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*Children as Victims of War*

# CHILDREN IN ARMED CONFLICT: AN OVERVIEW OF RELEVANT HUMANITARIAN LAW AND HUMAN RIGHTS LAW<sup>1</sup>

## 1. Introduction

The position of children in armed conflict finds itself uncomfortably positioned between concepts such as ‘the best interests of the child’ (reflecting notions such as chivalry and humanity) on the one hand, and war increasingly becoming ‘a space devoid of the most basic human values’ on the other. It reflects a glaring dichotomy between rhetoric and reality – an ideal of virtual world-wide acceptance of children’s rights through the medium of the Convention on the Rights of the Child (1989) contradicted by a reality in which children are constantly subjected to the full brutality of war. In fact, the changing face of war leads to a constant deterioration of the position of children in armed conflict. Battles are fought from village to village or from street to street. Struggles are marked by horrific levels of brutality. Any and all tactics are employed, from systematic rape to ethnic cleansing and genocide. With all standards abandoned, human rights violations against children occur in unprecedented numbers.

The effectiveness of measures currently in place to protect child victims in armed conflict needs to be valued against the background of war increasingly becoming more brutal and relentless. International humanitarian law and human rights law indeed do contain protection measures, but the extent of child casualties<sup>2</sup> requires urgent evaluation of these measures to establish whether it renders adequate protection to children under these conditions.

## 2. Brief exposition of current humanitarian and human rights law on children in armed conflict

Various provisions in international humanitarian law and human rights law have the protection of child victims in their aim. The Law of Geneva *qua* body of law relates to the protection of victims of war, the Wounded and Sick; Wounded, Sick and Shipwrecked; Prisoners of War; and categories of civilians who have as a result of some situation or other been rendered outside the conflict. More specifically it is

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<sup>1</sup> The following sources have been used to finalize this contribution: Hamilton & El-Haj ‘Armed Conflict: The protection of children under international law’ in 1997 *The International Journal of Children’s Rights* 1; Maçhel *Impact of Armed Conflict on Children* Report A/51/306 26 August 1996; Van Bueren ‘International legal protection of children in armed conflict’ in 1994 *International and Comparative Law Quarterly* 809; Kuper *International Law Concerning Child Civilians in Armed Conflict*; McCoubrey *International Humanitarian Law: The Regulation of Armed Conflicts*; McCoubrey & White *International Law and Armed Conflict*; Pictet *Development and Principles of International Humanitarian Law*; Sandoz *International Dimensions of Humanitarian Law*; Detrick *A Commentary on the United Nations Convention on the Rights of the Child*; Happold ‘Child soldiers in international law: The legal regulation of children’s participation in hostilities’ in 2000 *Netherlands International Law Review* 31; Dinstein ‘Human rights in armed conflict’ in Meron *Human Rights in International Law* 347; Maher ‘The protection of children in armed conflict’ in 1989 *Boston College Third World Law Journal* 297; Hampson *Legal Protection afforded to Children under International Humanitarian Law: Report for the Study on the Impact of Armed Conflict on Children* University of Essex, May 1996; Aldrich & Van Baarda *Conference on the Rights of Children in Armed Conflict – Final Report of a Conference held in Amsterdam, the Netherlands, on 20-21 June 1994*; Otunnu *Address at the Conference on Atrocities Prevention and Response*. Washington DC, October 1999; *General Assembly Resolution A/RES 51/77* 20 February 1997; Report of the Commission on Human Rights 12 March 1998 E/CN.4/1998/119 *Rights of the Child: Children in Armed Conflict*.

<sup>2</sup> See n 6 *infra*.

Geneva Convention IV (hereafter GC IV) that relates to the protection of civilian persons, including children, in time of war. Prior to the 1949-Conventions international humanitarian law made no specific mention of children as a particularly vulnerable group requiring special protection. GC IV remedies this omission and contains various provisions relating to the protection of children.

The value of GC IV for the protection of child victims is, however, doubtful. It indeed purports to render protection to victims where victims are those who are vulnerable. Unfortunately the notion of vulnerability is narrowly defined to include the sick, shipwrecked and wounded. The concept of vulnerability was not readily conceived to include all civilians. Furthermore the main function of GC IV is to protect a strictly defined category of civilians from arbitrary action on the part of the enemy, and not from the dangers due to military operations as such. This result flows from the fact that the Law of Geneva serves to provide protection for all those who as a consequence of armed conflict have fallen into the hands of the enemy so that protection from the hostilities itself falls outside the scope of GC IV. It is also clear that the principle of children's entitlement to special treatment is nowhere provided for in GC IV. The Convention does contain some provisions that provide for special treatment in specific situations, but one searches in vain for a general definition of childhood or an acknowledgement of children's entitlement to special treatment.

