO Sudan, CRC/C/OPAC/SDN/CO/1 para 24; and CO Thailand, CRC/C/OPAC/THA/CO/1 para 18.

article 7 requires international cooperation. The other factor guiding the exercise of a state's discretion is the work of the CRC Committee and its expectations regarding the types of measures which states should take. To date some of the recommendations by the Committee include measures to:

- C.41.P167 • Develop and review a national plan of action to implement OPAC;¹⁷⁰
- C.41.P168 • Ensure the coordination among the various ministries, agencies, and committees responsible for the implementation of OPAC;¹⁷¹
- C.41.P169 • establish expeditiously an independent mechanism for monitoring the implementation of OPAC, with a mandate to receive and investigate complaints by children on violations of their rights under OPAC;¹⁷²
- C.41.P170 • establish a centralized mechanism for the comprehensive collection of information and disaggregated statistics on the implementation of OPAC, and for the identification and registration of all children under its jurisdiction who may have been recruited or used in hostilities by non-state armed groups abroad, including refugee and asylum-seeking children;¹⁷³
- C.41.P171 • identify and protect the rights of children who are especially vulnerable to recruitment such as refugee and asylum seeker children, minority children, children in rural areas, and children in care institutions;¹⁷⁴
- C.41.P172 • strengthen peace education in the school curricula and to encourage a culture of peace and tolerance within schools, including upper secondary military schools and military colleges. It also recommends that the State Party increase human rights and peace education in the training of teachers, judges, civil servants, law enforcement officers, and military personnel, at every level;¹⁷⁵
- C.41.P173 • ensure that national legislation enables a state to establish and exercise extraterritorial jurisdiction; to include in its extradition treaties the offences under OPAC and take

C.41.N170 ¹⁷⁰ CO Nepal, CRC/C/OPAC/NPL/CO/1 paras 7–8. See also UNICEF *Guide* (n 11) 41.

C.41.N171 ¹⁷¹ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 9; CO Guinea, CRC/C/OPAC/GIN/CO/1 para 8(a); CO Malawi, CRC/C/OPAC/MWI/CO/1 para 7; CO Nepal, CRC/C/OPAC/NPL/CO/1 para 6; CO Brazil, CRC/C/OPAC/BRA/CO/1 para 9; CO Cambodia, CRC/C/OPAC/KHM/CO/1 para 7; CO Egypt, CRC/C/OPAC/EGY/CO/1 para 8.

C.41.N172 ¹⁷² CO Brazil, CRC/C/OPAC/BRA/CO/1 para 11; CO Cambodia, CRC/C/OPAC/KHM/CO/1 para 9; CO Singapore, CRC/C/OPAC/SGP/CO/1 para 8; CO China, CRC/C/OPAC/CHN/CO/1 para 9.

C.41.N173 ¹⁷³ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 13; CO Guinea, CRC/C/OPAC/GIN/CO/1 para 16(b); CO USA, CRC/C/OPAC/USA/CO/3–4 para 15; CO Malawi, CRC/C/OPAC/MWI/CO/1 paras 12–13; CO Estonia, CRC/C/OPAC/EST/CO/1 para 11; CO Nepal, CRC/C/OPAC/NPL/CO/1 para 14; CO Cambodia, CRC/C/OPAC/KHM/CO/1 para 13; CO Egypt, CRC/C/OPAC/EGY/CO/1 para 14; CO Russian Federation, CRC/C/OPAC/RUS/CO/1 para 7; CO China, CRC/C/OPAC/CHN/CO/1 para 14.

C.41.N174 ¹⁷⁴ During drafting it was actually suggested that 'particular attention shall be given to protect children who are especially vulnerable to recruitment'. Though this phrase was rejected, the CRC Committee has nevertheless frequently expressed its regret at the lack of measures taken by certain states to both identify and offer protection to children who are particularly susceptible to recruitment: CO Nepal, CRC/C/OPAC/NPL/CO/1 para 8; CO Russian Federation, CRC/C/OPAC/RUS/CO/1 para 11(c); CO Australia, CRC/C/OPAC/AUS/CO/1 para 24; CO Egypt, CRC/C/OPAC/EGY/CO/1 para 27; CO Mexico, CRC/C/OPAC/MEX/CO/1 paras 14, 22, 31; CO Montenegro, CRC/C/OPAC/MNE/CO/1 para 20; CO Ecuador, CRC/C/OPAC/ECU/CO/1 para 17.

C.41.N175 ¹⁷⁵ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 13; CO Malawi, CRC/C/OPAC/MWI/CO/1 para 17; CO Brazil, CRC/C/OPAC/BRA/CO/1 para 23; Singapore, CRC/C/OPAC/SGP/CO/1 para 14; CO Egypt, CRC/C/OPAC/EGY/CO/1 para 22; CO Russian Federation, CRC/C/OPAC/RUS/CO/1 para 13; CO China, CRC/C/OPAC/CHN/CO/1 para 25.

steps to ensure that a dual criminality requirement is not used in cases of extradition for offences covered by OPAC;¹⁷⁶

- C.41.P174 • seek technical assistance from United Nations agencies such as the UNDP and OHCHR;¹⁷⁷ and
- C.41.P175 • expressly prohibit the acquisition, possession, or use of firearms by children and put in place measures to prevent children and adolescents from gaining access to firearms and recover those illegally possessed.¹⁷⁸

C.41.S42 (b) **The Question of Resources**

C.41.P176 OPAC makes no attempt to distinguish between civil and political rights and economic and social rights. Article 6(1) simply requires states to take all necessary measures to ensure the effective implementation of OPAC. This contrasts with article 4 of the Convention which provides that '[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources'. A question therefore exists as to whether all the obligations under OPAC are of immediate effect and not subject to progressive realization. For its part the CRC Committee has not addressed this issue directly and has tended to simply recommend in its concluding observations, for example, that states 'ensure that sufficient and targeted resources are allocated for the effective implementation of all areas of the Optional Protocol'¹⁷⁹ and 'ensure the availability of adequate human, technical and financial resources for the prevention of the recruitment of children into armed groups or the armed forces'.¹⁸⁰

C.41.P177 These comments do not appear to tolerate a state claiming that a lack of resources is impeding its implementation of its obligations under OPAC. However, it may be unreasonable to impose an obligation on states to ensure the immediate implementation of *all* their obligations under OPAC. For example, measures to ensure the demobilization, recovery, and reintegration of child soldiers as required under article 6 will be resource intensive relative to, for example, measures to prevent recruitment of child soldiers. Indeed, the former obligation is aligned strongly with article 39 of the Convention which is best characterized as a social right and thus subject to progressive implementation. Thus, a degree of caution must be exercised when assessing the nature of the obligation imposed on a state under the various obligations under OPAC. Ultimately, when seeking to resolve any resource allocation dilemmas that arise under OPAC, guidance should be taken from the general principles set out in the commentary to article 4 regarding a state's obligations in the context of resource allocation.

