

Wilton Park Conference

Febr. 19-23, 2007

The Optional Protocol on the involvement of children in armed conflict:  
building an international wall of prevention.

Jaap E. Doek  
Chair CRC Committee ( 2001- 2007)

### Introduction

It is quite remarkable and disappointing that the Optional Protocol to the CRC on the involvement of children in armed conflict (OPAC) has not been mentioned at all in recent documents and statements such as the report of the Secretary General on Children in armed conflict (nor in the text, nor in the recommendations) and the statement of the President of the Security Council (1). It indicates not only an apparent lack of awareness of the existence of this Optional Protocol, but also of the great potential it has for the prevention of the recruitment for and use of children in armed conflict. In her strategic framework for 2006-2007 the Special Representative of the SG for children and armed conflict stated that she will undertake actions to promote the ratification and application of the Optional Protocol (par. 4.2 Advocacy) and that her Office with its partners hopes to commission a short (SIC!) report to analyse what has happened under the Optional Protocol (par. 4.4 under 3).

It is clear that most attention is understandably devoted to addressing the problems of children already recruited or used in armed conflict. And indeed, a lot of very commendable activities have been developed and implemented in this regard and it is particularly unique and commendable that the

Secretary Council has taken a very active role in the protection of children involved in armed conflicts.

But the potentials of the OPAC are not fully understood and it is objective of this presentation to inform you about these potentials based on the recently started examination of initial reports submitted by States Parties to the OPAC on its implementation.

## 2. OPAC: brief summary of its content

Assuming that not everybody is equally informed about the content of the OPAC let me first give a brief summary of the core provisions.

### - recruitment

a. no compulsory recruitment of persons under age 18 into the armed forces of States Parties (art. 2)

b. voluntary recruitment into national armed forces is possible for which the minimum age must be set at least at 16 years. Upon ratification a binding declaration to that effect should be made (art. 3). Various safeguards should be in place to make this recruitment genuinely voluntary, including e.g. consent of the parents and a reliable proof of age.

c. recruitment by armed groups (= distinct from national armed forces) of persons under age 18 is prohibited under all circumstances (that is: both voluntary or compulsory) and States Parties shall take all feasible measures to prevent such recruitment (art. 4).

### - involvement in armed conflict

a. States Parties should ensure that members of their armed forces under the age of 18 do not take direct part in hostilities (art. 1)

b. armed groups should not under any circumstances use persons under age 18 in hostilities and States Parties shall take all feasible measures to prevent this involvement (art. 4)

- demobilization, rehabilitation and social reintegration

a. States Parties shall take measures to ensure that persons recruited or used in hostilities, contrary to the OPAC, are demobilized (or released from service) and to provide these persons with the necessary assistance for their recovery and social reintegration (art. 6).

b. States Parties shall cooperate in the implementation of the Protocol, including in the rehabilitation and social reintegration of persons victims of violations of the Protocol. States Parties in a position to do so shall provide such assistance via existing, multilateral, bilateral and other programmes or, inter alia, via a voluntary fund established in accordance with the rules of the General Assembly (art. 7).

The remaining articles 8-13 contain the traditional provisions on the possible ratification of the Protocol (3), the reporting obligations of States Parties, the possibility of denouncing or amending the Protocol.

Some brief comments:

- the provisions on demobilization, rehabilitation/recovery and social reintegration are very limited (rudimental). This is most likely the result of the focus of the drafting of this Optional Protocol on recruitment and use of children in armed conflict/hostilities. The main drive behind this Protocol

was the dissatisfaction of various States Parties with the low standard set in this regard in art. 38 CRC.

It is understandable and regrettable because it is also reflected in the limited information that States Parties provide in their initial reports on demobilization, rehabilitation, recovery and social re-integration, including on international cooperation in that regard.

- despite the limited specific attention the CRC Committee does raise these issues in the meetings with States Parties and this includes - in particular for States not involved in armed conflicts - recommendations regarding children seeking asylum and who come from countries with (recent) armed conflict.

The Committee recommends States Parties e.g. to identify these children at the earliest possible stage (and not only children who were actively involved in armed conflict, but all children affected) to carefully examine their situation, to prohibit their detention and provide with immediate, culturally sensitive and multidisciplinary assistance for their physical and psychological recovery and their social reintegration (see art. 6(3) OPAC). In addition: to train authorities working for and with these children and engage in international cooperation in this respect (see e.g. Concluding Observations Malta, CRC/C/OPAC/CO/MLT/1; 29 Sept. 2006);

- the little attention paid to the OPAC, as noted before, may also explain why to the best of my knowledge no action has been taken to establish the international voluntary fund within the UN for child victims of armed conflict. I like to recommend the SRSB to explore the possibilities of such a voluntary fund;

- given the already large body of activities focussing on demobilization, rehabilitation and social reintegration (see also the recently at a conference in Paris (Febr. 5, 2007) adopted Paris Commitment and the Guidelines on the Protection of Children Associated with Armed Forces and Groups) I like to discuss the possibilities of prevention under the OPAC.

### 3. Protection from and Prevention of recruitment and use of children in armed conflict

The CRC Committee is of the opinion that the OPAC can be and should be used as an instrument to build an effective wall of prevention of recruitment and use of children in armed conflict/hostilities. Before elaborating on this opinion and by way of introduction I have to take you briefly to the other Optional Protocol on the Sale of children, child prostitution and child pornography.

What are the characteristics of this OP?

1<sup>st</sup> States Parties are required to make acts specifically mentioned in article 3 a crime.