The conclusion can safely be drawn from this rather cryptic overview of GC IV that the protection afforded by the Convention is limited and that it only covers a restricted group of children in the population, namely children in occupied territory.

The Additional Protocols to the Geneva Conventions of 1977 (hereafter GP) also contain provisions for the protection of children. It is especially article 77(1) of GP I that applies widely to all children in the territories of the parties to the conflict. It articulates the fundamental precept that children 'shall be the object of special respect and shall be protected against any form of indecent assault'. Parties to the conflict 'shall further provide them with the care and aid they require, whether because of their age or for any other reason'. This provision was intended to prevent injury to children and to provide for their normal development as far as is possible in situations of armed conflict. This article reflects the general precept of the entitlement of all children in the power of parties to a conflict to special treatment.

GP I applies only to international armed conflicts. In essence it requires that fighting parties must at all times distinguish between military and civilian objects so that civilians and civilian objects may not be the object of attack. The only targets that may be attacked legally, are those which by their nature, purpose, location or use make an active contribution to military action and whose total or partial destruction, capture or neutralization in the particular circumstances offers a definite military advantage. It is clear that the protection afforded by GP I extends only to civilians who may not be the direct or intended targets of attack.

The significance of article 77 for the protection of child civilians must be established against the background of the aims of GP I. Hamilton and El-Haj come to the conclusion, correctly so it is submitted, that its value for children is minimal. Three main arguments are put forward to substantiate their conclusion.

- Article 77(1) provides for children to be the object of special respect. This term, however, has no specific meaning and no definition is provided. It may mean no more than that children should be treated differently in the way specified in humanitarian law, e.g. that children should not be imprisoned or detained or recruited under the age of 18 years and that they should be among the first to receive relief.
- The term ‘protection’ cannot be equated with, and is fundamentally at odds with, the meaning given to protection in international children’s instruments. ‘Protection’ as intended by GP I, reflects a compromise between humanitarian ideals and military necessity. Any provision which allows for loss of civilian life, provided the loss is not excessive in relation to the anticipated advantages, is essentially incompatible with the right to life provisions of the Convention and the 1924 and 1959 Declarations on the Rights of the Child. According to the Convention and the Declarations the right to life is an intransgressible norm. This is not, however, reflected in the definition of protection under GP I which does not uphold a child’s fundamental right to life or to survival.
- No mention is made of the Declaration on the Rights of the Child (1959), notwithstanding the fact that the drafters were aware of the existence of the document. In the preamble to the Declaration it is stated that ‘mankind owes the child the best it has to give’, but there is no indication that GP I seeks to uphold this notion.

GP II extends to conflicts of non-international nature and is a watered-down version of GP I. It provides in article 4(3) that children shall be provided with the care and aid they require, yet it makes no mention of children’s need for special respect and their protection from indecent assault as does article 77(1) of GP I. GP II is extremely limited in its application leading to various problem situations.

- In terms of article 1(2), GP II does not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature. It would therefore only apply if
  1. there is an armed conflict not covered by GP I;
  2. the armed conflict takes place in the territory of the High Contracting Party;
  3. the conflict involves the armed forces of a High Contracting Party and dissident armed forces or other armed groups;
  4. the dissident armed forces are under responsible command; and
  5. such armed groups have control over a part of the territory of the High Contracting Party so as to enable them to carry out sustained and concerted military operations and to implement GP II.
- Many states view the suppression of those who challenge it’s authority as a legitimate right and would not readily concede that a situation within their territory amounts to an armed conflict meeting the requirements set out above. It goes without saying that for a child caught up in such situations there is little distinction between armed conflicts meeting and not meeting the requirements – the effects of war are not limited by their classification under humanitarian law.

Article 38(4) of the Convention, *qua* human rights provision, deals specifically with child civilians in armed conflict. It provides that

[I]n accordance with their obligation under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all

feasible measures to ensure protection and care of children who are affected by armed conflict.

The rights contained in article 38(4) are not innovative and are in fact disappointing. The primary concern with this article relates to the use of the phrase 'feasible measures'. Clearly this article does not impose an absolute duty on States Parties, but instead a very low standard. From the *travaux preparatoires* to this article it is evident that the members of the working group were not *ad idem* on the level of protection to be imposed on States Parties regarding the protection of child civilians, there being put forward a very strong argument to require of States Parties to take all necessary measures.

