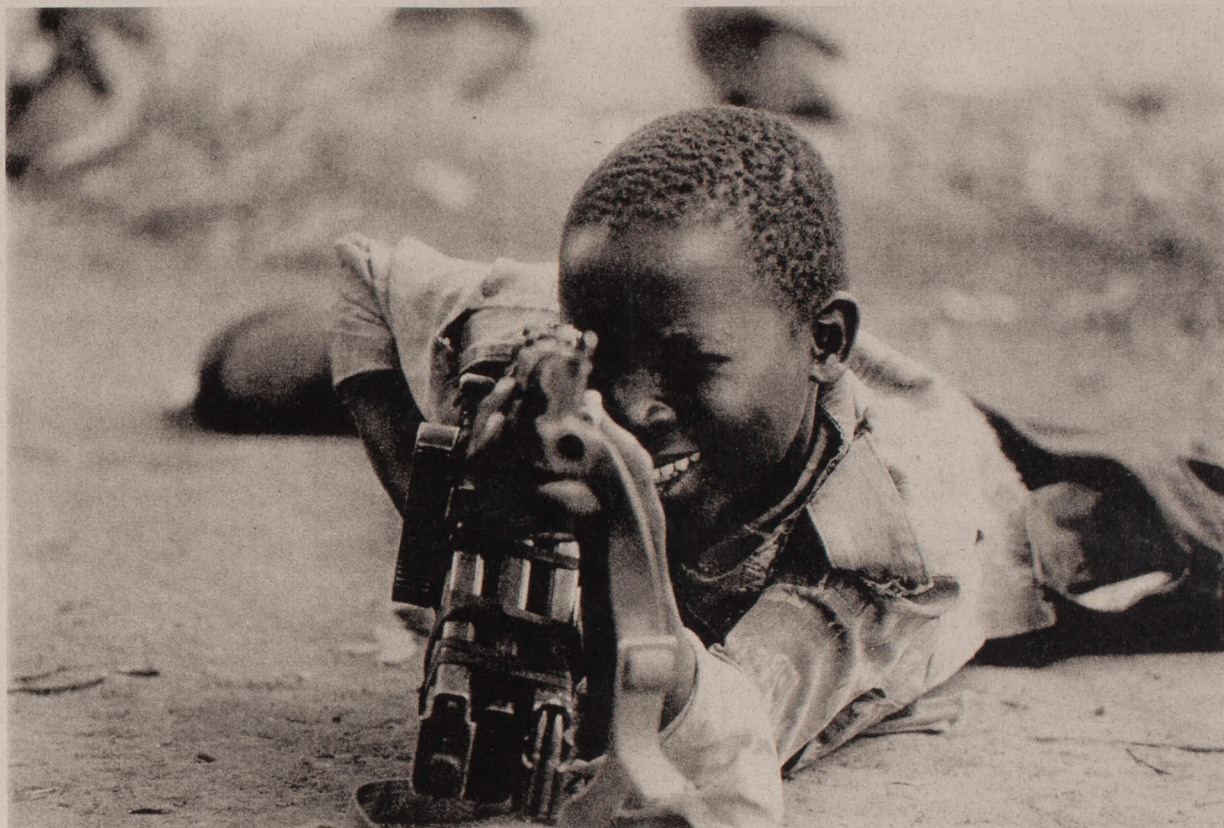


**INNOCENTS LOST: SEARCHING FOR A
SOLUTION TO COMBAT THE USE OF
CHILDREN IN ARMED CONFLICT**



Yann Gambin-UNICEF
Uganda, 1986, Mukamba, 9 years old, known for his marksmanship

CHARLOTTE DE FEIJTER
LLB (HONS) RESEARCH PAPER
PUBLIC LAW (LAWS 505)

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“It is immoral that adults should want children to fight their wars for them. ...There is simply no excuse, no acceptable argument for arming children.”

Archbishop Desmond M. Tutu

It is intended that these should
be printed in the year 1964
and the first issue should be
published in the month of
January 1964.



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ABSTRACT

The use of children in armed conflict is an ever increasing phenomenon. The horrific nature and consequences of the tasks children are expected to carry out in war mean their fragile innocence is taken from them far too soon. Children are especially vulnerable to war's consequences whether as the victim or perpetrator. They should therefore be accorded special protection when involved in armed conflict. However, there are currently no adequate international, or even domestic standards sufficient to protect children from participating in warfare. The adoption of the model statute proposed in this paper provides a mechanism to bring individuals who use children in armed conflict to account. It could also help build an international consensus that the practice will not be tolerated.

WORD LENGTH

The text of this paper (excluding contents page, footnotes and bibliography) comprises approximately 12,900 words.

I. INTRODUCTION

*Playing war is a favourite pastime for the young as they dream of being real soldiers one day. However, the thrill of victory and conquest hard won on the playground does not match the frightening reality of the phenomenon of the use of children in armed conflict around the world today. The lost innocence of our children who take part in war is not worth any help they may provide in conquering the enemy.

Hundreds of thousands of children are being exploited by adults in the militia around the world to either fight their wars for them or aid them in doing so. The roles they are expected to carry out are not suitable for any human, let alone young children. For these children, the debate about attempting to stop the use of children in armed conflict is not academic. It is a reality with which they must deal every day. A reality too easily forgotten during the negotiation and political bargaining about appropriate standards that attempt to combat the problem.

Owing to the increased awareness of the scale and reality of the use of children in armed conflict since the end of the 1980s and beginning of the 1990s, there has been a growing number of studies on the subject. Several books now focus on the topic of children in war and a smaller number deal with their recruitment and participation.¹ *Child Soldiers: the Role of Children in Armed Conflicts*² provides an in depth study on children involved in armed conflict using empirical evidence gathered a number of countries. It looks at the motivations behind children's participation in

* Considerable assistance was received by staff at the Ministry of Foreign Affairs and Trade, the Ministry of Defence, the Office of the Commissioner for Children, the Development Resource Centre, Amnesty International and UNICEF in the provision of material and information.

¹ The most recent publication by Rachel Brett and Margaret McCallin *Children: the Invisible Soldiers* (Radda Barnen, Stockholm, 1998) a report on children in armed conflict based on case studies of 26 countries, but was unavailable during the preparation of this paper.

² Guy Goodwin-Gill and Ilene Cohn *Child Soldiers: the Role of Children in Armed Conflict* (Clarendon Press, Oxford, 1994).

armed conflict and the relevant international and humanitarian law that governs the issue. It recommends prevention strategies and the intervention of NGOs to help minimise voluntary participation.

Several non-governmental organisations (NGOs) such as Amnesty International and Human Rights Watch have produced comprehensive studies on the use of children in war concentrating on particular areas, for example, Sierra Leone,³ Uganda,⁴ and South Asia.⁵ Some reports cover the general conditions faced by children in war, others outline the plight of child soldiers themselves. Their aim is to create an awareness of the issues involved and to put pressure on government to stop their practices and encourage the conclusion of international instruments.

The increased publicity concerning the rights of children has brought pressure on the United Nations (UN) to recommend the adoption of two optional protocols to the Convention on the Rights of the Child (CROC). One deals with the sale of children, child prostitution and child pornography, the other, the involvement of children in armed conflict.⁶ During the negotiation of the draft optional protocol on children in armed conflict the UN commissioned its own in depth study on the topic.⁷

³ Human Rights Watch *Sierra Leone: Sowing Terror - Atrocities Against Civilians in Sierra Leone*, July 1998 at <<http://www.hrw.org/hrw/reprots98/sierra>> (last modified 3 November 1999).

⁴ Amnesty International *Uganda Breaking God's Commands: the Destruction of Childhood by the Lord's Resistance Army* September 1997 AI Index: AFR 59/01/97 at <<http://www.amnesty.org/ailib/aipub/1997/AFR/15900197.html>> (last accessed 20 July 1999) [*Uganda Breaking God's Commands*]; Human Rights Watch *Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* September 1997 at <<http://www.hrw.org/hrw/reports97/uganda>> (last accessed 14 July 1999) [*Scars of Death*].

⁵ Amnesty International *South Asia: Action for Children* April 1998 AI Index: ASA 04/01/98 [*South Asia*].

⁶ *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict on its Third Session* UN Doc E/CN.4/1998/102 [*Draft Optional Protocol*].

⁷ The report written by Graca Machel *Impact of Armed Conflict on Children* UN Doc A/51/306 looks at all the major issues concerning the plight of child combatants and non-combatants in armed conflict and recommends action to be taken. It encourages the

The negotiation of these new international standards is still currently in progress. While diplomats and politicians take years bargaining over them, many more innocent children will be lost. What is needed is a mechanism that can be used to reduce the recruitment and participation of children in armed conflict without having to wait before international standards are adopted and slowly filter their way down to domestic legislation. This paper advocates such a solution.

The paper first considers the types of roles children fulfil in armed conflict and the reasons why they become involved to give an understanding of why this type of activity should cease. When examining the use of children in armed conflict the current literature does not delve into the theories behind the reasons to accord children special rights. The concept and special nature of childhood itself needs to be explored as these ideas form the underlying basis of policy and the formulation of standards concerning the protection of children from participating in armed conflict.

The adequacy of the existing and upcoming international humanitarian and human rights law standards that deal with the topic are also analysed. The challenge for states is to take these standards and develop them to a point where they provide a framework to enable specific action to be taken in specific cases, sending a message that the practice of using children in armed conflict will not be tolerated.