C.41.S43 **3. Paragraph 6(2): The Obligation to Make the Principles and Provisions of the Protocol Widely Known**

C.41.P178 Paragraph 6(2) requires states, by appropriate means, to make the principles and provisions of OPAC widely known to adults and children alike. Paragraph 6(2) is virtually

C.41.N179

¹⁷⁶ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 23; CO Nepal, CRC/C/OPAC/NPL/CO/1 para 18.

¹⁷⁷ CO Guinea, CRC/C/OPAC/GIN/CO/1 para 9(c); CO Egypt, CRC/C/OPAC/EGY/CO/1 para 14.

¹⁷⁸ CO Guinea, CRC/C/OPAC/GIN/CO/1 para 26; USA, CRC/C/OPAC/USA/CO/3-4 para 23(c); CO Malawi, CRC/C/OPAC/MWI/CO/1 para 21; CO Estonia, CRC/C/OPAC/EST/CO/1 para 13; CO Brazil, CRC/C/OPAC/BRA/CO/1 para 27.

¹⁷⁹ CO Nepal, CRC/C/OPAC/NPL/CO/1 para 10. See also: CO Vanuatu, CRC/C/OPAC/VUT/CO/1 para 8; CO Malawi CRC/C/OPAC/MWI/CO/1 para 9;

¹⁸⁰ CO Guinea, C/OPAC/GIN/CO/1 para 14(b).

identical to article 42 of the Convention.¹⁸¹ The final text was favoured over a more detailed version offered in the proposal from Canada and Norway.¹⁸² In practice, however, the CRC Committee has effectively adopted a broad approach to article 6(2) recommending, for example, in its observations for Tajikistan that the state:

- C.41.P179 (a) Ensure that the principles and provisions of OPAC are widely disseminated to the general public and in particular among children;
- C.41.P180 (b) Strengthen human rights training, with specific training on the provisions of OPAC for all relevant professional groups, in particular the armed forces;
- C.41.P181 (c) Develop awareness-raising, education, and training programmes on the provisions of OPAC for relevant professional groups working for or with children, including members of international peacekeeping forces, law enforcement and immigration officers, prosecutors, lawyers, judges, social workers, medical professionals, teachers, media professionals, and local and district officials.¹⁸³

C.41.P182 The undertaking of states under paragraph 6(2) is mandatory and requires states not only to make the provisions of OPAC widely known, but also to promote them. Implicit in this undertaking is the requirement that states must therefore themselves publicly endorse and support OPAC.

C.41.P183 Paragraph 6(2) is silent as to the substance of the measures required in order to promote OPAC. It requires only that such measures be ‘appropriate’. The Working Party refrained from discussion of the meaning of this term. It falls for states to determine the content of appropriate measures. These might include conferences, workshops, seminars, radio and television broadcasts, or publications which explain OPAC. The final paragraph of the Preamble also encourages ‘the participation of the community and in particular children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol’. The involvement of children in this context is especially important within processes of post-conflict generational empowerment. Any measures must also be in languages which ensure that all persons within a state’s jurisdiction understand the provisions of OPAC. The Canadian and Norwegian proposal specifically required the armed forces to be made aware of OPAC’s principles and provisions.¹⁸⁴ Though this language was not formally incorporated into the final text, in practice the CRC Committee has articulated such a requirement and has emphasized education about and training in OPAC.¹⁸⁵

C.41.N181 ¹⁸¹ The only difference between para 6(2) and art 42 is that the latter requires states to undertake to make the principles and provisions of the CRC widely known by appropriate and active means to adults and children alike. Para 6(2) omits the word ‘active’; however this is unlikely to create any tangible, substantive difference in the content of the obligations.

C.41.N182 ¹⁸² This proposal stated that ‘States Parties undertake to make the principles and provisions of the present Protocol widely known by appropriate and active means to the public at large especially children and government institutions including the armed forces. States Parties shall encourage the participation of the community and in particular children and child victims in such information and education programmes.’

C.41.N183 ¹⁸³ CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 11. See also: CO Malawi, CRC/C/OPAC/MWI/CO/1 para 10–11; CO Nepal CRC/C/OPAC/NPL/CO/1 [11–12; CO Brazil, CRC/C/OPAC/BRA/CO/1 paras 14–15.

C.41.N184 ¹⁸⁴ UN Doc E/CN4/2000/74 para 46.

C.41.N185 ¹⁸⁵ See eg: CO Australia, CRC/C/OPAC/AUS/CO/1 para 31; CO Greece, CRC/C/OPAC/GRC/CO/1 para 7; CO Democratic Republic of the Congo, CRC/C/OPAC/COD/CO/1 para 22; CO Azerbaijan, CRC/C/OPAC/AZE/CO/1 para 12; CO Ukraine, CRC/C/OPAC/UKR/CO/1 para 12; CO Japan, CRC/C/OPAC/JPN/CO/1 para 7; CO Slovenia, CRC/C/OPAC/SVN/CO/1 para 6; CO Moldova, CRC/C/OPAC/MBV/CO/1 paras 5–6; CO Bangladesh, CRC/C/OPAC/BGD/Co/1 para 11.

