OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD 
ON INVOLVEMENT OF CHILDREN IN ARMED CONFLICT (OP/CAC)

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BACKGROUND TO THE INSTRUMENT

1. The OP/CAC was the direct result of the ‘failure’ to get a complete prohibition on military recruitment and use in hostilities of children (as defined in the Convention on the Rights of the Child, i.e. all those up to the age of 18 years) in the Convention itself. The move for an OP came directly after the adoption of the Convention itself, primarily from the NGOs who had been active in trying to get the original prohibition into the Convention. In this they were strongly supported by (some members) of the newly-formed Committee on the Rights of the Child (CRC) itself, the ICRC and a number of Governments. The international advocacy campaign (the Coalition to Stop the Use of Child Soldiers) came much later in the process (see below). The CRC held its very first Day of Discussion on the subject of ‘children and armed conflict’, and two of the recommendations advocated by NGOs and adopted by the Committee were for an OP to the Convention and to ask the UN General Assembly to request the UN Secretary-General to undertake an Expert Study on children and armed conflict (in accordance with Article 45(c) of the Convention). Both proposals were taken up and endorsed. The latter became the UN Study on the Impact of Armed Conflict on Children (Machel Study). The UN Commission on Human Rights decided to establish an inter-sessional open-ended Working Group to draft the OP. In terms of Governments, Sweden played the major part in taking up the issue and moving it forward not least because the Swedish Red Cross and Rädda Barnen (Swedish Save the Children) were major initiators and proponents in raising the child soldier issue and seeking to get it addressed (together with the Quaker UN Office, Geneva). Other governments and NGOs became important players too as the process went on.
DESCRIPTION OF THE PROCESS AND ITS FORM AND NATURE

2. As explained in the previous paragraph, the original intention had been to address the issue in the Convention on the Rights of the Child itself. It was the failure to achieve this that led to the proposal for an Optional Protocol, and this was pursued throughout (although the issue was also taken up in standard-setting through the ILO Worst Forms of Child Labour Convention (No. 182), through the International Conferences of the Red Cross and Red Crescent, and earlier also through the African Charter on the Rights and Welfare of the Child, adopted one year after the CRC itself). The CRC was adopted in 1989. The UN Commission on Human Rights agreed to set up a Working Group to draft the OP in 1994 (resolution 1994/91). The OP was adopted by the UN General Assembly in 2000.

3. In terms of form, the changes to the OP/CAC during the drafting process consisted of (1) whether it should amend the CRC Article 38 or be separate from it; (2) in the latter case, the relationship between the OP and the CRC – notably whether States not parties to the CRC could become parties to the OP, and whether the Committee on the Rights of the Child should consider reports from States Parties to the OP – and whether the Committee should be given additional powers not included in the CRC itself (e.g. a provision similar to the Article 20 CAT power to investigate). The third change which took place was to substance rather than form. Whereas the early assumption – as reflected in the original draft for the OP produced by the CRC – was that in essence all that was required was to ‘amend’ Article 38 to read ‘18 years’ instead of ‘15 years’, as time went by and the issues became clarified and better understood, the text of the OP became more complex.

4. In terms of the OP itself, it was negotiated through an inter-sessional open-ended working group of the UN Commission on Human Rights. The only remarkable feature of this process was that from the beginning and throughout, NGOs participated actively in all aspects of the negotiations – not only in the formal sessions, but also in informals, and ‘informal informals’. (What are here called ‘informal informals’ are meetings of only interested parties, without interpretation, at which concentrated attention is given to trying to reach an agreement on a specific issue. In the final round of negotiations one Government representative was designated by the Working Group chair to chair the ‘informal informals’ on each particular topic that needed to be resolved). They were able to propose text as well as responding to other proposals and making comments and substantive statements. At that time, this was not usual, but built on the positive experience of NGO participation in the drafting of the CRC itself. During the CRC, it was the unilateral decision of the Chair to include NGOs in all aspects of the process, in recognition of the expertise of NGOs on the issues. The same line was followed by the Chair of the WG on the OP/CAC.