The paper advocates the adoption of a model statute which will provide a mechanism to abolish the use of children in armed conflict for those who wish to adopt it. Not only will it be an effective tool to prosecute individuals who carry out this activity, but if enough states adopt it, it could form a worldwide consensus that the practice must come to an end.

conclusion and subsequent ratification of the Draft Optional Protocol to CROC and the increased awareness of international law standards. It also encourages publicity, education and advocacy by NGOs and the media about the plight of child soldiers as well as the pursuit of diplomacy of UN bodies with governments and the implementation of national legislative measures [*Impact of Armed Conflict on Children*].

II. *CHILD PARTICIPATION IN ARMED CONFLICT*

War violates a number of the rights of children such as the right to be with family, the right to life, the right to development of personality and the right to be nurtured and protected. In the words of Graca Machel, the former UN expert on children in armed conflict:⁸

“...more 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 exploited as soldiers; 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.”

A. *Reasons Why Children Participate*

As Graca Machel acknowledges, children are not only affected by warfare as victims, they are sometimes the perpetrators. In order to draft a statute that will eliminate the use of children in armed conflict, the particular roles children fulfil and how they come to participate needs to be examined to discover the types of activities a model statute must prevent from occurring.

The use of children in armed conflict is not an entirely new phenomenon. Centuries ago children took part in conflicts as drummer boys in European battles and child ratings on warships. Children also participated in the army of the Third Reich during World War II.⁹ What is disturbing these days is that the participation of children as soldiers is being seen as the norm in armed conflict, rather than the exception, as in the past. Attitudes and practices have changed. Although children were once recruited only when

⁸ *Impact of Armed Conflict on Children*, above n7, 9.

⁹ UNICEF *State of the World's Children 1996* (Oxford University Press, Oxford, 1996) 14 [*State of the World's Children*].

the supply of adult fighters ran short, the youngest are now often sought first.¹⁰

It is estimated that as many as 250,000 children under the age of 18 have been recruited into armed activity.¹¹ Most recruits are over the age of 15, however significant recruitment often starts at the age of 10 and there have been reports of child soldiers as young as seven or eight years old.¹² Of the 33 conflicts where children under 18 are used as soldiers, 26 of them have reportedly used children under the age of 15.¹³

The change in nature of armed conflict leads to the underlying conditions that facilitate child participation. Reviewing the elements of conflicts where children are typically used gives a better understanding of why they take part.

1. *The change in nature of armed conflict*

Since the end of the Cold War the nature of armed conflict has changed considerably. Warfare no longer targets men on the march. Armed conflict now centres on disputes between ethnic and religious factions of society which can often be unpredictable.¹⁴ The hangover of colonialism and persistent economic, social and political crises as well as the manipulation of ethnicity and religion to serve narrow group interests have also had a debilitating effect on countries in conflict.¹⁵

¹⁰ "Children Under Arms" *The Economist*, London, United Kingdom, 10 July 1999, 15.

¹¹ *Children in Armed Conflict* UN Doc E/CN.4/1998/119 para 25. In addition, hundreds of thousands more children are enrolled in armed forces in countries not currently involved in armed conflict.

¹² Coalition to Stop the Use of Child Soldiers *The Use of Child Soldiers in Africa: An Overview* at <http://www.child-soldiers.org/Afr_exesum.html> (last modified 25 August 1999).

¹³ Coalition to Stop the Use of Child Soldiers *Stop Using Child Soldiers* (Radda Barnen, London, 1998) 14.

¹⁴ Bo Viktor Nylund "International Law and the Child Victim of Armed Conflict: Is the First Call for Children?" 6 (1998) 23.

¹⁵ *Impact of Armed Conflict on Children*, above n7, 14.

Instead of state to state conflict, most wars are now domestic. The boundaries are often elusive and the conflicts themselves can be long term, spanning successive generations. In these types of drawn out wars, once adult manpower is exhausted, children are seen as a valuable resource. Battles are no longer fought between contending armies, but take place from village to village and street to street making it easier for children to get caught up in the fighting.

Attacks on civilians and rural communities have caused mass exodus and displacement where the conflicts take place. Children in these situations are particularly affected by deprivation of food, health care and education. Where social structures break down and there is limited access to schooling, children are often more prone to recruitment or abduction into the armed forces or groups, for lack of viable alternatives.¹⁶

Although the problem lies mainly with states that are underdeveloped and in a constant state of tension, one must not forget that children are also recruited into the national armed forces of many states where this is not so. For example in the United Kingdom there are more than 6,000 soldiers under the age of 18 who are potentially liable for service in hot spots such as Kosovo.¹⁷

If a proposed statute is to be adopted universally, it must accommodate states with the worst political climates, rather than be tailored to those that do not exhibit the prevailing underlying conditions where the most serious incidents of child participation occur. Where states are involved in constant tension, children are often forced to join the armed forces or armed groups. Conscription and abduction, are common methods whereby children come to participate.

2. *Forced recruitment*

Some governments legally conscript children below the age of 18 years. The Democratic Republic of Congo and Angola have set their minimum ages of

¹⁶ Amnesty International *In the Firing Line: War and Children's Rights* (Amnesty International, London, 1999) 19 [*In the Firing Line*].

¹⁷ "Soldiers too Young to Die or Kill" *The Guardian*, Manchester, United Kingdom, 23 June 1999.

recruitment at 18 and 17 respectively. In the Congo, President Kabila recruited thousands of children in his war against the Mobutu government. A CNN report announced that children as young as eight years old were fighting within the Alliance of Democratic Forces for Liberation.¹⁸ Official broadcasts were aired over national radio encouraging children and youth between the ages of 12 and 20 to enlist in the armed forces.¹⁹ In Angola it is estimated that between 1980 and 1988 every third child has been involved in military operations. According to the government no child under 18 is being recruited.²⁰ However, some NGOs claim that children as young as 14 have been enforced to enlist.

The problem is two-fold. Even where the minimum age of recruitment is 18, states blatantly flout the laws that are there to protect children from entering the armed forces. They are often not willing to comply with their own legislation preventing the recruitment of children under a certain age. Where they do have the intention to keep children under a certain age out of the armed forces, there may be insufficient records indicating the age of a particular child which leaves recruiting officers guessing at the age of the child they are enlisting.²¹

Some states do not even use registers to conscript, instead rounding up children from the streets, schools, orphanages and refugee camps. Sudan introduced conscription at the age of 18 in 1992. When the initial round of recruitment failed to produce enough men, children as young as 12 were rounded up off the streets and taken off buses.²² Abduction is also carried

¹⁸ Coalition to Stop the Use of Children in Armed Conflict *The Use of Children as Soldiers in Africa* at <<http://www.child-soldiers.org/Africa%20report.html>> (last modified 25 August 1999) [*Soldiers in Africa*].

¹⁹ Human Rights Watch *The Use of Child Soldiers in the Democratic Republic of Congo* at <<http://www.hrw.org/campaigns/crp/congo.html>> (last accessed 15 July 1999).

²⁰ *Soldiers in Africa*, above n18.

²¹ Images of Asia *No Childhood at All: A Report About Child Soldiers in Burma* (Images Asia, Chiangmai, 1996) 22 [*No Childhood at All*].

²² *Soldiers in Africa*, above n18.

out by rebel groups. In the words of a young girl abducted from her school dormitory in Uganda:²³

“They started choosing girls. If you were chosen, they told you to stand up. They chose me...Then sister came back and kneeled in front of this man, L.O....Sister was pleading for more girls to be set free...The commander ordered the rebels to come and beat us. They started beating us, beating us, beating us. And then the commander told them they should jump on our chests with their boots. And even they jumped. For us, we cried.”

3. *Volunteers*

Many child soldiers are not forcibly recruited into the armed forces at all, but volunteer to join. This volunteerism is much more difficult to combat as opposed to blatant recruitment as much to do with the reasons why children volunteer is related to the environment where they grow up and the types of societies where they live.

Most child volunteers grow up in a militarised society filled with everyday violence and disruption. Many have witnessed extreme physical violence, motivating them to take up arms themselves to avenge harm done to family members, or to attempt to combat social and economic injustices.²⁴ Some children see participation in the armed forces as a way of survival as they are at first guaranteed regular food, clothing and medical attention, others are promised a tiny wage, although none of these things are often forthcoming.²⁵ Inadequate educational facilities or living in a refugee camp means that joining the army can look like the better of bad alternatives. Many orphaned children also look to the army as surrogate parents.²⁶

²³ Interview by Amnesty International with a fifteen year old girl selected to remain with the Lord's Resistance Army in *Uganda Breaking God's Commands*, above n4.

²⁴ *South Asia*, above n5, 33.

²⁵ *No Childhood at All*, above n21, 31.

²⁶ This is often the case for children recruited into the Lord's Resistance Army in Uganda *State of the World's Children* above n9, 17.

Some parents see it as an honour for their children to participate in armed conflict.²⁷ Religious and other forms of indoctrination also motivate children to join the armed forces. This was the reason for the flock of young men to recruitment centres in Iran.

B. How Children are Used in Armed Conflict

Once children have joined an environment of armed activity, they are expected to take part in many different ways. This may involve fighting on the front line and engaging in other forms of active combat for governmental or non-governmental armed groups. Children are also used indirectly for other purposes such as lookouts, messengers, cooks and porters. The tasks children are expected to carry out in these indirect forms of participation are often no less damaging to a child's physical or emotional well being than active participation and usually lead to roles involving front line combat.