C41.S44 4. Paragraph 3: The Obligation to Demobilize and Reintegrate Child Soldiers

C41.P184 Paragraph 6(3) requires that states take all feasible measures to ensure that all children recruited or otherwise used in hostilities in contravention of OPAC be demobilized or released from service.¹⁸⁶ OPAC is the first binding international agreement to explicitly impose such an obligation. This provision therefore addresses disarmament, demobilization, and reintegration programming ('DDR'). The reports of the Working Group do not reveal the origins of this obligation, which appears to have emerged from the discussions in the final session. Consequently, it is only possible to speculate as to the content of this obligation: which is mandatory as evidenced by the use of 'shall'. The obligation to take 'all feasible measures' as opposed to 'all necessary measures' presumably reflects the reality that in some cases it will not be possible for states to demobilize children who have been recruited or are being used by non-state armed groups. Neither paragraph 6(3) nor the reports of the Working Group elucidate the specific measures which states might take to assist children whose OPAC rights have been violated. This leaves states with significant discretion to determine appropriate measures.

C41.P185 Thus far, the CRC Committee has not been overly demonstrative or prescriptive in its guidance on this issue, preferring instead to defer to states' discretion with respect to the substantive measures to be undertaken, whilst at the same time providing broad advice on the nature of such measures. In its concluding observations for Mexico, for example, the Committee stated:

C41.P186 The Committee encourages the State party to establish an identification mechanism for children who may have been recruited or used in hostilities, and to take the necessary measures for their physical and psychological recovery and social reintegration. Such measures should include careful assessment of the situation of these children, reinforcement of the legal advisory services available for them and the provision of immediate, culturally responsive, child-sensitive and multidisciplinary

C41.N186

¹⁸⁶ This requirement has been specifically endorsed by the Security Council (S/RES/1261 (1999) para 15) and the UN Secretary General. In his report on Children and Armed Conflict in July 2000 the Secretary General declared that '[I]f child soldiers are to become productive members of post conflict societies then alternatives to fighting and effective programmes for reintegration must be in place from the earliest stages of conflict until the end of the formal disarmament, demobilization and reintegration process'. He also emphasized the need to integrate the demobilization and reintegration of child soldiers into any peace agreement and that the focus on the needs of child soldiers should be strengthened: see UN Doc A/55/163-S/2000/712 para 41. For further discussion on demobilization and reintegration and child soldiers, see: *Integrated Disarmament, Demobilization and Reintegration Standards* (2006) available at <http://unddr.org/iddrs.aspx>; Jeannie Annan, Moriah Brier, and Filder Aryemo, 'From "Rebel" to "Returnee": Daily Life and Reintegration for Young Soldiers in Northern Uganda' (2009) 24 *Journal of Adolescent Research* 639, 642; *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol 3B ch 4 (Children and the Armed Conflict in Sierra Leone) (2004) available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume3B.pdf>; Republic of Liberia, *Truth and Reconciliation Commission, Volume II: Consolidated Final Report* (30 June 2009) available at <http://www.pul.org.lr/doc/trc-of-liberia-final-report-volume-ii.pdf>; Macartan Humphreys and Jeremy Weinstein, 'Demobilization and Reintegration' (2007) 51(4) *Journal of Conflict Resolution* 531; Neil Boothby, Jennifer Crawford, and Jason Halperin, 'Mozambique child soldier life outcome study: Lessons learned in rehabilitation and reintegration efforts' (2006) 1 *Global Public Health* 87, 99; Kimberly Theidon, 'Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia' (2007) 1 *International Journal of Transitional Justice* 66; Theresa Betancourt and others, *Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The State of the Field and Future Directions* (Psychology Beyond Borders 2008).

assistance for their physical and psychological recovery and their social reintegration in accordance with the Optional Protocol.¹⁸⁷

C.41.P187

In its observations for Guinea, it recommended that the State Party:

C.41.P188

(a) Adopt a comprehensive policy for the physical and psychological recovery and the social reintegration of all affected children, and allocate the necessary human, technical and financial resources for the implementation of the policy;

C.41.P189

(b) Strengthen the structures of the child protection system to incorporate specialized services, allowing children who have been recruited or used in hostilities to receive appropriate assistance with a view to their physical and psychological rehabilitation and their social and professional reintegration, and allocate the necessary human, technical and financial resources to make these structures functional;

C.41.P190

(c) Ensure the presence and the optimal operation of the national and prefectural structures of the child protection system in the entire territory of the State party and allocate the necessary human, technical and financial resources to allow for the efficient and effective identification of child refugees, asylum seekers or migrants, including of unaccompanied children who enter the State party and may have been recruited or used in hostilities abroad.¹⁸⁸

C.41.P191

The obligation under paragraph 6(3) to reintegrate children recruited or used in hostilities performs the same role as Convention article 39, albeit with one significant distinction: paragraph 6(3) is only concerned with children who have been recruited or used in hostilities in contravention of the Protocol. In contrast, article 39 applies to all children affected by armed conflict. Notwithstanding terminological differences between paragraph 6(3) and article 39, the content of paragraph 6(3) consolidates the importance of reintegration.¹⁸⁹

C.41.P192

Reintegration, however, is a complex process. In the past, international interventions to facilitate reintegration of former child fighters have met with mixed success. While demobilization and disarmament processes tend to proceed with some confidence and celerity, reintegration is opaque and long-term.¹⁹⁰ Attention must be paid to anchoring educational and occupational training within programmatic initiatives, along with medical and psychological assistance, and for initiatives not to conform to generic blueprints but instead to reflect local economic, cultural, and political realities. When it comes to training, however, it is crucial to ensure that the skills taught to former child soldiers have market currency. Moreover, it is also wise to ensure diversification of training. Else, all at once hundreds of former child soldiers risk having certificates in, for example, tailoring when there is no local demand for those services—the result is systemic unemployment, which may present as a precursor to re-recruitment or criminal activity. A need may arise

C.41.N187

¹⁸⁷ CO Mexico, CRC/C/OPAC/MEX/CO/1 para 32. See also: CO Colombia, CRC/C/OPAC/COL/CO/1 paras 44–45; CO Sierra Leone, CRC/C/OPAC/SLE/CO/1 para 30; and CO Democratic Republic of the Congo, CRC/C/OPAC/COD/CO/1 para 45. Other cases where the CRC Committee has addressed post-conflict measures pertaining to the social reintegration of former child soldiers include Croatia (CO Croatia, CRC/C/OPAC/HRV/CO/1 paras 14–15) and Qatar (CO Qatar, CRC/C/OPAC/QAT/CO/1 paras 18–19).