5. At the point at which the process had become blocked (in 1998), the NGOs considered the possibility of alternative methods of drafting and adoption, including establishing a diplomatic conference to produce an International Humanitarian Law treaty, and/or to agree the text of an OP through a different process which would then be reintroduced to the UN General Assembly for adoption (since this would still have been an OP to the CRC), but there was not enough governmental support for either of these alternatives. A separate human rights treaty/instrument was not considered as a serious option because of the desirability of the link with the CRC and its Committee. The drafting of the ILO Worst Forms of Child Labour Convention (No. 182) presented an opportunity, which was taken up by some governments and NGOs, and supported by the Trade Unions. This had the effect of shifting the discussion away from the age question – since the 18 year age limit was already established in the ILO – and onto what should be prohibited for under-18s. In addition, the different balance of power in ILO negotiations was more favourable to a positive outcome once it was clear that the Trade Unions (who also have ‘voting rights’) were supportive, and the Employers were neutral. The result was a conceptual
breakthrough in that for the first time child soldiering was accepted as a form of child labour, which then had practical implications for the work of the ILO itself and more broadly, not only in relation to the specifics of ILO Convention 182.

6. The form chosen – an OP to the CRC – meant that this was treated as a human rights treaty, and although there was discussion of having the article on non-state armed groups in the form of ‘all parties to the conflict’ as in international humanitarian law, this was not adopted but instead the provision was drafted in terms of a moral obligation on the armed groups and a legal obligation on all States parties to the OP, thus retaining a classical human rights legal framework.

7. If a different process had been adopted it might have been possible to have achieved a stronger text (‘straight 18 prohibition’ etc). This could perhaps have been achieved if at an early stage it had been decided to have a diplomatic conference of only the States parties to the CRC, but by the time this was suggested, this would only have excluded the USA which although a major problem was not the only one. Similarly, a diplomatic conference to produce an international humanitarian law treaty might have produced a stronger text. (Though see below in relation to the actual outcome with respect to armed groups which might not have been so strong in an IHL treaty). The other major limitations in terms of the process were the refusal to even consider voting, and the role of the EU, which had a significant number of States recruiting under-18s.

8. The African Charter on the Rights and Welfare of the Child played a less significant role than might have been expected, partly because at that time too few States had ratified it for it to enter into force, and because of the relatively small number of African States participating actively in the Working Group on the OP. The other activities – ILO, International Conferences of the Red Cross and Red Crescent Movement (in particular the adoption of the Movement’s Plan of Action on Children and Armed Conflict), and subsequently the regional conferences organised by the Coalition to Stop the Use of Child Soldiers had significant impacts in producing a better result in the OP than otherwise seemed likely.

**Actors of the Process**

9. The significant positive actors in the process were a number of governments, a small group of NGOs, the ICRC and some Red Cross Societies. The lack of a stronger group of governments, in particular any major military powers, whether in one region or cross-regional, was the biggest limitation in relation to the actors. Linked to this was the fact that Ministries of Defence were concerned and were not prepared to permit the Ministries of Foreign Affairs a free hand in the negotiations. This was exacerbated by the fact that one major children’s NGO was actively opposed to the standard being sought. As with many UN standard-setting processes, only a small number of States were active participants (around 50). These were, inevitably, those who had strong opposition/reservations and therefore wanted to protect their own interests, and those with a strong commitment in favour and sufficient resources to participate. Many of the generally supportive and/or smaller/poorer States did not participate at all or only intermittently. They were also vulnerable to pressure.

**Other Influences**

10. A number of points have already been identified. Some additional ones are: Chairing of the Working Group. The role of the Chair is a significant one in the quality of the result. This includes a number of factors: (1) if the Chair is from one of a small number of strongly supportive countries, this may hamper the ability of that Government to play as strong a role in the negotiations as it otherwise might; (2) if the Chair is not well-versed in the issue, they may
not understand the significance of proposals or be in a position to counter them; (3) if the chair is not an experienced multi-lateral diplomat, this may hamper their ability to handle the process effectively; (4) there is also a personal element – some people make good Chairs – firm, clear, commanding authority/respect, with a good sense of when to pursue an issue and when not to; when to propose their own text and thus ‘take charge’ etc.

11. What should not be underestimated was the role of individual representatives of these and other actors: the personal commitment and skills of individuals is often hidden behind the institutional labels, whether government or IGO. This was true both in the formals, and in the ‘informal informals’ where the results in part varied both with the skills of the individuals tasked with chairing them and of the individual diplomats actively participating in them.

12. The initial text of the OP was very weak. This meant that efforts had to be made right from the beginning to strengthen it. It would have been more helpful to have had an expert consultation in advance in order to produce a strong first draft from which to work, rather than having to build it up and produce alternatives.