The comparable harmful consequences of both types of participation can be illustrated by two accounts of children who have been involved in armed conflict, advancing the argument that both should be considered when adopting standards. The first involves direct participation,²⁸ the second, indirect:²⁹

"I feel so bad about the things that I did...It disturbs me so much – that I inflicted death on other people...When I go home I must do some traditional rites because I have killed. I must perform these rites and cleanse myself. I still dream about the boy from my village who I killed. I see him in my dreams, and he is talking to me and saying that I killed him for nothing, and I am crying."

"When they tell me they were given as a 'helper' to this man's family, I'll ask them about the sleeping arrangements. Eventually, they will say, 'even at midnight, the man may call me.' The man will say, 'bring me water' or 'prepare my bed.'"

²⁷ *No Childhood at All*, above n21, 4.

²⁸ *Scars of Death*, above n4.

²⁹ A counsellor talking to Amnesty International in *Uganda Breaking God's Commands*, above n4.

And then sexual abuse and rape will take place. All the girls deny it at first. But eventually they'll say so."

1. *Direct participation*

On the front line children are expected to perform the same tasks as adults. One reason which makes it easier for children to do so is the proliferation of light weapons. The technical development in armament means that nowadays children can strip, reassemble and fire many hand held weapons.³⁰ As part of their military training children are involved witnessing atrocities. This desensitises them to suffering, enabling them to carry out the same types of violent acts themselves.³¹ However, as a result of being widely perceived to be dispensable commodities, they tend to receive little or no training before being thrust into the front line.³²

Children are exploited by adults in the armed forces. A child's sense of immortality is sometimes capitalised on by plying them with drugs and alcohol.³³ They are also often seen as an expendable resource and are used to plant mines and retrieve weapons from areas where fighting takes place. There have been reports that children as young as nine have been used as cannon fodder and mine sweepers in the Iran-Iraq conflict, where more than 100,000 children were sent to the warfront in 1985.³⁴ Sometimes children are also put ahead of the hostile groups they are a part of causing national police or peacekeeping forces to become hesitant to shoot.

2. *Indirect participation*

Apart from engaging in active combat, children take part in a number of support functions. They are not spared from physically demanding or emotionally disturbing tasks, and are punished if they are unable to complete them. Although boys are typically the targets of recruitment, girls are also likely to take part in these indirect support functions as well as in the front

³⁰ *State of the World's Children*, above n9, 17.

³¹ *South Asia*, above n5, 33.

³² *Child Soldiers in Africa*, above n18.

³³ *No Childhood at All*, above n21, 41.

³⁴ Maryam Elahi, "The Rights of the Child Under Islamic Law: Prohibition of the Child Soldier" *Colombia Human Rights LR* 19 (1988) 263, 277.

line. Sadly, girls can be subjected to sexual abuse. This is a common occurrence in Uganda where young girls are "married off" to rebel leaders.³⁵ Although children may start out in indirect roles, it does not usually take long before they are exposed to the front line.

Another consequence of carrying out support functions is that it puts all children under suspicion which results in them often not being distinguished from those engaged in combat. As a consequence, they are potentially exposed to being targeted by the enemy.³⁶

No matter how children take part in armed conflict the consequences for their current and future well being can be disastrous. The recognition of this fact and the awareness that there are more children participating in armed conflict than ever before has led to the negotiation of standards by the international community in order to prevent this phenomenon from occurring. Before examining the international law which has developed to deal with the issue, one must look at the basis for according children special rights, and more specifically, the reason why they should be given special protection from becoming involved in armed conflict.

1. Historical view

Historically the distinction between adulthood and childhood had much less prominence than it does today. Child labour was common place and the famous couple of Romeo and Juliet were busy teenagers when they fell in love. During the Middle Ages there was no need for awareness of the distinction between adult and child. As life was short, preparation for adulthood was not an essential requirement.³⁷ Childhood did eventually emerge, although there are conflicting views as to when it was first recognised, particularly in Western society, as a time of life separate from, and as a preparation for adulthood.³⁸

³⁵ *Scars of Death*, above n4.

³⁶ *Comments on the Report of the Working Group* UN Doc E/CN.4/1998/WG.13/2 para 22 [*Comments 1998*].

III. THE CONCEPT OF CHILDREN'S RIGHTS

The negotiation of standards concerning the elimination of the participation of children in armed conflict is premised on the belief that it is an abhorrent activity in which children should never be involved. At first glance, it seems wrong that children should carry out the gruelling and brutal tasks associated with warfare as well as being subjected to the harsh consequences that ensue, yet adults are often involved in much of the same roles. However, there are reasons why children should be accorded extra protection beyond that afforded to all people in times of war, including protection from the choice to participate in it.

In order to understand why people advocate special protection should be given to children in certain situations, it must first be recognised that childhood actually exists and should be accorded a special status.

A. The Concept of Childhood

1. Historical view

Historically the distinction between adulthood and childhood had much less prominence than it does today. Child labour was common place and the famous couple of Romeo and Juliet were barely teenagers when they fell in love. During the Middle Ages there was no need for awareness of the distinction between adult and child. As life was short, preparation for adulthood was not an essential requirement.³⁷ Childhood did eventually emerge, although there are conflicting views as to when it was first recognised, particularly in Western society, as a time of life separate from, and as a preparation for adulthood.³⁸

³⁷ Philip E Veerman *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff Publishers, Dordrecht, 1992) 4.

³⁸ The time period ranges from the end of the middle ages to the end of 18th century Philip E Veerman, above n38, 4.

2. *The emerging concept of childhood*

The recognition that childhood has a distinct status in life is gaining ground,³⁹ although a lack of clarity over where it begins, and more importantly in the context of this paper, where it ends, still exists. Where childhood ends and adulthood begins can vary enormously between different societies and cultures, depending on the roles children are expected to play. Some states set a lower age for the end of childhood to reflect the social reality of children working in the community for the survival of all members of their families.⁴⁰ Other states advocate a higher age depending on their culture and domestic legislation.⁴¹

The international community is still a long way from a universal definition of childhood, if such a definition is desirable. It does not seem possible to come to a conclusion as to when childhood ends in any case as a child's maturity and development will vary between different countries. It will also never be able to reflect the speed of developmental capacity of the individual child. Therefore any age decided upon as to when childhood ends and adulthood begins will inevitably be arbitrary.

Nevertheless, there does appear to be an international trend towards accepting that the time until the age of 18 should be accorded special protection.⁴² The definition of "child" in CROC extends until this age, although it does account for cultural differences by stating that the child is a person under 18, unless according to the law applicable to the child, majority is attained earlier.⁴³ However, states should still strive to accord protection until the age of 18. Other international instruments such as the African Charter on the Rights and Welfare of the Child (African Charter) and

³⁹ General Comment on Article 24 UN Doc HRI/GEN/1 1992 states that the right to special measure of protection belong to every child because of his status as a minor.

⁴⁰ Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, Dordrecht, 1995) 6.

⁴¹ The domestic legislation of Japan, Austria and Switzerland indicate the age of majority is over 18 Geraldine Van Bueren, above n40, 37

⁴² Geraldine Van Bueren, above n40, 38.

⁴³ Article 1 CROC.

standards dealing with juvenile justice also define a child as a person under the age of 18.⁴⁴

An emerging trend to extend special protection until the age of 18 is a significant development in terms of the protection of children from participating in armed conflict. In the current negotiations of new international law standards regarding the issue there is a push for consensus to extend the protections until the age of 18, despite the reluctance of some states to do so. This trend will help build pressure to form that consensus.

B. A Framework to Analyse Children's Rights

Once it is acknowledged that there is an emerging trend to accept that childhood extends to the age of 18, one can look at the analytical frameworks used to explain why children should be accorded special rights until this age. Children's rights are based on two seemingly conflicting premises. The first approach acknowledges that a child's special status and needs should be recognised (rights of protection).⁴⁵ The second advocates the extension of adult rights to children (rights of choice).⁴⁶ Both views are in favour of children's rights but, as will be seen when analysing the protection of children from participating in armed conflict, they often tend to be in conflict with one another.

1. Rights of protection

Rights of protection recognise that children are often more vulnerable than adults. Children have always generally had to look to others for their protection.⁴⁷ When adults or particular institutions do fail them, they are generally left helpless, unlike adults who may be able to look after themselves in a similar situation. The fact that children may be left open to

⁴⁴ Article 2 African Charter on the Rights and Welfare of the Child 1990.

⁴⁵ Michael P Roche "Childhood and its Environment: The Implications for Children's Rights" 34 (1988) 5, 11.

⁴⁶ Michael P Roche, above n45, 11.

⁴⁷ The rights of children were tied with the rights of women. If women's rights were secured, it was presumed that children's rights were also. Geraldine Van Bueren, above n40, 52.

exploitation and abuse by adults means that they should be accorded special protection to prevent this from happening.

Children also have an evolving capacity to decide what is in their best interest and are not always the best judges of what that might be. They may even perceive things that are beneficial to them as the reverse, for example appropriate discipline. They are often incapable of taking long term views.⁴⁸ Rights of protection acknowledge that children should sometimes be protected from making decisions that could result in adverse physical or psychological consequences.

However, when advocating rights of protection, one must be careful to distinguish between adult protection and adult property.⁴⁹ Children are dependent on adults, but should not be seen only as chattels to be ordered around at an adult's whim.⁵⁰ This leads to the second framework advocated for analysing children's rights.