C.41.N188

¹⁸⁸ CO Guinea, CRC/C/OPAC/GIN/CO/1 para 30.

C.41.N189

¹⁸⁹ CRC art 39 requires that states take all appropriate measures to promote physical and psychological recovery and reintegration. In comparison, para 6(3) of OPAC states that ‘States Parties shall when necessary accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration’. In his report to the UN Security Council on the role of UN peacekeeping in disarmament, demobilization, and reintegration, the UN Secretary General underlined that ‘a minimum 3 year commitment of resources and staff is generally necessary to ensure child soldier reintegration’: see (11 February 2000) UN Doc S/2000/101 para 92.

C.41.N190

¹⁹⁰ Drumbl (n 127) 168–75, 192–206.

for transitional justice interventions to address conflict resolution and the reality of the violence committed by and against former child soldiers during armed conflict. The content of a reintegration programme might optimally differ if implemented during ongoing conflict rather than after conflict has concluded. There may also be cause to question the differences that exist between DDR programming for adults, on the one hand, and children, on the other. At present, transitional justice processes—in which the combatant answers for the commission of systematic human rights abuses during conflict—tends to be sheared off from DDR for children. This is because ‘when an adult joins an armed group it is seen as a choice, while children’s involvement is a violation of their rights, regardless of whether they joined voluntarily or not’.¹⁹¹ While the treatment of children in this regard is a natural offshoot of the protective impulse of the Convention and OPAC, it may be that local communities do not share the same internationalist sensibilities. In such cases, a solution might be not to retrench, sensitise and re-educate local communities (or impose exogenously defined identities upon the children and their communities) but, perhaps, for internationalists to self-reflect about the limits of their own world-view and the role that they ought to play in local reconstruction. For the former child soldiers, this protectiveness may become fulsome or cloying and, hence, an impediment to effective reintegration and empowerment.

C41.P193 The experiences of girl soldiers, whether during or after conflict, are among the most poorly understood aspects of child soldiering generally. Available research, however, suggests that the reintegrative needs of former girl soldiers may depart from those of boy soldiers. For one, and depending on the conflict, many former girl soldiers may have given birth while associated with armed forces.¹⁹² They exit conflict as mothers with dependents in their care. Moreover, although incidents of sexual violence are perpetrated against boys in times of conflict, a significantly greater proportion of reported incidents (recognizing, of course, that many remain unreported) involve the victimization of girls.

C41.S45 J. Article 7: International Cooperation and Assistance

C41.S46 Article 7

- C41.P194 (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. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.*
- C41.P195 (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.*

C41.N19a

¹⁹¹ Elettra Pauletto and Preeti Patel, ‘Challenging Child Soldier DDR Processes and Policies in the Eastern Democratic Republic of Congo’ (2010) 16 *Journal of Peace, Conflict and Development* 35, 42. See also at 52 ([t]here is also evidence that local approaches to transitional justice can build on traditional norms to promote empathy and reconciliation, and that as part of this, child soldiers should understand and take responsibility for their actions in order to reconcile the victim, offender and the wider community’).

¹⁹² Katharine Stott, ‘Out of Sight, Out of Mind? The Psychosocial Needs of Children Formerly Associated with Armed Forces: A Case Study of Save the Children UK’s Work in Beni and Lubero Territories, North Kivu Province, Democratic Republic of Congo’ (2009) 24 *International Journal of Health Planning and Management* S52 (concluding that ‘[g]irls often reported being confronted with social stigma as a result of having had babies out of wedlock’).

C.41.S47

1. Paragraph 7(1): The Obligation to Provide Cooperation and Assistance

C.41.P196

OPAC article 7 requires States parties to provide international cooperation and assistance in its implementation. Although the Convention contains broadly comparable provisions relating to international cooperation,¹⁹³ it lacks a general article dedicated to international cooperation related to its own implementation. Reports of the Working Group indicate that article 7 only emerged from a text proposed by the US and the joint proposal of Canada and Norway referred to above during the sixth session.¹⁹⁴ There is no prior evidence of a draft article on international cooperation at any of the previous five sessions. Nor did such an article feature in the CRC Committee's original draft.

C.41.P197

The report from the sixth session of the Working Group contains few details about the debate on article 7. However, the use of unambiguous language in article 7 permits its core obligations to be distilled rather than divined. First, the word 'shall' demonstrates the mandatory nature of the obligation. Second, the scope of the obligation extends, but is not limited to, the prevention of any activity in contravention of OPAC *and* to the rehabilitation and social reintegration of the victims of acts which contravene it. Third, the nature of the assistance and cooperation includes, but is not limited to, technical cooperation and financial assistance. This requirement is therefore significant since it obliges states to commit resources to the implementation of OPAC beyond the limits of their own jurisdictions. Fourth, any assistance and cooperation provided by a state is to be taken in consultation with the states concerned and relevant international organizations. Article 7, however, provides no definition of 'international organization'. It is worthwhile to contrast this reference to language used in article 22(2) of the Convention, which requires states to provide (as they consider appropriate) cooperation in efforts undertaken *inter alia* to trace the parents or other family members of a refugee child by the UN, by competent intergovernmental organizations, or non-governmental organizations that are cooperating with the UN. Significant discussion about the nature of this aspect of article 22 arose during its drafting; a number of delegates expressed concern that it ought to be restricted to ensure that states were not required to cooperate with organizations that the UN did not recognize. It therefore seems surprising that similar concerns were not replayed during the drafting of OPAC and that as open-ended a phrase as 'relevant international organizations' was adopted without any significant debate.¹⁹⁵

C.41.P198

The guidance provided by the CRC Committee has not been extensive. In its concluding observations for Egypt, for example, the Committee recommended that Egypt strengthen its cooperation with the ICRC and the Special Representative of the Secretary-General on Children and Armed Conflict and that it 'explore increased cooperation with UNICEF and other United Nations entities in the implementation of the Optional Protocol'.¹⁹⁶ Similarly, in its concluding observations with respect to the Sudan, the CRC Committee recommended that 'the State party cooperate fully with and provide any

C.41.N193

¹⁹³ See eg arts 4, 22, and 45. ¹⁹⁴ UN Doc E/CN.4/2000/74 para 52.

