CHAPTER-II

OPTIONAL PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD
Optional Protocols are the additional legal mechanisms, which complements the original treaty. Most of the human rights treaties are having optional protocols. A Protocol can be used to add new ideas or concern, procedure, address something etc. in the original treaty. Likewise, the Convention on the Rights of the Child (CRC) is also followed by Optional Protocols, which gives additional obligations than the original treaty. The question arises in the mind that why the Protocols are to be called Optional? The Protocols are optional because states are not compelled to ratify the Protocols that have ratified the original treaty. The states are free to choose whether they want to ratify the Protocols or not. A Protocol is not binding upon the states that have already ratified the original convention. Generally, it happens that only those states can ratify the Optional Protocol who are party to the original treaty. But the Optional Protocols to the Convention on the Rights of the Child (CRC) also allows non-states parties to ratify them. We have good example of US who has not ratified the CRC but has ratified both the Optional Protocols.\(^1\)

The CRC is whole and sole for the welfare, support, development and protection of the rights of children. The Convention says that, “a child means every human being below the age of 18 years”\(^2\) The people less than 18 years of age need special care and protection. But today abuse and exploitation of children are growing rapidly throughout the world. In keeping these problems regarding children, the United Nations General Assembly (UNGA) adopted two Optional Protocols to the Convention on the Rights of the Child, so that the protection of children from involvement in armed conflicts and from sexual exploitation could be decreased. In the year 2000, UN General Assembly adopted two Optional Protocols – first is


\(^2\) CRC, Article 1.
the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography and the second is the Optional Protocol on the Involvement of Children in Armed Conflict.\(^3\)


The Optional Protocol on the sale of children, child prostitution and child pornography is adopted by General Assembly on 25\(^{th}\) May, 2000 but entered into force on 18\(^{th}\) January, 2002.\(^4\)

The problems of sale, prostitution and pornography are vital regarding children. The Optional Protocol on these issues draws attention towards the serious violations of child rights. This Protocol aims to increase the public awareness and international cooperation to protect children from such violations. The Convention on the Rights of the Child in the articles 34 and 35 direct the governments to protect children from all forms of sexual exploitation. Simultaneously, the CRC says that the states parties must take all possible measures to stop abduction, sale and trafficking of children.\(^5\) The Optional Protocols supplements the Convention by telling states to end sexual exploitation and abuse of children and also protects children for non-sexual purposes such as forced labour, illegal adoption and organ donation.

The Protocol provides definitions for the offences of ‘sale of children’, ‘child prostitution’ and ‘child pornography’.

\(^1\) [www.bayefsky.com](http://www.bayefsky.com). Retrieved 03-12-2009.
\(^2\) Ibid.
\(^3\) CRC Articles 34 and 35.
Sale of Children: It has been defined as “any act or transaction whereby a child is transferred by any person to another for remuneration or other consideration”.  

Child Prostitution: It has been defined as “use of a child in sexual activities for remuneration or other consideration”. 

Child Pornography: It has been defined as “any representation of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”. 

There are certain duties, which the states have to fulfill after ratifying the Optional Protocols to CRC. After ratifying the Protocol on the sale of children, child prostitution and child pornography, the states parties will assure and guarantee the protection of children from sexual exploitation, economic exploitation, trafficking, sex tourism etc. It will be the duty of the states parties to increase education among children. This is a well known fact that girl children are at greater risk of sexual exploitation, so states parties should also give great concern towards the protection of girl children. The advancement in technology also creates problem for children, which is growing child pornography on the internet. This child pornography on the internet is a vital problem worldwide. The states parties must control this problem to assure the protection of children. The states parties believe that poverty, economic disparities, socio-economic structure, lack of education, urban-rural migration, gender discrimination, wrong and harmful traditional practices, armed conflicts etc. are the reasons for the sale of children, child prostitution and child pornography. Thus, the states parties must eradicate these problems first.