2. *Rights of choice*

The second basis for advocating special rights for children is that children are autonomous individuals and should be free to think independently and be responsible for where their lives are heading.⁵¹ This view recognises that children do have the right to have some control over their lives and should therefore be able to have a say in decisions that affect them.

3. *Can the two be compatible?*

Some argue that one cannot treat children as adults in some situations (rights of choice) and not for others (rights of protection).⁵² This argument, as well as the law itself, tends towards a hierarchical and dualistic view of the

⁴⁸ Catherine Lowry "Autonomy and the Appropriate Projects of Children: A Comment on Freeman" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Oxford University Press, Oxford, 1992) 72.

⁴⁹ *In the Firing Line*, above n16, 21.

⁵⁰ *In the Firing Line*, above n16, 21.

⁵¹ Michael P Roche, above n45, 7.

⁵² Michael P Roche, above n45, 32.

world.⁵³ It does not take into account the complexities of existence and hence does not recognise the special and varied needs of children in different situations.⁵⁴

Rights of protection recognise that in some situations, if a child is free from any guidance or restrictions when making certain decisions, they will sometimes take the one most detrimental to them without realising the full consequences. Rights of choice recognise that in other circumstances it may be appropriate for children to have some sort of autonomy in decisions that affect them, so as not to be subject only to the will of their parents or guardian. Either type of right should be able to be used depending on a child's needs in a particular situation.

C. The Basis to Accord Children Special Rights in Armed Conflict

Standards regarding the protection of children in armed conflict as victims or participants are based on rights of protection as children are believed to be particularly vulnerable when caught up in warfare.

1. Special vulnerability of children as civilians

In the 149 major wars since World War II children have often been the hardest hit.⁵⁵ Over the last decade it is estimated 2 million children have been killed, 4-5 million left disabled, 12 million left homeless, over 1 million orphaned or separated from their parents and 10 million psychologically traumatised.⁵⁶

Children also suffer indirectly from the costs of warfare due to the dislocation it causes to the basic infrastructure of states and the disruption to their family life. Underdevelopment compounded by war in Angola and Mozambique has resulted in the highest infant and child mortality rates in the

⁵³ Michael P Roche, above n45, 32.

⁵⁴ Michael P Roche, above n45, 32.

⁵⁵ *State of the World's Children*, above n9, 13.

⁵⁶ UNICEF Facts and Figures 1998.

world.⁵⁷ Women and children must often walk for miles to obtain uncontaminated water, food shortages mean children's growing bodies cannot receive the essential nutrients they require, and exposure to constant violence severely affects them emotionally.⁵⁸

International humanitarian law has recognised the special vulnerability of children in war as civilians and as such has accorded them special protection.⁵⁹ As participants of war, children are also more vulnerable than adults.

2. *Special vulnerability of children as participants*

As a participant of war, the physical and psychological consequences of the constant exposure of to horrific acts and violence are extremely severe for children. Owing to the types of duties they are expected to perform, and the fact that they are still developing, children involved in armed conflict will often suffer more than adults. If they are used in minefields, they have a high risk of losing limbs and sight. They are more vulnerable to loss of hearing due to gunshots. If they are required to carry loads of a weight disproportionate to their size, they may acquire deformed backs and shoulders and growth may be stunted. Children are also susceptible to malnutrition, infections and diseases. Participation means that children miss out on educational opportunities and will often lack the skills to participate constructively in society. A problem compounded by the fact of having been taught a life of violence. Reintegration into normal life is not an easy task as demobilised child soldiers may be illiterate and shunned by other school students.

⁵⁷ A Report for UNICEF *Children on the Frontline: the Impact of Apartheid, Destabilization and Warfare on Children in Southern and South Africa* (United Nations Children's Fund, New York, 1987) 10.

⁵⁸ *State of the World's Children*, above n9, 13.

⁵⁹ In the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 [Fourth Geneva Convention] articles 14, 17, 23 and 24 refer specifically to children.

3. *Protecting children from participating in armed conflict*

Because of this special vulnerability and the ensuing consequences, children should be protected from being forced to participate in armed conflict. The more difficult question is when children choose to participate. This is when the theories of children's rights of protection and choice potentially collide.

Rights of choice advocate that children should have autonomy in making decisions which they perceive to be beneficial to them. It is therefore possible to argue that children are being deprived of exercising their right to freedom of expression or association, if prevented from choosing to participate in armed conflict. However, it is difficult to see the value of this view if the particular decision involved can result in nothing but harm to a child's well being. The decision by children to participate in war will be fraught with so many variables, it is questionable as to whether it will ever be exercised with a sufficient degree of freedom.

Some children profess loyalty to various political or religious ideology in the name of which they take up arms. Examples of this type of youth indoctrination negate any presumption of voluntary participation for the relevant cause.⁶⁰ Children may also be more susceptible than adults to manipulation or coercion when making the decision to participate.

It may be useful to make a comparison in terms of the benefits and disadvantages a child may receive from certain activities to determine whether they should be free in deciding whether to pursue them.⁶¹ In regard to child labour for example, a child may receive some training and a small wage which may be necessary for his or her short term survival. However, the disadvantage of being deprived of the chance to be educated in school, the physical and mental damage some types of jobs may cause, and the enormous opportunity for exploitation would far outweigh any benefit gained. This would therefore be an activity which should be prohibited, even if the child chooses to participate in it.

⁶⁰ Guy Goodwin-Gill, above n2, 35.

⁶¹ Abdullah An-Natim "Cultural Transformation and Normative Consensus on the Best Interests of the Child" in Philip Alston (ed) *The Best Interests of the Child* (Clarendon Press, Oxford, 1994) 77.

Child volunteering for roles in armed conflict is an even more clear cut case. Any perceived benefit can be discounted as they will be minimal and, as already mentioned, are usually not forthcoming. The ability to exploit is enormous. The harmful effects of participation are the same as for child labour not to mention the greater likelihood that the child will be injured or killed. There is therefore an even stronger argument to protect children from choosing to participate in armed conflict.

International standards have developed in accordance with this view. They cover with varying adequacy the prevention of children from participating in armed conflict. The next chapters will examine the progress that international law has made thus far and assess whether it has been adequate in addressing the problem.

number of international laws adopted to ensure children's safety. Warlords murder children with the aim of conquering the future, and the world turns a blind eye. The collapse of social order leads to lawlessness. Society's slide towards tolerance of such behaviour through their negligence violates the principles championed by international law since its inception. In reality, children have never before been so poorly protected.

It is an enormous challenge for international law to come to grips with the reality of the situation it is trying to improve, especially in the field of children in armed conflict.

A. The Origin of Children's Rights in Armed Conflict

International humanitarian law is the law that governs armed conflict. It limits the methods and means used in war and has developed to provide special protection for those who do not take part. Under customary international humanitarian law civilians were protected by a prohibition on not being attacked. Some groups particularly susceptible to the effects of war such as the elderly, the sick, and children were also afforded special protection.

² International Committee of the Red Cross *Children and War* (International Committee of the Red Cross, Geneva, 1994) 5.

IV. INTERNATIONAL HUMANITARIAN LAW

As part of the growing body of children's rights, their right not to participate in armed conflict has developed this century. Despite the progress of international law in the area, the International Committee of the Red Cross (ICRC) believes:⁶²

There is considerable discrepancy, however, between the detailed provisions worked out by experts and the daily life of children caught up in the maelstrom of war. Abuse of children's rights by combatants seems to rise in direct proportion to the number of international laws adopted to ensure children's safety. Warlords murder children with the aim of conquering the future, and the world turns a blind eye. The collapse of social order leads to lawlessness. Society's slide towards tolerance of such behaviour through sheer negligence violates the principles championed by international law since its inception. In reality, children have never before been so poorly protected.

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⁶² International Committee of the Red Cross *Children and War* (International Committee of the Red Cross, Geneva, 1994) 5.

The Declaration of the Rights of the Child 1924 was the first to spell out children's rights in armed conflict. It stated that in times of distress children were the first to get relief.⁶³ In 1939 the ICRC together with Save the Children Union accepted a draft convention entitled the Protection of Children in Emergency Armed Conflict. Unfortunately it was abandoned with the outbreak of World War II. In 1947 a recommendation to incorporate the principles of the draft into the future Fourth Geneva Convention concerning the Protection of Civilians (Fourth Geneva Convention) was approved. As a result, the possibility of a separate convention dealing with the particular vulnerability of children during armed conflict was abandoned.

B. The Fourth Geneva Convention

The Fourth Geneva Convention extends the protection of the Law of Geneva to specific groups of vulnerable civilians including children. The question regarding the use of children participating in armed conflicts was not addressed because at the time there was a presumption of the non-participation of children in armed conflict.⁶⁴ The drafters of the Convention also had an overriding need to obtain political consensus over the four conventions⁶⁵ and including a provision dealing with children in armed conflict would have been too contentious.

C. Additional Protocol I

In 1977, after nine years of negotiation, two additional protocols to the Fourth Geneva Convention were adopted. The emergence of Additional Protocol I to the Fourth Geneva Convention (Protocol I) which applies to international armed conflicts⁶⁶ meant the restriction on the participation of

⁶³ Principle 3 Declaration of the Rights of the Child.

⁶⁴ Howard Mann "International Law and the Child Soldier" 36 (1987) *International and Comparative Law Quarterly* 35.