Of further importance is the fact that particular principles pertinent to child civilians enjoy customary status. These principles are found both in human rights and humanitarian law and include the right not to be arbitrarily deprived of life, the entitlement of children to special treatment generally, the entitlement of civilians to protection in situations of armed conflict and the entitlement of child civilians to special treatment in situations of armed conflict. The customary law status of these norms generally renders them binding on all states even states that are not party to treaties that articulate these norms. The fact that they are enshrined in a treaty means that these principles may not be subject to derogation, reservation or withdrawal. Yet, notwithstanding the customary status of these norms and the fact that humanitarian and human rights law contain specific provisions regarding child civilians, the position regarding child civilians has reached a point that Maçhel describes as follows:

*[m]ore and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values, a space in which children are slaughtered, raped and maimed; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.* (italics added)

### **3. Children in armed conflict – *quo oportet nos vadere?***

Thomas Hammarberg, a member of the Committee on the Rights of the Child, addresses this very question in a keynote speech in 1994 in Amsterdam. He explains that there are three steps to be taken to improve the position of child civilians:

- ensuring the universal ratification of the key international standards protecting children in armed conflicts;
- taking of measures to monitor and enforce the full implementation of these standards; and
- developing of initiatives to improve the normative framework where there are gaps.

In conjunction these steps establish a framework of policy and practice that may ultimately lead to the improvement of the position of child victims in situations of armed conflict.

#### **3.1 Universal ratification of key international standards**

The main instruments that provide for the protection of child civilians in armed conflict, are relevant articles in the Convention on the Rights of the Child, the Geneva

Conventions and the Additional Protocols. These instruments have been widely ratified. Only two States Parties to the United Nations, the USA and Somalia, have not as yet ratified the Convention. GC IV has been ratified by 189 states, GP I by 158 and GP II by 150 states. However, the conclusion by Maçhel that a desolate moral vacuum exists regarding the position of child victims, gives an ironical perspective on the value of ratification. The other two steps identified by Hammarberg must therefore be seen as mechanisms that aim to impose the obligations flowing from ratification on states.

### **3.2 Measures to monitor full implementation of the standards set out in human rights and humanitarian law**

It is indeed a difficult question how to respond to violations of the set standards. There is a growing awareness that economic sanctions may not have the desired impact on targeted decision-makers and may therefore not justify the imposition of further suffering on the poorer part of the population. It must be remembered, though, that first and foremost it is the responsibility of the State to implement international human rights and humanitarian law – *pacta sunt servanda!* The role of international organizations in this regard is but secondary. With specific regard to the Convention on the Rights of the Child, the relevant States Parties have undertaken to respect and ensure the rights in the Convention and also to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized. It unfortunately cannot be denied that many states fail to adopt any national legislation resulting in difficulties for them to respect and ensure the rights set out in the Convention.

Under the international monitoring mechanisms, two institutions of the UN, the Committee on the Rights of the Child and the Special Representative of the Secretary-General come to mind. Of course the role of NGOs may not be under estimated.

The Committee on the Rights of the Child (hereafter the Committee) has been established in terms of article 43 of the Convention. In terms of article 44 States Parties undertake to submit to the Committee reports on the measures they have adopted which give effect to the rights recognized in the Convention and also on the progress made on the enjoyment of those rights. More specifically, article 44(4) authorizes the Committee to request further information relevant to the implementation of the Convention from States Parties.

Article 45 outlines the functions of the Committee. In order to give effect to its mandate set out in article 43 and to encourage international co-operation in the field covered by the Convention, the specialized agencies, the UN Children's Fund and other UN organs are entitled to be represented at the consideration of the implementation of such provisions of the Convention as fall within the scope of their mandate. The Committee may invite the said institutions as well as 'other competent bodies as it may consider appropriate to provide expert advice' on the implementation of the Convention in areas falling within the scope of their mandate. Such institutions may also submit reports on invitation of the Committee on the implementation of the Convention. The Committee shall transmit, as it may consider appropriate, to the said institutions any reports from States Parties that contain a request, or indicate a need for technical advice or assistance along with the Committee's observations and suggestions on the particular requests and indications. The Committee may

recommend to the General Assembly to request the Secretary General to undertake on its behalf studies on specific issues relating to the rights of the child<sup>3</sup> and it may make suggestions and general recommendations based on information received from States Parties and the said institutions. These suggestions and general recommendations must be transmitted to any State Party concerned and reported to the General Assembly, together with comments from States Parties.