13. The Machel Study was running in parallel with the negotiations on the OP. It might have been better to await the results of the Study before starting the standard-setting exercise. In part, both of these relate to the fact that the actual problems were not well understood. In this way, the Machel Study – or at least the in-depth research on child soldiers undertaken for it - might have formed a better basis from which to produce a first draft text of the OP. Much time in the early years (in particular) was spent in exploration and education about the issue and the real problems rather than in working on text. This was one of the reasons for the slow progress – and in the view of the NGOs, the slowness was not a problem as it was serving an educational purpose. There were two aspects to the lack of knowledge: (1) in the early years in particular, most governments were represented by their Geneva Missions, but few of these knew much about their own government’s recruitment laws and practices – military issues are not normally covered by the human rights officials; (2) there was an assumption that other governments recruited in the same way – whereas there is very considerable diversity in this field. Some government representatives therefore played safe by refusing to agree anything that they were not certain would not cause any problems domestically. Others simply could not understand what was being described in relation to other countries. In order to make progress, it was necessary to get greater clarity about the actual situation in countries and to find whether there were ways in which some of the apparent problems could be addressed without undermining the objective. Change was taking place constantly in this respect, which could lead to some confusion as governmental positions changed and new issues emerged which had not previously been raised.

14. Once the negotiations actually reached a stalemate (in 1998), the NGO campaign (Coalition to Stop the Use of Child Soldiers) was launched: one of the specific problems identified which it hoped this would address was the need to exert more pressure in capitals in order to change positions and increase political/public pressure. The regional conferences organised by the Coalition, bringing together governments, NGOs and others, significantly raised the profile of the issue in the regions, and the Conference Declarations did have some impact. This led to further developments and momentum, but also led to increased resistance from those who did not want to change their position, and this in turn seemed to be behind the urgency to complete the OP, whereas the NGOs would have been happy for it to continue for another year as it seemed likely that further progress (in changing Government positions) would have been possible.

15. On the more positive side, the slow pace in the early years combined with the developing understanding of the issue led to one of the most interesting and significant results in the OP,
the provision relating to ‘armed groups not part of the armed forces of the State’: a very sensitive and highly controversial provision for political and legal reasons (see below).

**Assessment of the Outcome**

16. The effort to introduce a more active monitoring/implementation mechanism than simply State reporting to the CRC failed, in part because of the perceived illogicality of having a stronger/more intrusive mechanism for one issue that did not cover the rest of the Convention itself. (In fact, there was a logic to it since the OP covers non-state actors who, by definition, do not fall within the treaty body reporting system). Again, if this and/or other stronger implementation mechanisms had been included in the original draft of the OP, it might have been more likely that something would have been retained. On the other hand, it might well have failed in any case because of the more general resistance to stronger implementation mechanisms.

17. The refusal to consider voting or alternative ways of producing the text meant that with the strong opposition and the relatively weak group of strongly supportive States, gaining the ‘ideal’ result substantively was impossible. It is possible that if some of the other factors had been different, a stronger, though still less than ideal, text might have been adopted. On the other hand, the links between the OP and the CRC itself mean that the Committee can question States about ratification of the OP even before they ratify it, and interpret the provisions of the OP in the context of the CRC itself.

18. In the final negotiations a contentious point was whether reservations should be permitted. There were strong views that they should not particularly since this was an *Optional* protocol with a very limited purpose and it was not at all clear what reservation would not be contrary to the object and purpose of it. However, the USA insisted and overrode strong opposition on this from other States.

19. If an IHL format had been used, it would have been likely that the provisions for governments and armed groups would have been equal. This would have been preferable in terms of equality/equity, but unless the different format had led to a significantly different result, the standards would have been lowered to equalise them rather than raised. An IHL format would also have been likely to have been limited to ‘armed conflict’ situations whereas the OP is not – neither for governments nor for armed groups. This is a real benefit, making it possible to address peacetime recruitment by both categories, and avoiding any debate on whether or not there is an armed conflict since this is irrelevant. Finally, an IHL treaty would normally only address the parties to the conflict, whereas the OP invokes legal responsibility of all States parties to prevent the recruitment of children from their territory, and thus addresses the issue of armed groups recruiting children from the ethnic diaspora from third countries well removed from the conflict zone, as well as recruitment from neighbouring territories, refugee camps, etc.

20. The idea of an independent human rights treaty was not seen as a good way to proceed because of the existence of the Convention and that this was an effort to redress the failings of Article 38.

21. In fact, in the final stages, the only provision of the OP which was really the subject of negotiation – as opposed to confrontation – was the provision relating to armed groups. This is, perhaps, one of the reasons for the strength (and creative tension) of this provision – all parties had an interest in it; there was genuine concern to try to produce something workable (thus even the NGOs had a very active role in its development given their perceived expertise, and understanding of the different legal traditions which also came into play in this provision, and
willingness to propose a strong compromise text, which was ultimately the basis for the final agreed text).