⁶⁵ Carolyn Hamilton and Abu El-Haj "Armed Conflict: the Protection of Children Under International Law" 5 (1997) *International Journal of Children's Rights* 1, 12.

⁶⁶ Article 1(4) of Additional Protocol I to the Fourth Geneva Convention [Protocol I] expands the definition of international armed conflict to those where people are fighting

children in armed conflicts was dealt with for the first time in an international treaty:⁶⁷

The parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

A minimum age of fifteen was chosen by the ICRC as the majority of those negotiating the draft were opposed to extending the restriction beyond this age.⁶⁸ The weaker "all feasible measures" in article 77(2) was concluded upon rather than "all necessary measures" suggested by the ICRC. The obligation to refuse voluntary enrolment of those under fifteen was also not included.⁶⁹ The word "direct" conveys the notion of resulting military harm in the normal course of events.⁷⁰ As indirect participation does not generally result in military harm, although may entail other types of injury, it is not covered.

against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

⁶⁷ Article 77(2) Protocol I.

⁶⁸ There was a general view that at fifteen a child's development was advanced enough that they did not need the same types of special protection they may have been accorded before this age, although the evidence upon which this view was based was not explored Howard Mann, above n64, 39.

⁶⁹ See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987) 901 [Commentary] where it was noted by the Rapporteur of Committee III that it would not always be realistic to prohibit the voluntary participation of children in conflicts, especially wars of liberation and those in occupied territories.

⁷⁰ Howard Mann, above n64, 45 see also *Commentary*, above n69, 516 which notes direct entails a causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.

D. Additional Protocol II

Additional Protocol II to the Fourth Geneva Convention (Protocol II) fulfilled the need for a convention to deal with non-international armed conflict. It covers a situation of civil war defined as open hostilities between organised armed forces.⁷¹ It does not include situations of internal disturbances and strife, such as riots, isolated and sporadic acts of violence.⁷² Article 4(3)(c) covers child participation:

Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

Protocol II is an improvement on the protections afforded in Protocol I. The lack of qualification of the obligations in the provision means it was quite forward thinking considering it was only 1977 when it was adopted. Article 4(3)(c) bears a closer reality to the actual issues involved in the participation of children in armed conflict than most subsequent standards.

The phrase "nor allowed to take part in" covers voluntary enrolment and the modifying phrases "all feasible measures" and "direct" have not been included in the provision. The Protocol also covers non-governmental armed groups who carry out most of the recruitment of children. An armed group must have responsible command, control over a part of a territory and a sustained and concerted character of military operations for Protocol II to apply.⁷³ The provision applies when an armed group is in conflict with the relevant state party, but does not cover fighting between groups.

E. The International Criminal Court⁷⁴

The Rome Statute of the proposed International Criminal Court (Rome Statute) also contains an article stating that the recruitment of children under

⁷¹ Article 1(1) Additional Protocol II to the Fourth Geneva Convention [Protocol II].

⁷² Article 1(2) Additional Protocol II.

⁷³ Article 1(1) Additional Protocol II.

⁷⁴ Most of the information from this section was provided by Felicity Wong from the Ministry of Foreign Affairs and Trade.

the age of 15 into the armed forces is a war crime.⁷⁵ In addition, it addresses one of the underlying causes of recruitment and abduction by stating that intentional attacks on educational institutions also constitute war crimes.⁷⁶

The provision was one of the last to be included in the Statute and was very nearly omitted. There was considerable opposition to its inclusion by the United States, Palestinian and Lebanese delegations. As a political compromise, predominantly to keep the Middle-East on the "yes" side of the vote to adopt the Rome Statute, the standards concluded upon were weaker than one might have hoped. Nevertheless, it was better to include a weaker provision than none at all.

The provision only covers "conscripting or enlisting" children which entails an active element on the part of the person recruiting. If a child offers to join the armed forces and the person recruiting makes no effort to stop them, that person will not be held liable. Therefore voluntary recruitment is not covered. Also, only active participation in hostilities is included.

Nothing in the Statute applies to persons under the age of 18.⁷⁷ The main argument behind the inclusion of this provision is that the aim of the International Criminal Court (ICC) is to focus on the worst perpetrators of the worst crimes as it does not have the resources to prosecute every person who commits a crime stated in the Rome Statute. This does not mean that children are not subject to the law for a crime they may have committed, but that procedurally, the ICC was not designed to deal with their prosecution. The inclusion of the provision also avoided the debate on an international minimum age of criminal responsibility which could have killed the provision altogether. Instead it is left up to each state to determine their own age of criminal responsibility.

⁷⁵ Article 8(2)(b)(xxvi) and article 8(2)(e)(vii) of the Rome Statute of the International Criminal Court UN Doc A/CONF.183/9 [Rome Statute] in regard to international and non-international conflict respectively.

⁷⁶ Article 8(b)(ix) and article 8(e)(iv) of the Rome Statute in regard to international and non-international conflict respectively.

⁷⁷ Article 26 of the Rome Statute.

F. Analysis of International Humanitarian Law

Protocol I was the first international instrument to deal with the protection of children from participating in armed conflict, but its provisions are no longer, if they ever were, adequate. Voluntary enrolment, indirect participation and recruitment by armed groups are the major issues concerning the use of children in armed conflict in the world today. The fact that they are not covered⁷⁸ means that Protocol I does not deal with the actual elements of the problem.

The qualifications of the obligations in Protocol I also weaken its effect. The term "feasible measures" has been defined as "that which is practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations."⁷⁹ Recruiting child soldiers could quite easily fall under military necessity, particularly if there was a national emergency and more manpower was needed. The obligation in the second part of Article 77(2) to give priority to older youths when recruiting persons between 15 and 18 is also not very strong.

Protocol II does afford better protection for children in armed non-international conflict⁸⁰ by dealing with voluntary enrolment, armed groups and all forms of participation. Although Protocol II comes a long way in addressing the major issues, the threshold of what constitutes a non-international conflict may be too high, thereby limiting the Protocol's scope of application. Most conflicts where children are being used today fall short of the provision's requirements.⁸¹

When the actual practice of government and armed groups are compared with the provisions of international humanitarian law the obligations might as well be theoretical. There is a lack of ratification of both protocols, making them

⁷⁸ See Marie Dutli "Captured Child Combatants" 278 (1990) *International Review of the Red Cross* 421, 424 where she argues that the word recruitment does in fact include voluntary enrolment.

⁷⁹ Howard Mann, above n64, 45.

⁸⁰ The protection afforded should be the same in both Protocols as although the use of children in international armed conflict is not as common as in non-international armed conflict, nevertheless the consequences for children would be no less harmful.

⁸¹ Guy Goodwin-Gill, above n2, 60.

difficult to invoke, even when in the rare circumstances they could apply on the facts.

As well as the difficulty in the application of international humanitarian law to a particular conflict, it severely lacks a sufficient mechanism of enforcement. Even when the laws are applicable, they are breached with impunity.⁸² This could change with the prospect of the ICC as individuals will be able to be held accountable for breaches of international humanitarian law, and more specifically, for recruiting or using children in armed conflict.

However, it is unknown how instrumental the ICC will prove to be. Time is an important factor when considering the ICC's ability to be effective. Firstly, the Statute needs 60 ratifications to come into force. At the time of writing there have been four.⁸³ It may therefore take years for the Rome Statute to come into force. When it does, an individual who has potentially breached the Statute will only be prosecuted years after the alleged commission of the crime. Furthermore, the Statute will probably not deter the every day recruiter as it only has only limited resources to go after the worst perpetrators of war crimes.

⁸² Carolyn Hamilton, above n65, 32.

⁸³ The four states who have ratified the Rome Statute are Senegal, Trinidad and Tobago, San Merino and Italy. As yet, New Zealand has not ratified the Statute because of the lack of space on the parliamentary calendar to pass legislation in order to comply with its provisions.

V. *INTERNATIONAL HUMAN RIGHTS LAW*

With the adoption of CROC in 1989, rights especially tailored to children's needs were embodied in a single document. Owing to the almost near universal ratification of CROC,⁸⁴ it is obvious that the international community recognises that children should have special rights.

A. *The Convention on the Rights of the Child 1989*

The drafters of CROC did not build upon the progress achieved in international humanitarian law by Protocol I and especially Protocol II. Article 38 deals with the recruitment of children into the armed forces:

States Parties undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which are relevant to the child.

States Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.

States parties shall refrain from recruiting any person who has not attained the age of 15 years into their armed forces. In recruiting among those persons who have attained the age of 15 years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

Again, the phrase "all feasible measures" qualifies the obligations instead of requiring an absolute duty on states. Unlike international humanitarian law concerning non-international conflict, it does not protect children from recruitment into non-governmental armed groups, or deal with voluntary enrolment. Fifteen is still the minimum age accorded for recruitment and participation. This means that article 38 provides the only express exception in CROC to the extension of protection to 18 years. This is mainly because

⁸⁴ The only members of the UN not to have ratified CROC are the United States and the collapsed state of Somalia.

in December 1988 the United States decided that it was no longer willing to support a formulation of the provision stating that "no child" should take a direct part in hostilities, even though it had twice before been adopted with consensus.⁸⁵

B. The African Charter on the Rights and Welfare of the Child 1990

The African Charter is one of the most recent international human rights instruments that contains a provision dealing with the use of children in armed conflict and does build on standards of international humanitarian law and CROC. The minimum age for recruitment is 18 which is consistent with the age of the child for the purposes of the Convention. It uses the words "all necessary measures" rather than the weaker onus of "all feasible measures."