Article 45 raises issues that need to be elaborated upon. In the first place it must be remarked that it is a pity that similar provisions to those of the African Charter on the Rights and Welfare of the Child (adopted in 1990) which establishes a committee that *may also carry out investigations* have not been provided for. In this respect, it appears that the Committee may only make a recommendation to the General Assembly to request the Secretary General to undertake studies on its behalf. Article 45(d) furthermore does not make it clear whether the Committee can make specific recommendations and suggestions to particular states, general recommendations to individual states or only general recommendations to all States Parties together. The Committee interprets article 45(d) as authorizing it to make general comments on articles of the Convention and general recommendations in the field of the rights of the child. It furthermore decided that after it has examined the report received from a States Party, it will issue ‘concluding observations’ which will be ‘an authoritative comment with the purpose of defining outstanding problems and discussing remedies.’ These observations form the basis for discussions about technical advice or assistance

It is submitted that the Convention’s reliance on state reports and its lack of inter-state or individual complaints mechanisms limits its capacity to strengthen state observance of international legal norms pertaining to children in armed conflict. Kuper expresses concern regarding the performance of the Committee in monitoring state reports from countries embroiled in armed conflicts. This author’s criticism focuses on the Committee’s apparent failure, when examining reports from such countries, to question the government representatives on their observance of international law applicable in situations of armed conflict. This omission is considered to be significant since a lack of proper scrutiny when grave violations of human rights and/or humanitarian law are taking place, seriously undermines the purpose and impact of the reporting process in improving observance of the relevant standards.<sup>4</sup>

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<sup>3</sup> This is in fact what had happened when Mrs Graça Machel was requested to undertake a comprehensive study on the impact of armed conflict on children. Her subsequent report of 26 August 1996 under reference number A/51/306 served as an impetus for some comprehensive evaluation of international humanitarian and human rights law pertaining to children.

<sup>4</sup> Hamilton and El-Haj in a report preceding the Machel report recommend that the role of the Committee should be more pro-active than passive so that it be enabled to receive information from NGOs and governments about an existing emergency. This would allow the Committee to initiate early action to ensure that the position of children is secure and that the rights of children are respected by the parties to the conflict. The Committee could enquire from the government concerned and then bring the emergency to the attention of other UN bodies with responsibilities at field level. The authors further recommend that the function of enquiring from the particular government be performed by a specially appointed standing committee, the members of which should be neutral experts of good standing and experience in working with children. The members should not represent any government.

The remit of the standing committee should be to investigate allegations of emergencies, both by enquiry from the government and by visiting the areas in question (with the approval of the State Party

From the description of the functions of the Committee it appears that its principal tools are persuasion and mobilization of shame. Of course it is not suggested that persuasion does not have effect, but rather that its effect is conditional and variable. The object of the dialogue between the Committee and the representatives of a particular reporting States Party is indeed to promote improved respect for the treaty commitments. This object is vital indeed as human rights undertakings are unilateral and objective in character and also in the Convention on the Rights of the Child *qua* international human rights law there is no element of reciprocal interest present. On the other hand, even though the only ‘sanction’ pertaining to the Convention is an adverse report, this should not be allowed to detract from the valuable work the Committee is doing. Its detailed scrutiny of a State Party’s report may help that State to define its own priority for improved compliance. The public nature of the report, particularly if widely reported in the media, will also assist local NGOs in their campaigning.

Pressure also mounted for the appointment of a special rapporteur/representative to ensure the protection of child victims in armed conflict.<sup>5</sup> It finally lead to the

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concerned or the non-state entity in *de facto* control. The role of the committee would be to assess and determine the needs and best interests of the child population in the affected areas and co-ordinate their inter-agency response. UNHCR, UNICEF and NGOs should work in liaison with this committee. The learned authors continue to explain that either the standing committee or one of the UN agencies should be appointed as a key co-ordinating agency, delegating appropriate functions to other agencies. Particular attention should be paid to co-ordination and communication to maximise the protection. This role could possibly be filled by the ICRC, or by a newly established NGO. Local NGOs should feed information into the international body allowing for as wide coverage of the impact of armed conflict on children as possible.