C.41.N195

¹⁹⁵ Note that art 7 does not explicitly oblige states to consult with national or local NGOs working with children.

C.41.N196

¹⁹⁶ CO Egypt, CRC/C/OPAC/EGY/CO/1 para 33. Similarly, in its concluding observations on Sudan, the CRC Committee explicitly called for Sudanese cooperation with the Special Representative, thereby indicating the relevance of this organization for the purposes of art 7: see CO Sudan, CRC/C/OPAC/SDN/CO/1 para 39. See also: CO Guinea, CRC/C/OPAC/GIN/CO/1 para 31; CO Vanuatu, CRC/C/OPAC/VUT/CO/1 para 18; CO Nepal, CRC/C/OPAC/NPL/CO/1 para 30.

necessary assistance to both the International Criminal Court and its Prosecutor, in accordance with Security Council resolution 1593 (2005).¹⁹⁷ In this context, it is not clear whether the Committee is recommending that Sudan cooperate with the International Criminal Court ('ICC') due to the binding nature of the obligations under Security Council Resolution 1593, or whether such cooperation is required pursuant to article 7. It is likely that the Committee had regard to both of these factors in recommending such cooperation and therefore the ICC may be considered a relevant international organization for the purposes of article 7. Whilst the Committee clearly regards the ICRC as a relevant international organization, it is yet to extend this recognition to other NGOs and indeed may be reluctant to do so on the basis that this may extend the requirements of article 7 to an indeterminate number of organizations, thereby creating significant logistical and practical difficulties for State Parties seeking to comply with the provision. The Committee has expressed regret at a lack of consultation with NGOs and civil society organizations in the context of states' preparations of reports under OPAC. The Committee has refrained from specifying either which are the relevant organizations or the form which the consultation ought to take.¹⁹⁸

C₄₁.P199 Paradoxically, recognition of a broad range of international organizations may delay or even jeopardize the provision of cooperation and assistance since states providing financial or technical assistance are not simply required to notify beneficiary states and relevant international organizations: rather, they must consult with them. The reports of the Working Party indicate that there was no real discussion about the meaning of the phrase 'undertaken in consultation' in paragraph 7(1). Such consultation will presumably be time-consuming. Moreover, consultation likely prevents donor states from making unilateral or bilateral decisions with a recipient state regarding the most appropriate means by which technical assistance or financial cooperation would be provided. It therefore remains for the CRC Committee to suggest measures which states must take to fulfil their obligation to consult with relevant international organizations. To date, the Committee has offered no such guidance.¹⁹⁹

C₄₁.S48 2. Paragraph 7(2): Means of Cooperation and Assistance

C₄₁.P200 While paragraph 7(1) defines the scope of a state's obligation to provide cooperation and assistance, paragraph 7(2) prescribes the means by which this obligation is to be secured. Specifically, it requires that 'States in a position to do so' shall provide assistance through:

- C₄₁.P201 • existing multilateral, bilateral, or other programmes; or
- C₄₁.P202 • inter alia, a voluntary fund established in accordance with the rules of the General Assembly.

C₄₁.P203 Although the use of 'shall' indicates the mandatory nature of the obligation to provide assistance in these forms, account must be had of two particular aspects of the wording of paragraph 7(2).

C₄₁.N199

¹⁹⁷ CO Sudan, CRC/C/OPAC/SDN/CO/1 para 36. This linkage to international criminal law is of interest.

¹⁹⁸ See eg: CO Guatemala, CRC/C/OPAC/GTM/CO/1 para 2; CO El Salvador, CRC/C/OPAC/SLV/CO/1 para 14.

¹⁹⁹ Even when the CRC Committee has required states to consult with organizations, it has not clarified the substantive measures which states are required to take in order to realize such consultations. See eg: CO Democratic Republic of the Congo, CRC/C/OPAC/COD/CO/1 para 15; CO Uganda, CRC/C/OPAC/UGA/CO/1 para 7.

C.41.P.204 First, the obligation applies only to ‘States in a position to do so’. This is presumably intended to reflect that reality that many states lack the requisite financial resources and technical expertise. That said, and however realistic, this wording may qualify the mandatory nature of the provision by extending to State Parties an opportunity to avoid their obligations by arguing that they are not in a position to provide assistance. On the other hand, if the obligations are too onerous and costly, then fewer states might join the Protocol. Ultimately, it could be for the CRC Committee to determine objectively the relevant criteria. In the interim, states must self-assess regarding their capacity to provide assistance.

C.41.P.205 Second, the multilateral, bilateral, or other programmes referred to in article 7(2) are not explicitly required to be relevant to the rehabilitation and reintegration of children who are victims of practices that infringe OPAC. An implicit nexus exists, to be sure. Furthermore, the inclusion of a reference to ‘other programmes’ is open-ended; it presumably extends to programmes undertaken at the national, regional, or local level and, *ergo*, is not restricted merely to multilateral or bilateral programmes.

C.41.S.49 (a) **Existing Multilateral, Bilateral or Other Programmes**

C.41.P.206 With respect to multilateral, bilateral, or other programmes of assistance and cooperation, the CRC Committee has tended to direct its attention to the issues of arms exports and military assistance. For example, in its observations for Brazil, it recommended that the State Party:

- C.41.P.207 (a) Enact legislation to prohibit the sale or smuggling, export and/or transit of arms, including small arms and light weapons, and the provision of military assistance to countries where children may be recruited into armed conflict;
- C.41.P.208 (b) Expedite the ratification of the Arms Trade Treaty, which regulates the international trade in conventional weapons and prohibits States from exporting conventional weapons to countries when they know those weapons will be used for genocide, crimes against humanity or war crimes.²⁰⁰

C.41.P.209 Similarly in its observations for the Russian Federation, it recommended that ‘the State party reconsider its policies in relation to the trade and export of arms to countries where children are known to have been or are involved in armed conflict’ and ‘that the State party ratify the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, and the Convention on Cluster Munitions’.²⁰¹

C.41.S.50 (b) **The Voluntary Fund**

C.41.P.210 At the time of writing, steps had not been taken to establish a voluntary fund in accordance with the rules of the General Assembly. It is worth noting, however, that the provision for such a fund represents a conceptual watershed in the implementation of states’ international human rights obligations.