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7 Ibid.
8 Ibid.
There should be efforts to increase public awareness to reduce the practice of the sale of children, child prostitution and child pornography. The states parties must keep some international instruments under consideration for the protection of children such as the Hague Convention on Protection of Children, the Hague Convention on the Civil Aspects of International Child Abduction, Hague Convention on Jurisdiction, Applicable Law, Recognition, ILO and so on. The states parties give importance to the provisions of the Programme of Action for the prevention of the sale of children, child prostitution and child pornography and the Declaration and Agenda for Action adopted at the World Congress against commercial sexual exploitation of children held in Stockholm in 1996. Simultaneously, the states parties should consider the traditions and cultural values of each and every people for the protection of the child.⁹

Provisions of the Optional Protocol

The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography to CRC consists of 17 articles. The states parties are supposed to stop the growing abuse of sexual exploitation. Article 1 of the Protocol obligates the states parties to prohibit the sale of children, child prostitution and child pornography. Article 2 provides the definition of the sale of children, child prostitution and child pornography. Article 3 states that the act of sexual exploitation comes under criminal or penal law whether committed at the domestic or transnational level. The establishment of jurisdiction over the offences of sale of children, child prostitution and child pornography is necessary according to article 4 of the Optional Protocol. Article 9 talks about the obligation of states parties to disseminate and implement laws, adopt administrative measures, social

policies and programmes, etc. to prevent the offences referred to in the Protocol. The offences of sale of children, child prostitution and child pornography shall be included as extraditable offences under article 5. Article 8 mandates the states parties to adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol. ¹⁰

Article 13 states that the present Protocol is open for signature by any state that is a party to the Convention or has signed it. Article 16 gives right to the state parties so that they may propose amendment to the Protocol and file it with the Secretary General of the UN. According to Article 17 of the Protocol, Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic and will be deposited in the archives of the UN. ¹¹

Optional Protocol to CRC on the Involvement of Children in Armed Conflict


The Optional Protocol to CRC on the involvement of children in armed conflict adopted with an aim to increase the protection of children from taking part in hostilities. Today it is estimated that about 300,000 children are engaged in armed conflict with disastrous results. Children are being forced to join armies. Sometimes, the children go for war against

¹¹ Ibid.
their own families or communities. This problem of early age recruitment of children as soldiers is brought to the knowledge by the United Nations General Assembly (UNGA) which is really an appreciable effort. Children as soldiers are one of the major areas of concern. Before the adoption of the Protocol on the involvement of children in armed conflict, this problem was not under consideration. The adoption of Protocol on this condition of children as soldiers wake up the people throughout the world.\textsuperscript{13}

It is noted that children are forced to join armies under the age of 10. The CRC requests governments in article 38 to take all feasible measures to ensure that children have no direct part in hostilities under 15 years of age. It is also there in the Convention that 15 years will be the minimum age at which an individual can be voluntarily recruited in the armed forces. But the Optional Protocol on the involvement of children in armed conflict establishes 18 years as the minimum age for compulsory recruitment. The Protocol directs states that children under 18 years of age must be given special protection. So sufficient safeguards should be provided to the children under the age of 18 who get voluntarily recruited. There are some independent armed groups who use children under the age of 18 in conflicts. Thus, the states parties should take legal measures to prohibit such independent groups.\textsuperscript{14}

States parties must make a declaration regarding the age at which national armed forces will give permission for the voluntary recruitment and also about the steps which the states will take to ensure that such recruitment is never forced at the time of ratifying Protocol. States parties shall take all feasible measure to ensure that the members of the armed forces below the age of 18 years will not take a direct part in hostilities.

\textsuperscript{13} Ibid.
\textsuperscript{14} Ibid.
The forces like non-state actors and guerilla are not supposed to recruit anyone under the age of 18 for any purpose.\textsuperscript{15}

According to the ICRC commentary, this is not a complete ban on the use of children in conflict. It suggested that states parties should "take all necessary measures" but the final text says that states parties should "take all feasible measures". This feasible measure is not a total ban on the use of children in armed conflict because feasible should be understood as capable of being done or possible or practicable. Another controversial thing is "take a direct part in hostilities". The word direct shows that children could be involved in hostilities indirectly such as for gathering and transmitting military information, helping in the transportation of arms and ammunitions, provisions of supplies, etc.\textsuperscript{16}

All the states parties to the Protocol on the involvement of children in armed conflict have to do commitment towards the promotion and protection of the rights of the child. There are certain duties, which the states parties have to do such as give publicity saying that children’s rights need special protection. They must call for continuous improvement, development and education with peace and security. The states parties have been disturbed by the harmful impact of armed conflict on children, which always targeted children through places like schools and hospitals. The states parties consider the statute of the International Criminal Court (ICC) because according to ICC statute, involvement of children under 15 years in international and non-international armed conflict is taken as war crime. To increase the protection of children’s rights recognized in the CRC, there is need to control the involvement of children in armed conflict. The states parties consider that the best interests of the child should be a primary

