CHAPTER THREE

SCOPE OF THE OPTIONAL PROTOCOL

24. The 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts extends the protection provided for by Article 38 of the CRC. Child rights advocates sought for many years to raise the minimum age for recruitment and participation in hostilities from 15 to 18 years.90 The dissatisfaction with Article 38 also manifested itself within the Committee on the Rights of the Child.91 At its second session, in 1992, the Committee proposed to draft an Optional Protocol to the CRC in order to further restrict the participation of children in hostilities.92 It was convinced that this Protocol would contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children.93 In 1993, one of the members of the Committee was appointed to prepare a preliminary draft Optional Protocol raising the minimum age of recruitment to 18.94 Moreover, in the Vienna Convention and Programme of Action adopted on 25 June 1993, the World Conference on Human Rights urged the Committee 'to study the question of raising the minimum age of recruitment into armed forces'.95 In 1994, the Commission on Human Rights formed an open-ended working group in order to negotiate an Optional Protocol.96 The working group concluded its work in 2000. The UN General Assembly formally adopted the Optional Protocol on 25 May 2000. After receiving the first 10 ratifications

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91 Hereinafter also referred to as the ‘CRC Committee’ or ‘the Committee’.
92 CRC Committee, Day of General Discussion on Children in Armed Conflict (UN Doc. CRC/C/10, 1992).
93 Paras. 61–77; Cf. also CRC Committee, Concluding Observations: Germany (UN Doc. CRC/C/Add. 43, 1995), para. 4.
94 See UN Doc. CRC/C/625, para. 176.
needed for its entry into force,\textsuperscript{97} the Protocol became legally binding on 12 February 2002.\textsuperscript{98} As of 4 September 2004, 77 States were party to the Protocol.\textsuperscript{99}

25. The Optional Protocol does not entirely meet up to the expectations. Due to the reluctance of some States, in particular the USA, 18 years has not been set as minimum threshold for all recruitment and deployment practices.\textsuperscript{100} Indeed, States are still allowed to recruit under-18s when the latter voluntarily join the armed forces. Instead of a ‘straight-18’ protection, the lowest common denominator has thus been sought.\textsuperscript{101} However, it is asserted that the Optional Protocol is ‘a significant milestone in the international community’s halting journey towards the adoption of a policy that would see the cessation of all forms of recruitment and participation of children in armed conflict’.\textsuperscript{102} Its provisions are commented upon below.

\textit{Preamble}

26. The negotiators of the Optional Protocol easily agreed on the wording of the Preamble.\textsuperscript{103} In it, the Optional Protocol is consequently situated within human rights law. International humanitarian law and international human rights law have thus merged with regard to child combatants, with ‘human rights considerations infiltrating the body of international humanitarian law’.\textsuperscript{104}

\begin{footnotes}
\footnotetext{97}{The first ten States to ratify were the following: Andorra, Austria, Bangladesh, Canada, Democratic Republic of the Congo, Holy See, Iceland, New Zealand, Romania and Sri Lanka.}
\footnotetext{98}{Unicef, Guide, o.c. (note 54), p. 7.}
\footnotetext{99}{Those States are Afghanistan, Andorra, Argentina, Austria, Azerbaijan, Bangladesh, Belgium, Belize, Bosnia and Herzegovina, Brazil, Bulgaria, Cambodia, Canada, Cape Verde, Chad, Chile, Costa Rica, Croatia, Czech Republic, Democratic Republic of the Congo, Denmark, Dominica, Ecuador, El Salvador, Finland, France, Greece, Guatemala, Holy See, Honduras, Iceland, Ireland, Italy, Jamaica, Japan, Kazakhstan, Kenya, Kyrgyzstan, Lesotho, Lithuania, Luxemburg, The Former Yugoslav Republic of Macedonia, Mali, Malta, Mexico, Republic of Moldova, Monaco, Morocco, Namibia, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Qatar, Romania, Rwanda, Senegal, Serbia and Montenegro, Sierra Leone, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Timor-Leste, Tunisia, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Venezuela and Viet Nam.}
\footnotetext{100}{R. Harvey, o.c. (note 7), p. 13.}
\footnotetext{101}{A. Sheppard, ‘Child soldiers: Is the optional protocol evidence of an emerging ‘straight-18’ consensus?’, l.c. (note 22), p. 54.}
\footnotetext{102}{Ibid., p. 63.}
\footnotetext{104}{Ibid., p. 236.}
\end{footnotes}