<sup>5</sup> In this regard reference may be made to the *Amsterdam Conference on the Rights of Children in Armed Conflict* in 1994. In a working group that had to discuss the need for such a rapporteur there existed consensus that such a need indeed existed and that the various roles of such a rapporteur could well complement other efforts on behalf of children in armed conflict. However, the working group opined that certain factors militated against such an appointment. It nevertheless felt that reference to the desirability and role of a special representative/rapporteur would suffice and that a detailed list of tasks and actions for which he/she would be competent could only be drawn up once the idea had been approved in principle. In the so-called *Amsterdam Declaration* the following functions for the representative are set out:

- Seek and receive substantiated information from governmental, inter-governmental or non-governmental sources, and respond effectively;
- Transmit, as appropriate, substantial information on violations of the rights of children and raise humanitarian rights issues related to child-victims of armed conflict;
- Make appropriate recommendations to effect full implementation of the human rights of children in the areas of armed conflicts and rules of international humanitarian law which are relevant to the child;
- Bring to the immediate attention of relevant national and international bodies, cases of serious or repeated violations of children’s humanitarian and human rights; and
- Recommend the appointment of a Committee of Experts and/or an international tribunal on war crimes against children.

The so-called *Machel Report* of 26 August 1996 indeed affirms the need for such a rapporteur and contains substantial recommendations in this regard. She believes that to keep the issues of education for peace, demilitarization and early warning systems high on the international human rights, peace, security and development agendas, it is essential to ensure a follow-up to her report. She recommends the establishment of a special representative of the Secretary-General on children in armed conflict. This representative would act as a standing observer, assessing progress achieved and difficulties encountered in the implementation of the recommendations presented by her study. A number of functions are outlined in paragraphs 268 and 269 of her report. Such representative would prepare an

appointment of Mr Olara Otunnu by the Secretary General as his special representative for children in armed conflict in terms of General Assembly resolution 51/1977 on 19 August 1997. Articles 35-39 of the resolution makes provision for the office of the Special Representative and for the functions relating to the office. The articles read as follows:

35. Recommends that the Secretary-General appoint for a period of three years a Special Representative on the impact of armed conflict on children and ensure that the necessary support is made available to the Special Representative for the effective performance of his/her mandate, encourages the United Nations Children's Fund, the Office of the United Nations High Commissioner for Refugees and the Office of the United Nations High Commissioner for Human Rights/Centre for Human Rights to provide support to the Special Representative, and calls upon States and institutions concerned to provide voluntary contributions for that purpose;

36. Recommend that the Special Representative:

- (a) Assess the progress achieved, steps taken and difficulties encountered in strengthening the protection of children in armed conflict;
- (b) Raise awareness and promote the collection of information about the plight of children affected by armed conflict and encourage the development of networking;
- (c) Work closely with the Committee on the Rights of the Child, relevant United Nations bodies, the specialized agencies and other competent bodies, as well as non-governmental organizations;
- (d) Foster international cooperation to ensure respect for children's rights in these situations and contribute to the coordination of efforts by Governments, relevant United Nations bodies, notably the office of the United Nations High Commissioner for Human Rights/Centre for Human Rights, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the specialized agencies and the Committee on the Rights of the Child, relevant special rapporteurs and working groups, as well as United Nations field operations, regional and subregional organizations, other competent bodies and non-governmental organizations;

37. Requests the Special Representative to submit to the General Assembly and the Commission on Human Rights an annual report containing relevant information on the situation of children affected by armed conflict, bearing in mind existing mandates and reports of relevant bodies;

38. Requests Governments, the specialized agencies, relevant United Nations organs and regional, intergovernmental and non-governmental organizations, as well as the Committee on the Rights of the Child, other human rights treaty bodies and human rights mechanisms, to cooperate with the Special Representative and to provide

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annual report to be submitted to the General Assembly as well as to the Commission on Human Rights. The report would contain information received from all relevant sources, including governments, UN bodies, specialized agencies, NGOs and other competent bodies on progress achieved as well as on any other steps adopted to strengthen the protection of children in situations of armed conflict. The representative would work closely with the Committee on the Rights of the Child and would maintain close contact with the Department of Humanitarian Affairs and members of the Inter-Agency Standing Committee on Co-ordination for Inter-agency Follow Up to recent Global Conferences and would be supported in his/her work (including financial support) by the UN system and in particular by the High Commissioner for Human Rights and/or the Centre for Human Rights, UNICEF and UNHCR.

information on the measures adopted to ensure and respect the rights of children affected by armed conflict;

39. Calls upon Member States and relevant United Nations bodies and non-governmental organizations to consider how the impact of armed conflict on children can best be integrated into events designed to commemorate the tenth anniversary of the World Summit for Children and the entry into force of the Convention;

It is clear that the articles of the resolution closely resemble the recommendations of the Machel Report. From the various reports the Special Representative has submitted to date it is also clear that he is conscientiously pursuing his mandate. In an interim report submitted on 12<sup>th</sup> March 1998 Mr Otunnu relates to the plight of children in armed conflict.<sup>6</sup> He concludes that at the heart of the growing phenomenon of mass violence and social disintegration lies a crisis of values. He further conveys that the most fundamental loss a society can suffer is the *collapse of its own value system* and further that the abominations against children are due in large measure to a *normative crisis at both the international and local levels*.