\textsuperscript{15} Ibid.
consideration. The 26th international conference of the Red Cross and Red Crescent (December 1995) recommended states parties to take steps to prohibit all the children below the age of 18 to take part in hostilities. In this way all the countries that have ratified the Protocol, will follow such instructions to implement Optional Protocol on the involvement of children in armed conflict in their respected countries.¹⁷

**Provisions of the Optional Protocol**

There are 13 articles under the provisions followed by the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. Article 1 of the Optional Protocol provides that states parties will take all feasible measures to stop children to take part in hostilities who have not attained the age of 18 years. States parties will ensure that the children below 18 years are not compulsorily recruited into armed forces as stated by article 2. The provisions of the Optional Protocol also stresses on the minimum age for recruitment in article 3, accordingly to which 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 CRC. Any armed groups other than armed forces of a state are not allowed to use persons under the age of 18 years in hostilities according to article 4 of the Optional Protocol. Simultaneously, nothing shall be constructed in the Protocol which will prohibit provisions in the law of a state party or in international or humanitarian law that are helping to the rights of the child; this is stated in article 5. Article 6, gives certainty of a state party to take all necessary legal and administrative measures for the effective implementation of the provisions of this Protocol within its jurisdiction. Article 7 talks about the state’s cooperation which also includes technical as well as financial

¹⁷ Naseema, n.9, pp. 174-175
assistance in the implementation of the present Protocol. The submission of report to the Committee on the Rights of the Child by state party is dealt in article 8 of the Protocol. The report will provide information on the measures taken by the state party to implement the provisions of the Protocol. The Protocol is open for signature by any state party who has signed it as stated in the article 9. Article 11 states that any state party may denounce the present Protocol at any time by written notification to the Secretary-General of the UN. There is also provision of amendment in article 12. In this way all provisions contained in the Protocol safeguards rights of children.¹⁸

**Implementation Mechanism of both the Optional Protocols to CRC**

Both the Optional Protocols have the same implementation mechanism as to the Convention on the Rights of the Child (CRC). The task of implementation of the Protocols is fulfilled through the Committee on the Rights of the Child which acts as the watchdog on the implementation of the provisions of the Optional Protocols by the states, which have ratified them. The Optional Protocols have opted the same way to implement it through the regular submission of country reports. So, the Committee on the Rights of the Child plays an important role in monitoring the implementation of the Optional Protocols to CRC on the sale of children, child prostitution and child pornography and on the involvement of children in armed conflict.

**Implementation Mechanism of Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography**

All the states parties to the Optional Protocol on the sale of children, child prostitution and child pornography must submit reports to the

¹⁸ Ibid., pp. 176-179.
Committee on the Rights of the Child regarding the steps taken by them to implement the provisions of the Protocol. According to article 12, paragraph 1, each state party shall submit a report to the Committee within two years following the entry into force of the Optional Protocol for that state party, other states parties shall submit reports every five years. The reports must include information on the legal status of the Optional Protocol in domestic law, the procedures used for the periodic evaluation of the implementation of the Optional Protocol and so on.

The reporting should indicate that how the implementation of the Optional Protocol is in accordance with the general principles of the CRC like non-discrimination, best interest of the child, right to life, survival and development and respect for the views of the child. The states parties must also point out that to what extent the Optional Protocol give its contribution to the implementation of the provisions of the CRC particularly article 1, 11, 21, 32, 33, 34, 35 and 36. There should be involvement of both the governmental and non-governmental organizations in preparing the report. To prohibit the sale of children, child prostitution and child pornography, the monitoring Committee may seek the information on existing criminal or penal laws and regulations defining the activities and acts dealt with in article 3, paragraph 1 of the Optional Protocol. The states parties have to establish jurisdiction over the offences of sale of children, child prostitution and child pornography, so that all the legislative, judicial and administrative measures should be adopted. The reports should provide information about the extradition policy of states parties. In the light of articles 8, 9 paragraphs 3 and 4 of the Optional Protocol, the states parties should take measures to protect the rights and

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19 Optional Protocol to the CRC, Article 12.
interests of child victims of the offences of sale of children, prostitution and pornography.²⁰