2<sup>nd</sup> States Parties are required to establish national and a certain level of extra territorial jurisdiction allowing for the prosecution of crimes under the OP, even if they are committed outside their territory (art. 4).

3<sup>rd</sup> States Parties shall make the crimes covered by the OP extraditable offences. If an extradition is not made by the requested State Party that State shall take suitable measures to submit the case to its competent authorities for the purpose of extradition (art. 5).

4<sup>th</sup> States Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal extradition proceedings.

Much more can be said about this OP but this is sufficient for explaining the CRC Committee's **approach** in relation to the implementation of OPAC.

In examining the initial reports so far submitted by States Parties, the CRC Committee was struck by the fact that almost all these States Parties do not have specific provisions that explicitly make acts that violate the provisions of the OPAC a crime. Also provisions on possible territorial jurisdiction and extradition in this regard were lacking.

The CRC Committee is of the opinion that States Parties to OPAC should take specific measures to enforce the provisions of OPAC with a view to develop an international and effective system of prevention of recruitment and use of children in armed conflict.

Based on particular:

Article 4(2): "States Parties shall take all feasible measures to prevent such recruitment and use of children(that is: by armed groups), including the adoption of legal measures to prohibit and criminalize such practices" and on Article 6 (1): "Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the present Protocol within its jurisdiction".

The CRC Committee makes the following recommendations to States Parties (4);

a) to explicitly prohibit by law (that is: make it a crime) and in line with article 38 CRC the recruitment of children under the age of fifteen years into

armed forces or armed groups and their direct participation or their use in hostilities.

In the Rome Statute of the International Criminal Court the conscripting or enlisting of children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities is listed as one of the war crimes (art. 8, par. 2 under b (xxvi) and under e (vii). This is, in my opinion, a clear imperative to criminalize these acts and also for States Parties to the CRC to assume extra-territorial jurisdiction. Personally I am, in the light of article 8 of the Rome Statute, in favour of universal extra-territorial jurisdiction but it would already be important if a State assumes extra-territorial jurisdiction if the perpetrator or the victim of these crimes is a citizen of that State or has other links with that State.

b) to explicitly prohibit by law (that is: to criminalize) the violation of the provisions of the Optional Protocol regarding the recruitment and involvement of children in hostilities.

This wording is of a general nature because a detailed description of the various acts that should be criminalized would be too cumbersome. But the recommendation means that States Parties should include in their penal law as a crime:

- the compulsory recruitment of persons under age 18 (5) into (national) armed forces or armed groups (art. 2 and 4 OPAC);
- the voluntary recruitment of persons under age 18 into armed groups;
- the voluntary recruitment of persons below the age set in the law (and which should be at least 16) into national armed forces;

- the use of persons under age 18 for (direct: in case of armed forces; see art. 1 OPAC) participation in hostilities.

c) to establish for the crimes mentioned before extra-territorial jurisdiction when these crimes are committed by or against person who is a citizen of or has other links with the State Party.

To use this extra territorial jurisdiction the State Party may need the cooperation of another State Party to OPAC e.g. in order to arrange for an extradition of the alleged perpetrator. The Committee does not make specific recommendations in that regard. But I like to refer to art. 7 (1) OPAC “States Parties shall cooperate into implementation of the present Protocol, including in the prevention of any activity contrary thereto”.

If the current States Parties to the OPAC (about 115) do implement these recommendations and do closely and effectively cooperate in this regard, the message sent out is clear: if you do recruit persons under age 18 and/or use them in hostilities you will commit a crime and we, the States Parties make sure that you will not escape justice.

It means that States Parties should start to build an international wall of protection from and prevention of the recruitment and use of children in armed conflict. This wall can only be complete if all States Parties to the CRC do ratify the OPAC and the promotion of that ratification must be one of the priorities of NGO’s the SRSG and the Security Council and all other members of civil society.

Will it prevent for 100% all recruitment and involvement of children in armed conflict? Most likely not. But if we want to make the slogan “Stop Child Soldiers” a reality (or: as close as possible to it) we must build this wall.

## NOTES

1. See inter alia the Report of the Secretary General on Children and armed conflict (11 October 2006, A/60/x-S/2006/x), Statement before the Security Council of the Special Representative of the SG for Children and armed conflict; the Statement of the President of the Security Council (28 November 2006), S/PRST/2006/48).
2. Office of the Special Representative of the Security General for Children in Armed Conflict, Strategic Framework 2006-2007 (New York September 2006)
3. OPAC and the other Optional Protocol (on Sale of Children, Child Protection and Child Pornography) do contain the provision, unique in the history of human rights treaties and related protocols, that they can be ratified by a State that did not ratify but only signed the Convention on the Rights of the Child. The USA insisted on the inclusion of this provision - it had and has (not yet?) ratified the CRC - and indeed did ratify both Optional Protocols.

4. See most recently the Concluding Observations after considerations of reports submitted by States Parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict for Kyrgyzstan (CRC/C/OPAC/KGZ/CO/1; 2 Febr. 2007), Costa Rica (CRC/C/OPAC/CRI/1; 2 Febr. 2007), Vietnam (29 Sept. 2006), Kazakhstan (CRC/C/OPAC/KAZ/1; 29 Sept. 2006) and Malta (CRC/OPAC/CO/MLT/1; 29 Sept. 2006).

5. It is important to underscore the fact that the OPAC does not use the term “children”. Instead it uses systematically the term “persons under the age of 18 years”. It means that the intention of OPAC cannot be undermined by a definition in the domestic law of the term “children” that set an age lower than 18 (see also for that possibility art, 1 CRC).