Departing from this background, Mr Otunnu as Special Representative spearheads the efforts of all concerned parties to address the atrocities against children in the context of armed conflict. His functions in this regard consist of the promoting of the concept of 'prevention, protection and rehabilitation' of child victims. Prevention entails the strengthening of the normative foundations of societies and mobilizing public opinion in order to create a social and political climate that is capable of impeding abuse against children. Protection of children in zones of active conflict is the most visible and daunting challenge of the Special Representative since, in addition to their right to life and physical security, children require continued access to relief, health and educational services. Rehabilitation relates to the need for healing and reintegration of children in the aftermath of armed conflict. In this regard, Mr Otunnu remarks that the provision of physical, spiritual and emotional care to children whose lives have been shattered by conflict must constitute an important component of programmes for post-conflict recovery.

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<sup>6</sup> There are approximately 50 countries around the world where children are suffering because of the waging of armed conflict. This suffering bears many faces; children are being killed, made orphans, uprooted from their homes etc. Over the last decade, 2 million children were killed in conflict situations, more than 1 million were made orphans, over 6 million have been seriously injured or permanently disabled, and over 10 million have been left with grave psychological trauma. A large number of children, especially young women, have been made targets of rape and other forms of sexual violence as a deliberate instrument of war. At present there are more than 20 million children who have been displaced by war within and outside their countries and approximately 800 children are killed or maimed by landmines every month.

The magnitude of this abomination attests to a new phenomenon: There has been a qualitative shift in the nature and conduct of warfare. Several developments mark this transformation. Almost all the major armed conflicts in the world today are civil wars. They are protracted, lasting years if not decades; they are fought amongst those who know each other well – they pit compatriot against compatriot, neighbour against neighbour; they are characterized by widespread social breakdown and lawlessness, the proliferation of small arms and light weapons, the indiscriminate use of anti-personnel landmines and the involvement of multiple and often semi-autonomous armed groups. A key-feature of this struggle is the 'demonization' of the enemy community – often defined in religious, ethnic, racial or regional terms and the orchestration of vicious hate campaigns. This shift in the nature and conduct of warfare results in 90% of casualties in ongoing conflict around the world being civilians, the vast majority of whom are women and children. This figure must be compared to the 5% in WW I and 48% in WW II.

To advance the objectives of the promotion of ‘prevention, protection and rehabilitation’, the Special Representative seeks the participation and collaboration of key actors from both the official and non-official sectors. He is also building partnerships with entities both within and beyond the United Nations. The entities include the media, Governments, the UN system, regional organizations and civil society organizations. In this regard the role of NGOs should in particular be emphasized. NGOs dispose of unique qualities that make them indispensable in protecting children in armed conflict. One of the most important qualities is their ability to remain true to their cause. While governments are sometimes so influenced by entrenched economic and political forces that they tend to abandon the defence of children, the independence of NGOs enables them to denounce wrongs and to advocate positive solutions long before these causes become politically attractive. A further useful quality of NGOs is their creativity. They readily conceive and implement innovative ideas unlikely to develop or thrive within the bureaucratic rigidities of government. It is therefore strongly recommended that NGOs should be actively encouraged to provide information on the plight of children in armed conflict to the Committee. This can be done by an existing children’s NGO and would involve the appointment of responsible officers. UN funding should also be made available for these purposes.

The Committee on the Rights of the Child and the Special Representative are diligently and conscientiously fulfilling their respective mandates in the protection child victims in situations of armed conflict. However, phrases used in the reports of Mrs Maçhel and Mr Otunnu that ‘more and more of the world is being sucked into a desolate moral vacuum’ ‘devoid of the most basic values’ and that a crisis of values lies at the heart of the growing phenomenon of mass violence and social disintegration, leaves one in doubt on the question whether it is possible *überhaupt* to effectively protect such children. This poor state of affairs is amply illustrated by relevant States Parties’ refraining to implement article 14 of GC IV. This article allows for, but does not make obligatory, the establishment of hospital and safety zones and localities. The purpose of these is to protect children under 15, expectant mothers and mothers of children under 7 from the effects of armed conflict. These zones and localities may accommodate any civilian in the specified categories, regardless of whether they are, for example, enemy aliens. They can be established in peace time by parties to 1949 GC IV. Alternatively, in times of armed conflict the belligerents may conclude agreements with each other to recognise such zones either in their own territory or in occupied areas. They can call on the offices of the ICRC or the Protecting Power for this purpose. However, article 14 has never been implemented, notwithstanding that such hospital and safety zones could prove particularly appropriate in the context of non-international armed conflict where it may be difficult to distinguish between combatants and civilians. One would think that belligerents would implement article 14 as a matter of course if they were really serious about the protection of children’s rights.