C.41.P.211 The Rome Statute of the International Criminal Court permits reparations to victims, including children under the age of 18.²⁰² The ICC may make a reparative order directly

C.41.N.200 ²⁰⁰ CO Brazil, CRC/C/OPAC/BRA/CO/1 para 34.

C.41.N.201 ²⁰¹ CO Russian Federation CRC/C/OPAC/RUS/CO/1 para 24. See also: CO Tajikistan, CRC/C/OPAC/TJK/CO/1 para 31.

C.41.N.202 ²⁰² In its Preamble, OPAC notes ‘the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict’.

against a convicted person (presumably, many convicts would be impecunious); it also can order the reparative award to be made through the separate Trust Fund for victims.²⁰³ The Trust Fund is capitalized through fines, forfeitures, and orders to freeze the assets of convicts; funds also may be independently offered by states or private parties. Awards to victims may be individual or collective. To date, the Trust Fund has allocated funds, derived from voluntary grants, inter alia to a number of projects in Uganda and the Democratic Republic of the Congo; planned projects in the Central African Republic have not gone forward owing to security concerns in the country. Beneficiary projects include programmes for child soldiers and abductees as well as programmes geared to communities, war victims, victims of sexual violence, teenage mothers, orphans, and also to support services, agricultural initiatives, and communications. The Trust Fund has done well to disburse funds widely among war-afflicted constituencies. A funding focus excessively tilted toward child soldier returnees may elicit tensions within the community.

C41.S51 **K. Article 8: Compliance Mechanism**

C41.S52 *Article 8*

- C41.P212 (1) *Each State Party shall, within 2 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 to the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.*
- C41.P213 (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.*
- C41.P214 (3) *The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.*

C41.P215 Article 8 sets out the compliance mechanism for OPAC. In effect, OPAC adopts the same reporting process as Convention article 44. As with article 44(1), article 8(1) requires states to submit reports detailing their implementation measures within two years of their ratification of OPAC. If a state is a party to the Convention, there is no requirement to submit a further report and, in such cases, paragraph 8(2) simply obliges the state to include in its article 44 report any further information with respect to the implementation of OPAC. Alternatively, where a state is not party to the Convention, it will be required to submit a report once every five years. Paragraph 8(3), like paragraph 44(4), empowers the CRC Committee to request further information from a state that is germane to its implementation of the Protocol. The Committee has prepared guidelines regarding the content of initial reports and the information to be provided in subsequent reports pursuant to article 8.

C41.P216 Setting the appropriate compliance mechanism constituted a significant point of discussion during drafting. The original draft of OPAC, which integrated the entire compliance procedure into the existing reporting process under the Convention, stated that:

C41.N203

Weissbrodt et al note that the CRC Committee ‘routinely mentions the Rome Statute in the Concluding Observations under the [Optional] Protocol’: Weissbrodt, Hansen, and Nesbitt (n 20) 144.

²⁰³ Rome Statute, art 75(2).

C₄₁.P₂₁₇ The States to the present protocol shall include in the reports they submit to the Committee on the Rights of the Child in accordance with article 44 of the Convention information on the measures that they have adopted to give effect to the present Protocol.²⁰⁴

C₄₁.P₂₁₈ This same formulation appeared in the Chairman's Perception paper at the end of the fourth session. This formulation was preferred by many participants during the sixth and final session, some of whom found it 'to be clear, comprehensive and brief'.²⁰⁵ In contrast, other delegations considered that the proposal should be strengthened and broadened by provisions taken from other proposals.²⁰⁶

C₄₁.P₂₁₉ One such proposal shared for a confidential hearing procedure before the CRC Committee.²⁰⁷ Under this proposal, upon receipt of reliable information that children were being unlawfully recruited or used in hostilities, the Committee would be permitted to request a response from the state concerned and, if necessary, hold hearings to clarify the situation. This proposal envisioned that the Committee would initiate an inquiry and visit the state in question. All proceedings were to remain confidential, but the Committee could summarize the results in its annual report.

C₄₁.P₂₂₀ The report of the Working Group from the sixth session does not indicate precisely why this proposal was rejected. Some states had raised concerns about extending the functions of the CRC Committee and ensuring the reliability of information on the use and recruitment of children in hostilities.²⁰⁸ Delegates in the fourth session appeared split on the merits of the proposal.²⁰⁹ In any event, it was excluded from the final text of OPAC.

L. Article 9: Signature and Ratification

Article 9

C₄₁.S₅₃
C₄₁.S₅₄
C₄₁.P₂₂₁ (1) *The present Protocol is open for signature by any State that is a party to the Convention or has signed it.*

C₄₁.P₂₂₂ (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.*

C₄₁.P₂₂₃ (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.*

C₄₁.P₂₂₄ Article 9 serves two functions. First, it performs the equivalent roles of Convention articles 46 and 47 and provides that states can sign, ratify, or accede to OPAC. A state need not be a party to the Convention in order to become a party to OPAC. This was a point of some contention during drafting. The representative for France emphasized 'strongly

C₄₁.N₂₀₅ ²⁰⁴ UN Doc E/CN4/1995/96 para 133. ²⁰⁵ UN Doc E/CN4/2000/74 para 42.

C₄₁.N₂₀₆ ²⁰⁶ *ibid.*

C₄₁.N₂₀₇ ²⁰⁷ This proposal first appeared in the draft optional protocol prepared at the end of the first session of the Working Group: see E/CN4/1995/96 para 34.

C₄₁.N₂₀₈ ²⁰⁸ UN Doc E/CN4/1997/96 paras 128–33. A legal opinion was actually sought from the UN legal counsel as to whether the proposed extension of the tasks of the CRC Committee would fall within the competence of the Working Group. Counsel indicated this not to be the case, but also that if the draft provision were to become part of OPAC, the CRC Committee could exercise its extended functions only with respect to those States parties to it: *ibid* para 132.

C₄₁.N₂₀₉ ²⁰⁹ UN Doc E/CN4/1998/102 paras 85–86.

that the ratification of the optional protocol without adhering to the mother Convention on the Rights of the Child should not set a precedent for the future'.²¹⁰

C.41.P225 The second function fulfilled by paragraph 9(3) is to impose an obligation on the UN Secretary General to inform all States Parties to the Convention of the minimum age set by each state for the voluntary recruitment of children into its armed forces, as required under article 3 of OPAC.