Through the system of periodic reporting, the Committee establishes pressure on the state party to implement the provisions of the Optional Protocol in an effective manner for protecting children from all forms of sexual exploitation. In the context of article 9, it is the duty of the states parties to raise public awareness about the offences prohibited under the Protocol. The reports must include the steps taken to promote the international cooperation to find out the root cause of the offences referred to in the Protocol and also to assist child victims. Such information will be provided in the light of article 10. All the treaties and agreements such as regional, bilateral, multilateral, even relevant domestic legislation etc. will be provided in the reports submitted by the states parties to the Committee. As a result, the states parties are not only confined to the ratification but have to show the implementation of each provisions provided in the Optional Protocol to protect children from sale, prostitution and pornography. The Committee through the reports always keeps on watching the extent of implementation of the provisions of Optional Protocol in the states parties.²¹

Implementation Mechanism of Optional Protocol on the Involvement of Children in Armed Conflict

The Optional Protocol on the involvement of children in armed conflict has the same implementing body i.e. Committee on the Rights of the Child, as the Optional Protocol on the sale of children, child prostitution and child pornography. So, the reporting procedure is also the same. The only difference is that, the states have to submit regular country

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²¹ Ibid.
reports towards the protection of children from involvement in armed conflict. The states parties have to protect children from taking direct part in hostilities.

The reports submitted to the Committee must include the copies of the principal legislative texts and judicial decisions, administrative and other instructions to the armed forces both of civil and military character and also the detailed statistical information, indicators and relevant research. The reports must indicate that how the implementation of the Optional Protocol is according to the principles of the CRC such as non-discrimination, best interests of the child, right to life, survival and development and respect for the views of the child. The involvement of both the governmental and non-governmental organizations is needed in drafting the reports. The age limit of a person must be mentioned to determine whether a person is on the stage of protection or not.\footnote{Article from www.unhchr.ch. Retrieved 04-03-2010.}

In the context of article 1, the reports should provide information on the meaning of "direct participation" in the legislation and practice of state. The states parties must assure that the children below the age of 18 years are not involved in hostilities. Simultaneously, in the context of article 2 of the Optional Protocol, the children below 18 years are not compulsorily recruited into army. The reports submitted by the states parties must indicate the age for voluntary recruitment into the armed forces in the light of article 3 of the Protocol. In the context of article 3, the states parties should provide information with the detailed description of the procedure, medical examination, and verification of the age, opinion of parents or legal guardians and so on for recruitment of children into the armed forces. Simultaneously, the information also included the minimum age to join the army schools, type of education like academic education, military training
etc. According to article 4 of the Protocol, the states parties have to inform the Committee about the steps taken to operate armed groups from preventing recruitment of children below the age of 18 years. In the light of article 7, the states parties have to show the technical as well as financial cooperation in the implementation of the Protocol.\textsuperscript{23}

**Role of India**

India has ratified both the Optional Protocols to the Convention on the Rights of the Child. India has ratified Optional Protocol on the sale of children, child prostitution and child pornography on 16 August, 2005 which entered into force on 16 September, 2005. The Government of India (GOI) has also ratified Optional Protocol on the involvement of children in armed conflict on 30 November 2005 which entered into force on 30 December 2005. India has not submitted either of the reports till now. But India is preparing to submit initial reports on the Optional Protocols to the CRC. The making of reports is under due process. After submitting reports it will be revealed that to what extent the implementation of Optional Protocols is going on in India. The reports will prove the positive efforts taken by India in controlling sexual exploitation and protecting children from taking part in hostilities.\textsuperscript{24}

**Summary Observations**

The Committee assists the states in implementing the provisions of the Optional Protocol. So, it could be said that the Optional Protocols have very strong implementation mechanism. Therefore, like other human rights treaties, the Convention on the Rights of the Child is also followed by the

\textsuperscript{23} Ibid.
Optional Protocols. After a gap of 11 years, Optional Protocols to the CRC adopted in the year 2000, however, they entered into force in 2002.

Both the Optional Protocols deal with such issues of the sale of children, prostitution, pornography and involvement of children in armed conflict which had been unnoticed. No doubt, the issues are very vital; as the childhood of children is at stake. There was great need of drawing attention of people towards this growing abuse of sexual exploitation and involvement of children in armed conflict. It is also true that no Convention and Optional Protocols can eradicate such problems but could control it. One very positive step is taken towards controlling such abuse is the submission of regular reports to the Committee on the Rights of the Child. At least to include the measures taken to implement the provisions of the Optional Protocols, the states parties will have to take positive steps to protect children from involving in such abuse of sexual exploitation like sale, prostitution and pornography and also from early age recruitment of children in armed conflict. Thus, the Optional Protocols have strengthened the Convention on the Rights of the Child.