The fact that it leaves in the word "direct" means it does not cover indirect participation. It also does not address recruitment by armed groups. However, it does significantly extend the scope of application of the provision to not only internal conflict, but also situations of tension and strife. This is a more realistic threshold to satisfy if it is to apply to typical conflicts where children are actually being used. The problem is that it is not yet in force, again because of a lack of willingness to ratify.

C. Analysis of International Human Rights Law

Unfortunately, CROC did not take the opportunity to build on the obligations of international humanitarian law. The African Charter is an improvement to some extent by raising the minimum age of recruitment and including situations of tension and strife, although it is not yet in force.

The ability to enforce international human rights law leaves much to be desired. The Committee on the Rights of the Child (CRC) which supervises the implementation of CROC, has only a reporting mechanism to monitor state compliance with the Convention. The CRC does not yet have the

⁸⁵ Thomas Hammarberg "The UN Convention on the Rights of the Child – and How to Make it Work" (1990) 12 HRQ 97, 101.

capability to initiate its own investigations into breaches of its provisions,⁸⁶ although this has been under consideration.⁸⁷

Without any direct legal obligation to adhere to the Committee's recommendations, its ability to change state practice significantly may be limited, although CROC can be used as a basis to challenge policy and practice. It can also be used to encourage compliance with domestic legislation that already complies with CROC.⁸⁸ However, any change to state practice that is achieved through political pressure or a moral obligation to comply will take years to come about and will therefore be too late to help alleviate the plight of thousands of children involved in armed conflict today. Recognising this inadequacy, a draft optional protocol to CROC regarding the use of children in armed conflict has been proposed.⁸⁹

A. Definition and Age of Participation

The first issue concerns whether "participation" should include all forms of participation as opposed to merely direct participation in hostilities.⁹⁰ If the Protocol covered indirect participation it would protect children from being involved in performing activities which could be just as harmful as front line combat itself. It would also prevent them from being subject to pressure to move from direct to indirect participation.⁹¹ As already stressed, the revision of the word direct is an important step to take in order to address the reality of the use of children in armed conflict.

⁸⁶ Such as that which the Committee against Torture has under Article 20 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

⁸⁷ See *Question of Urgent Appeals* UN Doc CRC/C/SR.42 para 3 which is a discussion paper prepared in 1992 advocating that the CRC should be able to take an "urgent response" in defined circumstances. The situation must be related to an obligation in CROC in a state who is a party to it, it must be serious, truly urgent and entail a risk of future violations for the mechanism to be invoked.

⁸⁸ Guy Goodwin-Gill, above n2, 69.

⁸⁹ The draft optional protocol to CROC does currently contain a proposed provision enabling the CRC to initiate its own investigations.

VI. DRAFT OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

The increase in awareness of child participation in armed conflict and NGO pressure has led to the further development of international law standards. In 1993 the Committee on the Rights of the Child recommended the adoption of a draft optional protocol to CROC on the involvement of children in armed conflict (the Protocol).⁹⁰ In 1994 the UN Commission on Human Rights established an open-ended Working Group to draft the Protocol. Since then the Working Group has met every year to discuss the draft. Over 40 countries, 30 UN bodies and numerous international organisations and NGOs have been involved in the process. There are three main issues prohibiting the conclusion of a final draft to be open for adoption.

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The minimum age of participation is also in contention. During the Working Group's session in 1997, the United States supported by a small number of other states, refused to accept a consensus on a minimum age of 18 for

⁹⁰ *Committee on the Rights of the Child Report on the Third Session* CRC/C/16/1993.

⁹¹ The provision applies when a child is involved in hostilities rather than armed conflict. Hostilities is defined by the International Committee of the Red Cross as the time when a weapon is made use of, when it is being carried, as well as the undertaking of hostile acts without using a weapon *Comments 1998*, above n36, para 91.

⁹² Rachel Brett "Child Soldiers: Law, Politics and Practice" 4 (1996) *The International Journal of Children's Rights* 113, 124.

participation.⁹³ It took the view that if 17 was agreed upon it would be more widely accepted in the UN General Assembly as it was the practice of most states.⁹⁴ Other delegations also felt that it would be more realistic to aim for a minimum age of 17 rather than 18 for participation as they believed it was already difficult to implement existing standards under CROC.⁹⁵

B. Recruitment by Non-Governmental Armed Groups

The second issue concerns the extension of the Protocol to non-governmental armed groups. Most conflict now takes place within states and much recruitment of child soldiers is carried out by these groups. As it is government representatives who undertake the negotiation of the draft, it is not surprising that the inclusion of a provision dealing with the conduct of armed groups was not contentious.⁹⁶ The proposed obligations for armed groups are even higher than those for future state parties to the Protocol.⁹⁷ The draft article requires a minimum age of 18 for recruitment into armed groups and does not distinguish between voluntary and compulsory recruitment.

Arguments against the inclusion of such a provision are based on the fact that it is often impossible to apply provisions relating to groups which cannot be formally contracting groups to a treaty of international law.⁹⁸ Although difficult, some governments with the help of humanitarian organisations and

⁹³ Amnesty International "Old Enough to Kill but too Young to Vote" January 1998 AI Index: IOR 51/01/98 at <<http://www.amnesty.org/ailib/aipub/1998/15100198.html>> (last accessed 20 July 1999).

⁹⁴ Michael J Dennis "The Fifty-Third Session of the United Nations Commission on Human Rights" *Am J Int'l L* 92 (1998) 112, 117.

⁹⁵ *Draft Optional Protocol*, above n6, paras 19-23.

⁹⁶ Rachel Brett, above n92, 127.

⁹⁷ *Comments 1998*, above n36, para 97.

⁹⁸ *Comments 1998*, above n36, para 105.

the UN have in practice been successful in exerting influence on such groups and persuading them to respect certain humanitarian obligations.⁹⁹

The Working Group decided that there should be a moral obligation on non-governmental armed groups and a legal obligation on states in regard to this provision.¹⁰⁰ Its inclusion will hopefully be able to provide an additional basis to be used by governments and NGOs to apply pressure on non-governmental armed groups to abide by humanitarian standards.

C. Minimum Age of Recruitment

The greatest disparity between delegations negotiating the Protocol exists in regard to an accepted minimum age for both compulsory and voluntary recruitment. States agree that the minimum age for compulsory recruitment will be 18, but this standard reflects state practice in any case.¹⁰¹ The problem is that currently 56 states permit voluntary recruits below the age of 18 to train with the armed forces and therefore advocate a minimum age of 17 for voluntary recruitment.¹⁰² New Zealand is one of these states. Our Defence Act 1990 allows voluntary recruitment at 17 years to provide a means of training for school leavers.¹⁰³

D. The Promotion of a "Straight-18" Ban on Recruitment

In 1998 the Working Group adjourned early as there was no possibility of reaching an agreement on the minimum age of recruitment. Due to the deadlock, a group of NGOs formed a coalition to stop the use of child soldiers in order to advocate the adoption of a straight-18 ban for

⁹⁹ In Sudan, humanitarian organisations have negotiated agreements with rebel groups to prevent the recruitment of children *Impact of Armed Conflict on Children*, above n7, para 61.

¹⁰⁰ Rachel Brett, above n92, 126.

¹⁰¹ Rachel Brett, above n92, 125.

¹⁰² Coalition to Stop the Use of Child *Soldiers States Recruiting Under-18s into the Armed Forces* at <<http://www.child-soldiers.org/countryposition.html>> (last modified 15 September 1999).

¹⁰³ Brett Wilson "Child Soldiers: Part Two" 41 (1999) *Youth Law Review* 16, 18.

compulsory and voluntary recruitment and participation.¹⁰⁴ There are several reasons for the pressure to adopt a straight-18 ban on recruitment and participation.

1. *Consistency of application*

Eighteen is emerging as the preferred age to grant suffrage,¹⁰⁵ which is an indicator of the moment when a community recognises the intellectual maturity of a child.¹⁰⁶ It is also the minimum age to buy alcohol and be subject to the death penalty in many states. It therefore seems inconsistent that a person cannot choose to vote or drink in some states until this age, but they can choose to participate in warfare.

An interesting parallel can be drawn between recruitment into the police force and the armed forces, being the two branches of the state authorised to use lethal force under certain circumstances. In the Netherlands, recruitment into the police force was recently raised from 16 to 19, where recruitment into the armed forces has only been raised to 17.¹⁰⁷ Likewise in the United States, where 17 year olds can be enlisted into the army, the minimum age for joining the police force is generally 18, and in many cases, 21.¹⁰⁸

2. *Ease of enforcement*

A straight-18 ban on recruiting children would mean that the Protocol would be easier to enforce. It would eliminate the temptation for officials to employ 17 year old voluntary recruits in armed combat in a time of war who would otherwise be at their immediate disposal.¹⁰⁹ In areas where birth records are lacking, a straight-18 ban would also reduce the chances of mistaking the age of those who under 18 but look older.

¹⁰⁴ The coalition comprises a number of regional and international NGOs such as Amnesty International, Human Rights Watch and World Vision International.

¹⁰⁵ Out of 150 states surveyed, 109 have 18 as a minimum age to vote Guy Goodwin-Gill, above n2, 7.

¹⁰⁶ Guy Goodwin-Gill, above n2, 7.

¹⁰⁷ Coalition to Stop the Use of Child Soldiers *The Issues* at <<http://www.child-soldiers.org/issues2.html>> (last date modified 28 August 1999) [*The Issues*].