C.41.S55 M. Article 10: Entry into Force

C.41.S56 Article 10

- C.41.P226 (1) *The present Protocol shall enter into force three months after the deposit of the tenth instrument or ratification or accession.*
- C.41.P227 (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.*

C.41.P228 Article 10 of OPAC is equivalent to Convention article 49. OPAC's specific requirements for entry into force are different than the Convention's. Whereas the Convention entered into force on the thirtieth day after its twelfth ratification, OPAC entered into force three months after its tenth ratification.

C.41.P229 Similarly, and incidentally, the Convention comes into force on the thirtieth day after ratification by an individual state, whereas OPAC enters into force one month after ratification.

C.41.S57 N. Article 11: Denouncement

C.41.S58 Article 11

- C.41.P230 (1) *Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.*
- C.41.P231 (2) *Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.*

C.41.P232 Article 11 permits States Parties to denounce their ratification or accession to OPAC in the same way that article 52 does with respect to the Convention. Article 11 provides that denouncement shall take place one year after written notification is provided to the UN Secretary General. Where article 11 of OPAC differs from article 52 of the Convention is in its attempt to address the dilemma presented where a state is involved in an armed conflict one year after its denunciation. If this happens, article 11 provides that the denunciation will not become effective until the armed conflict ends. The goal here is not to permit denunciation because a state takes part in an armed conflict.

C.41.N210

²¹⁰ UN Doc E/CN4/2000/74 para 92. See also the comments of Sweden, para 96; Belgium, para 123; cf Uruguay, para 128.

C.41.P.233

That the drafters envisioned the potential difficulties created by such a situation is to be commended, however, it remains unclear why they chose to use the phrase ‘armed conflict’ rather than the broader phrase ‘hostilities’ which is referred to in articles 1 and 4 of OPAC. The reports of the Working Group offer no insight as to why ‘armed conflict’ was preferred. As a result, the drafting of article 11(1) in its present form leads to the awkward possibility that a denouncing state may to avoid its obligations under OPAC, despite its involvement in hostilities, simply by arguing that conflict falls short of armed conflict.

C.41.P.234

Paragraph 11(2) reasserts that until a state’s denunciation is effective, that state remains bound by OPAC. Paragraph 11(2) further provides that denunciation shall not prejudice the continued consideration of any matter already under consideration by the CRC Committee prior to when denunciation becomes effective. In practice, such matters would probably only extend to the Committee’s consideration of a state’s report or a requirement that the state respond to a request from the Committee to provide further information.

C.41.S.59

O. Article 12: Amendments

C.41.S.60

Article 12

(1) *Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within 4 months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.*

C.41.P.236

(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.*

C.41.P.237

(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.*

C.41.P.238

Article 12 is identical to Convention article 50. It sets out the procedure for amending OPAC. Article 12 was uneventfully adopted by the Working Group.

C.41.S.61

P. Article 13: Deposition and Circulation

C.41.S.62

Article 13

C.41.P.239

(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.*

C.41.P.240

(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.*

C.41.P.241

Article 13 is largely a standard housekeeping provision. Paragraph 13(1) is similar to Convention article 54 but requires that OPAC be deposited in the UN archives rather than with the UN Secretary General.

C.41.P.242

For obvious reasons, the Convention contains no equivalent to paragraph 13(2), which requires the Secretary General to circulate certified copies of OPAC to states parties to the Convention.

IV. Evaluation

C41.S63

C41.P243 By raising the minimum age for compulsory recruitment by states and for all recruitment by non-state armed groups to 18, and by creating what Happold has described as a ‘ratchet mechanism’ to increase the minimum age for voluntary recruitment into state armed forces,²¹¹ OPAC has expanded the range of children protected by international law during periods of armed conflict. In the case of children affected by armed conflict, OPAC has served to galvanize the efforts of the international community. The fact that OPAC extends coverage to children associated with armed groups is a major breakthrough, especially since a substantial number of children are recruited not by states but by non-state armed groups. Nonetheless, a practical disconnect arises between the text of OPAC and the reality that even where states are willing to abide by its provisions, they often lack the resources to ensure that non-state entities do the same.

C41.P244 OPAC also presents other challenges and blind-spots. Similar considerations bedevil the Convention as well—these were discussed earlier in the commentary to article 38. In short, aggregating more law is not necessarily a guarantor of success: the quality of the law and compliance therewith are crucial determinants.

C41.P245 How to mesh recognition of children’s agency with the emergent ‘Straight 18’ position, and the ‘Zero under 18’ push to ensure universal ratification of OPAC? Much like Convention article 38, OPAC suggests a protectionist and paternalist approach to children. As was highlighted in the earlier analysis of article 38, this approach can be difficult to reconcile with the view of a child as an active subject who possesses agency and whose capacities are continually evolving.²¹² Hanson identifies a number of constructions of children’s rights—schools of thought, so to speak: paternalism, liberation, welfare, and emancipation.²¹³ The paternalist position posits children as ‘dependent, future citizens (becoming) who are generally incompetent to make rational decisions . . . [w]hat is in the best interests of children is completely decided by caring and loving adults who offer their help and exercise their authority over children’.²¹⁴ This perspective, according to Hanson, contrasts with the liberation approach, which considers ‘children as independent actual citizens (beings) who are competent to make well-founded, rational decisions . . . [t]hey have the right to autonomy and to full participation in society’.²¹⁵ Liberationists emphasize children’s rights to self-determination and may even challenge the bifurcation of the world into adult, on the one hand, and child, on the other. For Hanson, the welfare approach is a diluted form of paternalism (favouring becoming over being) and the emancipation approach is a diluted form of liberation (favouring being over becoming). Adopting Hanson’s typology, then, article 38 and OPAC appear as paternalistic documents addressing children’s experiences with armed conflict, which are embedded within a broader child’s rights international legal framework that aspires more to the welfare approach and, in certain instances, even stretches towards emancipation. As Hanson notes, an unresolved tension arises between the human rights of children, conceptualized as they are around ‘a double claim that includes both children’s “equal rights” and their “special”

C41.N213

²¹¹ Happold (n 130) 238.