### **3.3 Improvement of the normative framework within which children are protected**

A comprehensive strategy for the protection of children in armed conflict cannot only be based on law. It should include a whole series of measures of a preventative nature.

Important is to contribute to a climate of tolerance. In this regard the school can play an important role. Article 29 of the Convention indeed provides for such a function. Article 29(1)(b) stipulates that the education of the child shall be directed, *inter alia*, to the development of respect for human rights and fundamental freedoms – education should be a tool for peace and understanding, not for indoctrination.

Article 38, which is the focal provision in the Convention regarding the protection of children in armed conflict, has proven to be most controversial. It is particularly the provisions of article 38(1) and (2) that are of relevance to the protection of children.

Article 38(1) reads that States Parties ‘undertake to respect and to ensure respect for *rules of international humanitarian law applicable to them* in armed conflicts which are relevant to the child’. In terms of article 38(4) States Parties ‘in accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, .. shall take *all feasible measures* to ensure protection and care of children who are affected by an armed conflict.’

There are major deficiencies in this article. It does not distinguish between international and non-international conflicts. *Prima facie* it appears to apply to any armed conflict. However, the term ‘armed conflict’ and the reference to international humanitarian law, means that the article does not extend to internal disturbances. It goes without saying that for a child caught up in such situations there may indeed be little distinction. The effects of war are not limited by their classification under humanitarian law.

Furthermore the qualifying phrase ‘applicable to them’ is equally ambiguous. Does it mean, for example, that the relevant rules depend on ratification by a particular country of conventions such as the 1949 Geneva Conventions and the 1977 Additional Protocols or does it refer to the customary law obligation of all states. Furthermore the precise content of the rules of international humanitarian law relevant to the child is also uncertain. Given the complexity of this body of law and the fact that it is scattered throughout various treaties that are not universally ratified, uncertainty exists about the detailed rules that apply to a specific States Party to the Convention. State reports to the Committee are therefore prone to be problematic.

Article 38(4) relates to the treatment to be afforded to child civilians in situations of armed conflict. More in particular, criticism is leveled against the phrase ‘feasible’. Already in the drafting process many participants were of the opinion that ‘feasible’ set too low a standard and the word ‘necessary’ was suggested as an alternative. No consensus could be reached on this point. In particular the US representative expressed a strong preference for ‘feasible’. He argued that it would be impossible to fulfil a duty to take all the ‘necessary’ steps to protect child civilians in view of the fact that armed conflicts inevitably have harmful consequences for civilians and it would be impossible to ensure their protection. In fact, a duty to take all ‘necessary’ steps to protect such children, so the argument ran, might even undermine the state’s inherent right to defend itself. On the other hand an argument more in line with the absolute nature of protection accorded to civilians in times of armed conflict, stresses that States Parties must take all ‘necessary’ measures and that an obligation to take

only 'feasible' measures would 'present the greatest danger to the weakening of international humanitarian law'.<sup>7</sup>

It is history now that, contrary to the line of argument of the last mentioned group of participants, the chairman put forward the weaker version, which allowed only for 'feasible measures'. However, prior to the final adoption of the Convention, Rädde Barnen circulated a document, arguing that the least that had to be done was to make clear for the *travaux préparatoires* that the acceptance of 'feasible' was not intended to lower the standards of international humanitarian law with regard to the protection of children. Should one take a rather cynical view of the phraseology of article 38, though, one could link it to the drafters of the Convention on the Rights of the Child who would not determine that the best interests of the child shall be *the* primary consideration in all matters concerning them. The fact that article 3 of the Convention on the Rights of the Child provides that the best interests of the child shall be *a* primary consideration, substantially weakens the status of the best interests of children. The best interests of children in armed conflict may now be weighed up against interests that are equally important from a state's perspective, such as religious or cultural factors.