IMPLEMENTATION PHASE

22. The negotiations on the OP led a number of States to either actually change their domestic law/practice or to make commitments to do so if required to do so by the OP. Thus, even before adoption, the OP had an impact. Where States were represented in the process by people from capitals, this had a bigger impact than when represented by their Geneva Mission, as the people from capital were able (and interested) to follow through on changes and commitments. The positive side of the strong US engagement on this, was that the USA did in fact follow through and has ratified the OP.

23. The creation of the Coalition to Stop the Use of Child Soldiers with national coalitions/campaigns has meant that continued pressure has been exerted on governments to ratify and implement the OP.

24. Substantively, the less than perfect result in fact increased pressure on Governments in two ways. First, the NGOs and other advocates did not feel that they had achieved their objective and thus that further action was not needed. Secondly, the fact that the OP did not endorse recruitment of under-18s, although permitting it, but requires States to specify their minimum voluntary recruitment age meant that there was an incentive for continuing to campaign for those recruiting under-18s to raise the age prior to becoming a party to the OP, and indeed, to continue to do so even afterwards since the State declaration can be withdrawn in favour of a higher age.

25. One of the problems during the negotiations was the difficulty of accessing clear information about the legal situation in States in relation to governmental recruitment into the armed forces. The focus on the issue led to a greater awareness even amongst Government officials as well as NGOs who had not previously known that their country did or could recruit under-18s. Again, in itself, this led to a number of changes. The fact of the need to make a legal Declaration on ratification of the OP has led many countries to give consideration to this issue prior to ratification and indeed to introduce legislation – as has also the specific requirement to take action, including legal measures, against recruitment from their territory/jurisdiction by armed groups. Of course, not all States appear to take these requirements as seriously as others, but what it means is that there has been a direct impact domestically in a way which has not always been the case with other human rights treaties, and it is assumed that the Committee on the Rights of the Child will continue to monitor and put pressure on Governments in this respect. At the same time, those who have taken them seriously have been relatively slow to ratify precisely because they have usually had to introduce new legislation in order to do so. However, once the legislation and ratification were completed, this of course meant that there was serious domestic implementation rather than either simply a ratification, which in some systems would only provide an external obligation and in others would require a legal challenge to ensure that its provisions were effective domestically. (The ILO is continually reviewing the law and practice in relation to ILO 182 as well as working on practical alternatives to child recruitment and in demobilisation/socio-economic reintegration because of the new understanding that this comes within their remit).

26. The fact that the OP directly addresses the issues of recruitment and use of children under 18 years by ‘armed forces not part of the armed forces of the State’ also has had a direct impact. At least one human rights body associated with an armed group has recently accepted that the Government ratification of the OP/CAC has created an obligation not to recruit under 18s,
rather than their previous assumption that the obligation was the under-15 prohibition in the 1977 Additional Protocols to the Geneva Conventions. The disadvantage of the standards in the OP in this respect is the discrepancy between the permission for governmental voluntary recruitment between 16 and 18 and the complete prohibition on this for armed groups. However, this apparent discrepancy is in fact less problematic than if the OP had simply set a lower age for States, since the actual age applicable is that in the Declaration by the State concerned, so in this example, the Government specified 18 as its minimum voluntary recruitment age, thus there is no discrepancy in this case. However, it is not so easy to explain this to those less involved in the process/issue (whether human rights advocates or armed groups) and thus there is a tendency to assume that the OP permits any State to recruit voluntarily into its armed forces from 16 – or even (quite erroneously but because of the way the provision is drafted) from 15 years.

27. The proliferation of standards regulating ‘child soldiering’ is not desirable in itself. It leads to confusion and misunderstandings, or simply failure to take account of all the relevant standards – in particular, those who work in the IHL field are often unaware of the significance of ILO Convention 182 in this respect. It would be better if there was a single standard on recruitment and use of children in hostilities that covered all governments and all armed groups and at the same level. However, given that the OP and other efforts were driven precisely by the need to remedy the perceived deficiencies in the already adopted texts, this was not an option. Finally, the OP addressed an issue that most had not even considered but which expert NGO opinion had identified: ensuring that there was no ‘gap’ in standards in relation to armed groups aligned to or fighting on the same side (or at least not opposing) the government, since the standards cover government armed forces and armed forces not part of the government armed forces. Thus the government can either declare government-aligned paramilitaries or other armed groups as being part of the armed forces of the State, or as not being part of them. There is no third option, and thus all are covered.