¹⁰⁸ *The Issues*, above n107.

¹⁰⁹ Brett Wilson, above n103, 18.

The Protocol does recognise the benefit of children under the age of 18 enrolling in educational institutions and taking part in training provided for by the governmental armed forces. As long as the youths enrolled in the institutions are kept separate from the national forces, the state will not be breaching the provisions of the Protocol.

E. Future Prospects

1. The draft optional protocol

The year 2000 session of the Working Group is supposed to be its last. Some delegations are showing a readiness to change their national legislation while others are in the process of doing so to bring it into conformity with their ambitions to achieve higher international standards.¹¹⁰ Despite the growing tendency towards a consensus of a straight-18 ban on recruitment, it is doubtful that next year's session will achieve the consensus needed to produce a final draft of the Protocol.¹¹¹

There is some hope, however, that the United States will change its position on its refusal to accept a consensus on a minimum age of participation. A congressional resolution in October 1998 regarding the United States Department of Defence Appropriations Act for Fiscal Year 1999 condemns the use of child soldiers and urges no blocking of international efforts to establish a minimum age of participation.

The CRC has stressed that the function of an optional protocol is to promote the development of international law by enabling states who are willing to do so to adopt a higher standard. It has urged states who are unwilling to accept an 18 year limit not to prevent the acceptance of a higher standard by others.¹¹² The United State's refusal to adopt consensus is in any case ironic

¹¹⁰ *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict on its Fourth Session* UN Doc E/CN.4/1999/73 para 29 [Fourth Session].

¹¹¹ *Fourth Session*, above n110, para 19.

¹¹² *Comments on the Report of the Working Group* UN Doc E/CN.4/1999/WG.13/2 para 8.

considering the Protocol can only be ratified by states who are parties to CROC. The United States and the collapsed state of Somalia remain the only two states in the UN not to have ratified the Convention.

2. *Additional international developments*

There has been further UN support for the conclusion of a draft of the Protocol. The Security Council has debated the matter and has also issued a statement stating it will pay close attention to the issue.¹¹³ The UN Secretary-General has also announced that the minimum age for UN peacekeepers will preferably be 21, but will definitely be no less than 18.¹¹⁴

Other international standards concerning the problem are being pursued at the same time. The International Labour Organisation negotiated a Convention in June this year which included child participation in armed conflict to be one of the worst forms of child labour.¹¹⁵ Until this time, child soldiering had not been perceived as a child labour issue.¹¹⁶

Many NGOs have played key roles in enforcing international human rights and humanitarian standards. In connection with the use of children in armed conflict, UNICEF, Radda Barnen (Swedish Save the Children), Amnesty International and the ICRC among others, have been particularly active in

¹¹³ *Presidential Statement of the Security Council* UN Doc PRST/1998/28.

¹¹⁴ *Fourth Session*, above n10, 20.

¹¹⁵ Article 2 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour defines children as all persons under the age of 18.

¹¹⁶ Article 3(1) ILO Convention 138 concerns the minimum age for admission to employment which by its nature was likely to jeopardise the health, safety or morals of young persons. The minimum age to participate in this type of work was 18. However, the ILO considered that the involvement of children in armed conflict fell outside the scope of this article *Comments on the Report of the Working Group* UN Doc E/CN.4/1996/WG.13/2 para 3. Now studies show that mostly the same groups of children who become child soldiers in wartime, become child labourers in peace time and that child involvement in armed conflict is therefore an appropriate issue for the ILO to consider Amnesty International *Child Soldiers: One of the Worst Abuses of Child Labour* January 1999 AI Index: IOR 42/01/99.

initiating programmes in crisis areas to demobilise child soldiers and facilitate their return to normal life. They have also been instrumental in creating publicity and general awareness about the issue.

A. Inadequacy of International Law Standards

Encouraging the strengthening of international law is important in terms of the awareness of the plight of children involved in armed conflict. Pressure during negotiations can also be used to help build a consensus to adopt higher standards rather than accepting the status quo. The standards negotiated will also hopefully filter down to a national level whereby states who ratify them will incorporate them into domestic legislation.

However, the process of negotiation, particularly by consensus, is exceedingly slow. Delegations are fraught with concern about matching the standards with their own domestic law and policy rather than addressing the relevant issues to stop the problem. In the context of using children in armed conflict there are also no direct penalties for states who breach the relevant international standards apart from political pressure or a moral obligation to comply. Although individuals will be able to be held accountable under international humanitarian law, the potential for prosecution by the ICC will not be a sufficient deterrent for the everyday recruiter. Some form of legislation is needed that can be effectively used to deter people from recruiting children to participate in armed activity.

An overwhelming majority of African states already have legislation that prohibits recruitment into the armed forces below the age of 15, yet in practice recruitment frequently occurs significantly below this age.¹¹⁷ Effective domestic laws that can be used to punish those who recruit child soldiers are therefore required. Even if in practice there is no actual recruitment or use of persons under 15 in armed conflict in a particular state, if enough states adopt an effective model statute it could form an international consensus that the practice should cease.¹¹⁸ New Zealand could lead the way in doing so.

¹¹⁷ *Soldiers in Africa*, above note 1.

¹¹⁸ As an example of this, New Zealand enacted the Geneva of Torture Act 1987 to demonstrate our support for the Convention against Torture and Other Cruel, Inhuman or

VII. THE NEED FOR EFFECTIVE DOMESTIC LEGISLATION

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However, the process of negotiation, particularly by consensus, is excruciatingly slow. Delegations are fraught with concern about matching the standards with their own domestic law and policy rather than addressing the relevant issues to stop the problem. In the context of using children in armed conflict there are also no direct penalties for states who breach the relevant international standards apart from political pressure or a moral obligation to comply. Although individuals will be able to be held accountable under international humanitarian law, the potential for prosecution by the ICC will not be a sufficient deterrent for the everyday recruiter. Some form of legislation is needed that can be effectively used to deter people from recruiting children to participate in armed activity.

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¹¹⁷ *Soldiers in Africa*, above n18.

¹¹⁸ As an example of this, New Zealand enacted the Crimes of Torture Act 1989 to demonstrate our support for the Convention Against Torture and Other Cruel, Inhuman or

B. Defence Act 1990

An examination of the Defence Act 1990 will illustrate that it is currently insufficient to protect young people under the age of 18 in New Zealand from becoming involved in armed conflict.

1. Minimum age to apply

Section 36 of the Defence Act 1990 covers the enlistment of minors into the national armed forces. The statute does not specify a minimum age of enlistment. However, the Defence Force Orders do specify a minimum voluntary recruitment age of 17 in the three branches of the armed forces.

The only requirement is that the applicant must obtain consent in writing from their parents or from a guardian.¹¹⁹ The person who gives the consent must also give written acknowledgment that they are aware that the person enlisting will be liable for active service outside New Zealand at the age of 18 if enlisting in the army or air force and 16 years and 6 months if joining the navy.¹²⁰ If an application to enlist is not accompanied by consent, reasons must be provided outlining the why consent cannot be obtained.¹²¹

2. Minimum age of liability for service

Section 37 of the Defence Act 1990 does include a minimum age requirement of liability for active service abroad. No one under the age of 18, for the army or air force, or 16 and 6 months, for the navy, is liable for active service outside New Zealand,¹²² although the Defence Force Orders have revised the minimum age for the Navy upwards to 18 years. The section does not mention liability for indirect participation in the armed forces overseas or liability for service within New Zealand.

Degrading Treatment or Punishment 1984 and help build an international consensus that torture is a universal crime.

¹¹⁹ Defence Act 1990, s36(4) does not require consent for the application of minors who are married to enter the armed forces.

¹²⁰ Defence Act 1990, s36(4)(b)(i) and (ii) respectively.

¹²¹ Defence Act 1990, s36(6).

¹²² Defence Act 1990, s37(1) and (2) respectively.

According to Human Resources at the Ministry of Defence, a minor is not liable to participate in active service whether within or outside New Zealand until he or she reaches the relevant age. The question still remains as to whether indirect participation is permitted. Again, according to Human Resources, as a general rule minors are not required to participate in the armed forces in any way, but if they were short on personnel, there could be an exception as to indirect participation.

3. *Inadequacy of New Zealand standards*

The only requirement keeping youths under the age of 18 out of the armed forces is consent from parents or a guardian. Even this requirement is weakened by the fact that there is provision for application without consent. There is also no legal guarantee that persons below the age of 18 will not be used in indirect roles abroad or within New Zealand.

Applicants must go through a series of physical and psychological tests and interviews before being chosen to join the armed forces. Those who fail to meet the relevant standards or are considered not suitable to join will not be accepted. The Ministry of Defence is likely to abide by these procedures as there is not likely to be any pressure for extra human resources without the threat of war. New Zealand also has sufficient facilities and staff to help youth adjust to army life.

However, if the Defence Act 1990 was the relevant legislation in concerning the enlistment of minors in an underdeveloped state involved in constant tension between factions of society, most likely little regard would be had to its provisions, least of all to the minimum age of recruitment. There would also be no incentive to comply considering there is no penalty for breaching sections 36 and 37.