²¹² See generally Michael Freeman, ‘The Sociology of Childhood and Children’s Rights’ (1998) 6 *International Journal of Children’s Rights* 433; Drumbl (n 127).

²¹³ Karl Hanson, ‘Schools of Thought in Children’s Rights’, in Manfred Liebel, Karl Hanson, Iven Saadi, and Wouter Vandenhoele, *Children’s Rights from Below: Cross-Cultural Perspectives* (Palgrave, 2012) 63, 72–78.

²¹⁴ *ibid* 73. ²¹⁵ *ibid* 74–75.

rights'.²¹⁶ The Preamble to OPAC, for example, reaffirms 'that the rights of children require special protection, and call[s] for continuous improvement of the situation of children without distinction' and also recognizes 'the special needs of those children who are particularly vulnerable to recruitment or use in hostilities . . . owing to their economic or social status or gender'. If the goal of international child rights law is to instantiate a vibrant citizenship among children, with its attendant entitlements and obligations, perhaps a less paternalistic and more liberation-oriented perspective would be salutary. It also is recommended for adult activists who militate on behalf of children not to impose their views of the children's identities and experiences upon the children's understandings of their own identities and experiences.²¹⁷ Katharine Stott, reporting on research from North Kivu in the DRC, concludes:

C₄₁.P₂₄₆ Many of their [former CAAF (children associated with armed forces) involved in the study] thoughts, concerns and needs were, in the main, those of adults: livelihood strategies, vocation and parenting. Their carers, on the other hand, tended to communicate the notion of former CAAF as dependent youth in need of nurturing. As such, former CAAF were expected to be submissive to adults and respectful of their rules. . . . [Carers] stressed that the former CAAF should be treated as children; that they were untrustworthy and irresponsible . . . Young people conferred an impression of deep-rooted confusion with regards to their sense of self; a confusion which simmered within a melting pot of perceived roles and responsibilities and mixed advice from carers. Interwoven with these issues was a hopelessness and lack of autonomy which had a profoundly negative impact on young people's self-esteem.²¹⁸

C₄₁.P₂₄₇ Young people are not only suppressed by events, they also help define them and their roles in them.

C₄₁.P₂₄₈ Also of some disappointment is the CRC Committee's relative lack of engagement with the standards of international humanitarian law when considering reports under OPAC.²¹⁹ Were the Committee to engage in a more detailed and clarificatory analysis of states' humanitarian obligations under OPAC, the result could be greater fulfilment of extant legal obligations.

C₄₁.P₂₄₉ Proponents of the 'Straight 18' advocacy position may be dissatisfied with OPAC since it falls short of full instantiation of this position. On the other hand, the fact that OPAC permits voluntary enlistment should impel the international community to look more closely at what exactly volunteerism in children actually means. A framework that adheres to the evolving capacities might not be as quick to condemn the voluntary enlistment of recruits under the age of 18. Moreover, the categorism of current child rights discourse (in which the law may indulge persons under the age of 18 but then abruptly become very exigent for persons 18 or over) could be attenuated by a progressive stance to age whereby certain conditions could be placed on the volunteer recruitment of persons, say, beginning at the age of 16 or 17 but extending progressively up and until the age of 21 or 25 in light of neurobiological evidence regarding the development of brain function.

C₄₁.P₂₅₀ Looking ahead, OPAC superseded Convention article 38 but OPAC is now itself being surpassed by soft law documents and non-binding instruments, along with the

C₄₁.N₂₁₆ ²¹⁶ Hanson (n 7) 43, 50 ('[c]ompeting emancipatory perspectives towards children or particular local understandings of childhood . . . were hardly invoked when the provisions regarding child soldiers were developed; the only framework of childhood for understanding the agency of children was an extreme protectionist one').

C₄₁.N₂₁₇ ²¹⁷ Stott (n 192) S63 ('[a] tension between adults' views of the former CAAF, and the young people's views of themselves, became evident and is explored here').

C₄₁.N₂₁₈ ²¹⁸ *ibid* S66. ²¹⁹ Weissbrodt, Hansen, and Nesbitt (n 20) 141–43.

infusion of best practices and policies within post-conflict transitional settlements. The *épanouissement* of these instruments suggests the polycentric nature of international law and policy, and how the two entwine. Given the fact that states often have limited financial, resource, and technical capacities, and that these limitations may impede ratification, such broad support for OPAC is a significant achievement.²²⁰

C.41.P251 When it comes to constructing the application of human rights, notably children's rights, careful mediation is required between the universalist and abstract nature of those rights as posited in international instruments and the local, malleable, and contextual manner in which those rights are lived, or lost, on the ground. Observers have chided post-conflict programming for former child soldiers that imposes psychotherapeutic trauma models, for example, or imports 'a one-size-fits-all Western definition of childhood as an idyllic time free from responsibility'.²²¹ Although the provenance of such concepts as 'westernized' may be disputed, the point remains that the application of generic templates of childhood may stall within the neighbourhood contexts in which children and adults, victims and victimizers, and fighters and civilians need to map out cartographies of co-existence.

C.41.P252 Finally, the ability of OPAC to actuate its goals cannot be viewed only from the perspective of which states have become parties thereto and which states have declared 18 as the minimum age of voluntary recruitment. Actual compliance with the terms and the declarations is another matter. States Parties may lack the ability or volition to invigilate adherence with OPAC. They may lack the ability to supervise non-state armed groups. Accordingly, chiding those states which declare ages younger than 18 but zealously determine that recruitment is voluntary may be less pressing than ensuring that all States Parties, including those who express fealty to the 'Straight 18' position, actually have the tools to adhere to their declared commitments. Compliance with international law involves much more than just head-counts of who is a party to what.

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²²⁰ Radhika Coomaraswamy, former Special Representative of the Secretary General on Children and Armed Conflict, has emphasized that the ultimate goal of those who have advocated so vociferously for OPAC is to attract universal ratification. See Radhika Coomaraswamy, 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict—Towards Universal Ratification' (2010) *International Journal of Children's Rights* 535, 549.

²²¹ Pauletto and Patel (n 191) 38; Hanson (n 7) 62 ('[i]nternational human rights law concerning the situation of children affected by armed conflict presents itself as a straightforward example of how international children's rights have been developed following a top-down process').

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