Some uncertainty also exists due to the fact that the Convention on the Rights of the Child does not contain a derogation clause. The full implementation of the child's right to protection, provision, prevention and participation would go a considerable way to protecting children in armed conflict. However, the omission of a provision providing for derogation raises the question whether States Parties who have ratified the Convention should continue to be bound by its provisions once armed conflict has broken out within its jurisdiction. An argument may well be raised that only article 38 applies in war time situations, so that once armed conflict begins, the particular States Party ceases to be bound to implement the other stipulations of the Convention. This conclusion stems from the fact that if all the articles of the Convention on the protection and care of children would apply at all times, the necessity for article 38 may be doubted. According to this line of argument it would not be unreasonable to suppose that the drafters of the Convention expected that the Convention would be subject to derogation during armed conflict.

On the other hand the Committee on the Rights of the Child favours the argument that a child does not cease to have basic rights once an armed conflict has broken out. Hammarberg explains that while article 38 specifically addresses the situation of children in armed conflicts all the other articles of the Convention remain relevant. The Convention applies in its entirety also in times of war and emergency. The right of the child to a family environment, to go to school, to play, to receive health care and nutrition remain intact in armed conflict.

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<sup>7</sup> The ICRC has argued that art 38(4) may lead to the undermining of humanitarian law because many provisions in the GC's and the GP's designed to protect children lay down absolute obligations (as opposed to 'feasible measures' to be taken. They are therefore much stronger and afford more protection. However, art 41 of the Convention on the Rights of the Child counteracts this criticism in that it declares that 'nothing in this Convention shall affect any provisions that are more conducive to the realization of the rights of the child and that may be contained in the law of a State Party or international law in force for that State. See C & EH 40.

Bearing in mind that the philosophy of humanitarian law is not that of children's rights and was never intended to be so must be borne in mind. Provisions in humanitarian law instruments such as GP I that allow for the loss of civilian life, provided that the loss is not excessive in relation to the concrete and military advantage anticipated, must of necessity lead to the conclusion that the best interests of child victims in armed conflict will never be the focal point of humanitarian law. It is therefore submitted that the Convention on the Rights of the Child should be viewed as the primary vehicle to secure the rights of child victims. Nevertheless, humanitarian provisions providing for different kinds of zones, such as safety and hospital zones, impose positive obligations to remove or protect those within them from the dangers of combat. If fully implemented, such measures offer children a greater level of protection than that under most other relevant provisions of international humanitarian law. States and other belligerents involved in armed conflict should be actively encouraged to create such zones as a matter of urgency.

#### **4. Conclusion**

It is submitted that the implementation of radical new rules to remedy the lack of respect for existing rules of international humanitarian and human rights law may be counter-productive. Such rules may contribute to an increasing gap between law and practice where law becomes part of the myth rather than a bridge what is and what ought to be. It may even lead to a deterioration in the respect for international human rights. To be meaningful, it is submitted, existing norms must be respected and applied. The immense effort involved in the creation of international instruments comes to naught if adoption is not followed by application – the value of international instruments is after all limited to the extent to which they are applied.

Furthermore it is not enough to accept that there is a legal obligation under international law that comes with ratification of international instruments without accepting that there is a need to mobilize political will among the States Parties to find solutions and put them into effect. The suggestion is put forward that a first step to achieve this goal is for each States Party to codify all the existing law pertaining to such Party so that it is accessible and more easily understood and put into practice. As matters stand at present, it may indeed be very difficult for the Committee and even the governments themselves to ascertain, for the purpose of state reports to the Committee, the detailed content of 'international law applicable to them'.

It is also suggested that an individual complaints system should be considered to enable children, or those acting on their behalf to present cases of alleged violations of the relevant law. Such development will indeed give effect to the provisions of article 12 of the Convention on the Rights of the Child which provide for the right of the child who is capable of forming his or her own view to express those views freely in all matters affecting him or her. In addition to such an individual complaints system, consideration should be given to a single set of rules that would be applicable in both international and non-international armed conflict. The different thresholds that apply before the different conventions become applicable create uncertainty and certainly from a human rights perspective, do not meet the requirement of the best interests of the child to be served. It is furthermore suggested that specific provisions dealing with

children in internal disturbances should be provided for in a further convention. Given that many conflicts involving child civilians are categorised as internal disturbances and bearing in mind the subjectivity of such categorisation (and also that in the drafting of the Convention on the Rights of the Child many governments refused to include a provision regarding internal disturbances owing largely to a reluctance to permit international scrutiny of such situations) this matter has become one of urgency.

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