VIII. MODEL STATUTE

Much stricter standards need to be adopted than those in the Defence Act 1990 in order to draft a model statute to adopt universally, if the goal is to effectively reduce the recruitment and participation in armed conflict. Other factors relating to the issues of participation and recruitment need to be included as well as a mechanism to ensure compliance and deterrence. People who use children in armed conflict should be held accountable for their actions. The best way to do this is to make it a criminal offence to recruit those under 18 into the armed forces or armed groups or use them to participate in hostilities.¹²³

The Prevention of the Use of Children in Armed Conflict Act 1990¹²⁴

An Act to encourage the prevention of the use of persons under 18 in armed conflict.

BE IT ENACTED by the Parliament of New Zealand as follows:

1. Short Title-This Act may be cited as The Prevention of the Use of Children in Armed Conflict Act 1999.

¹²³ The Friends World Committee for Consultation have devised an alternative text for the protocol suggesting in Article 4 of the text that states should make it a criminal offence to compulsorily or voluntarily recruit those under 18 into armed forces or groups, or use them to participate in hostilities *Comments on the Report of the Working Group* UN Doc E/CN.4/1999/WG.13/2 para 10.

¹²⁴ There is no interpretation provision included in the proposed statute as the author believes it is more beneficial for the purposes of this paper to discuss the meaning of the terms under the analysis of each section.

2. Jurisdiction-(1) No proceedings for an offence against any of the provisions of this Act shall be brought unless-

- (a) The person to be charged is a New Zealand citizen; or
- (b) The person to be charged is present in New Zealand; or
- (c) The act or omission constituting the offence charged is alleged to have occurred in New Zealand or on board a ship or aircraft that is registered in New Zealand.

3. Exclusion of application for persons under 18-(1) Nothing in this Act shall apply to persons under the age of 18.

4. Recruitment and participation-(1) Unless all reasonable measures are taken, it is an offence to-

- (a) compulsorily recruit, enlist, or abduct any person under the age of 18 to into the national armed forces or armed groups; or
- (b) voluntarily recruit any person under the age of 18 into the national armed forces or armed groups; or
- (c) permit any person under the age of 18 to be used either directly or indirectly in hostilities.

5. Other crimes-(1) It is an offence to-

- (a) persuade, encourage, or coerce any child to carry out a war crime as defined in the Rome Statute of the International Criminal Court; or
- (b) persuade, encourage, or coerce any child to compulsorily or voluntarily recruit any other child into the national armed forces or armed groups; or
- (c) intentionally attack any educational institution; or
- (d) intentionally deprive a child of his or her immediate circle of support.

6. Military schools and training-(1) It is not an offence to-

- (a) permit persons under the age of 18 to attend establishments that carry out education and vocational training operated by or under the control of the national armed forces as long as training takes place separate to that of the national armed forces and there is no pressure to join the national armed forces during a person's time there, or after the completion of their education or training.

7. Penalties-(1) Every person who breaches sections 4, 5, or 6 of this Act shall be liable-

- (a) for imprisonment up to 14 years; or
- (b) to undergo community service related to programmes concerned with the prevention of the use of children in armed conflict; or
- (c) to forfeit their personal property or the property of the armed group; or
- (d) to the levying of a proportion of personal income.

8. Court's discretion as to penalties-(1) The court may determine which penalties to apply in each case.

(2) Any amount received by the court shall be used for the purpose of the rehabilitation of child soldiers, education promoting the prevention of the use of children in armed conflict, or other such causes related to aiding children in armed conflict, or shall be given to appropriate governmental or non-governmental organisations to be used for those purposes.

9. Legal status-(1) The legal status of any entity to whom this Act applies shall not be affected.

nationals anywhere in the world and foreign nationals who are present in New Zealand. This will enable states to continue to have jurisdiction over the crimes in the Act no matter where or when they were committed.

The Act does not apply to persons under the age of 15. States are left free to decide upon their own legal age of criminal liability. The purpose of the Act is to focus on those who breach the rights of children. It is beyond its scope, and the scope of this paper, to deal with the issue of children who breach the rights of others.

B. Section 4

1. Recruitment

The words "recruited, enlisted and induced" cover all the methods under current practice whereby children have been forced to join armed forces or groups. They all entail an active element on the part of the person recruiting. Voluntary recruitment is also covered. Whether a person encourages a person under 18 to join or simply fails to refuse them from joining are both included under section 4.

The standard of "reasonable measures" was chosen as a realistic obligation with which states could comply. A person will not be liable for the unintentional recruitment of those under the age of 18. However, failure to make any investigation as to the age of the person being recruited will not be sufficient. Reasonable steps to ensure the non-recruitment of those under 18 could include checking available birth records and their authenticity. If no records are available the state could seek other means of identification or even consent in writing from a parent or guardian. The full purposes of this Act recognises that will not contain the notion of military necessity.

IX. ANALYSIS OF THE MODEL STATUTE

A. Sections 2 and 3

The Act applies to any person in New Zealand who breaches its provisions. It also covers New Zealand nationals anywhere in the world and foreign nationals who are present in New Zealand. This will enable states to continue to have jurisdiction over the crimes in the Act no matter where or when they were committed.

The Act does not apply to persons under the age of 18. States are left free to decide upon their own legal age of criminal liability. The purpose of the Act is to focus on those who breach the rights of children. It is beyond its scope, and the scope of this paper, to deal with the issue of children who breach the rights of others.

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2. *Participation*

As already stated, to deal with the reality of how children are used in armed, all forms of participation must be addressed. Therefore using children as cooks, messengers, or exploiting them by the means of sexual abuse will be illegal under the Act as well as using them in front line combat or carrying out other acts of atrocity.

3. *Armed forces and armed groups*

The "national armed forces" includes any military group under the aegis of the government, for example the army, navy, or air force. A more difficult task is to define the criteria of an "armed group," although the requirements in Article 1(1) of Protocol II would probably be satisfactory. Therefore responsible command, control over a part of the territory and a sustained and concerted character of military operations are required to qualify as an armed group under the Act. Although it may be possible for gangs to also fulfil some of these criteria, the distinguishing feature between gangs and armed groups would be the requirement of carrying out military operations.

The statute must be applied fairly to both the national armed forces and armed groups. It should not be used by the government only as a means to weaken those groups who oppose them. It is a rule of international humanitarian law to treat all parties to a conflict on an equal footing.¹²⁵

The fact that the Act applies to armed groups will not change their legal status. Without the inclusion of section 9 governments may be concerned that the application of the Act to armed groups could imply their legitimacy.

C. *Section 5*

As the Act does not apply to persons under 18, the inclusion of this provision will ensure that people are deterred from using those under 18 to recruit other youths in order to avoid liability. It also emphasises that it is not acceptable to compel children to carry out atrocities against others, although this is already covered under section 4 by disallowing participation in hostilities.

¹²⁵ *Comments 1998*, above n36, para 97.

Attacks on educational institutions are illegal under the Act. They are often carried out in order to make it easier to round up children for recruitment. Depriving children of their immediate circle of support is also outlawed as this weakens a child's security also making them more susceptible to being recruited into armed activity. This could include terrorising, torturing or even killing family members or guardians in order to scare children to join armed forces or groups or leave them with no support network so they are forced to do so.

D. Section 6

The draft optional protocol to CROC recognises the benefit of educational institutions and training run by the government for those under 18 as long as there is no pressure on them to take part in any activities with the armed forces until the age of 18 and they are trained separately from them. Section 6 accords with this view as long as the child volunteers to enrol in the institution and is not pressured to join the armed forces during or after their training or time there. Armed groups are obviously prohibited from setting up their own establishments to provide training as their only interest is in recruiting, not educating children.

E. Sections 7 and 8

The penalties that are available for breach of the Act are significant. Considering the irreparable damage to a child's psychological and physical well being which can be the consequence of being recruited to participate in armed conflict they are justified. The court can choose the appropriate penalty to award depending on the severity of the breach. If an alleged defendant has severely infringed the rights of a child, a combination of penalties may be applied, or a prison sentence. If the breach has not been severe, the court may decide only to require community service.

The Act not only deters people from recruiting or using children in armed conflict by advocating punishment for a breach by an individual, but also helps to alleviate the problem on another level. Tying any money received by the court, or any community service that must be undertaken, to the wider issues surrounding children in armed conflict, provides much needed

financial and human resources to organisations and individuals who are involved in alleviating the problem in the field.

Unlike current international standards, the proposed model statute deals with the range of issues involving the use of children in armed conflict and provides significant deterrents for non-compliance. If adopted and enforced, it will ensure that adherence to international standards through the adoption of domestic legislation is not merely window-dressing.

The model statute is no doubt provocative and idealistic. Sections 7 and 8 regarding penalties may also be controversial. However, it is important for states to begin thinking about the concept of an effective statute to eliminate the use of children in armed conflict. As well as usually being able to be used to bring those who use children in armed conflict to account, if enough states adopt something similar to it, it could build up a worldwide consensus that the use of children in armed conflict is a phenomenon that must be stopped. However, even the adoption of an effective statute can only go so far to eliminate the problem.

Efforts to end the participation of children in armed conflict cannot be achieved in legal isolation. A combination of legal, diplomatic, governmental, and non-governmental action is required. Ideally a variety of programmes should be initiated to enhance the effectiveness of domestic legislation. Programmes to prevent child recruitment, monitoring recruitment, providing alternatives to volunteering, ensuring safe demobilisation and reintegration of former child soldiers are badly needed. Education for peace in countries where child participation in armed conflict is prevalent could prove invaluable in encouraging the perception that the practice should not be tolerated. As wars are waged in the minds of men, they should not become the universe of the world's children to fight in them.

X. CONCLUSION

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