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# INTERNATIONAL LAW AND THE CHILD SOLDIER

HOWARD MANN\*

Whereas mankind owes to the child the best it has to give . . .  
(Preamble, UN Declaration of the Rights of the Child, General Assembly  
Resolution 1386, 20 November 1959.)

## I. INTRODUCTION

IN 1970, following three years of work and debate, the UN General Assembly adopted a series of five resolutions dealing with international humanitarian law. Through these resolutions the Member States of the UN reaffirmed their belief in the continuing validity of many basic humanitarian principles.<sup>1</sup> Despite their unequivocal language, these same States also recognised the urgent need to reassess the substance of these principles and to draft new "legal instruments for the reaffirmation and development of humanitarian law applicable in armed conflict" to reflect the rapidly changing circumstances of both international and internal armed conflicts.<sup>2</sup> The supervision of this task was undertaken by the International Committee of the Red Cross (ICRC), with the blessing of the General Assembly.<sup>3</sup>

Among those changing circumstances noted by the ICRC as it began its efforts was the increasing use of children in armed conflicts, particularly in Indo-China during the 1960s. Bearing this in mind, as well as similar events in other areas of the world, it is not surprising that, in 1971, the ICRC declared this to be the most important problem facing humanitarian law as it related directly to children.<sup>4</sup> Yet it noted at the

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1. See UNGA Res. 2673(XXV), 2674(XXV), 2675(XXV), 2676(XXV), and 2677(XXV), all adopted on 9 Dec. 1970. Earlier initiatives are reflected in the Final Act of The International Conference on Human Rights, Teheran (1968), Res. I and XXII: see UN Doc.A/Conf.32/41; and UNGA Res. 2444(XXIII) of 19 Dec. 1968. See also the two reports of the Secretary General on the Respect for Human Rights in Armed Conflicts, UN Doc.A/7720 (1969), and UN Doc.A/8052 (1970).

2. See Res.2677(XXV).

3. *Ibid.* For a brief review of these events see R. R. Baxter, "Humanitarian Law or Humanitarian Politics: The 1974 Diplomatic Conference on Humanitarian Law" (1975) 16 Harv. I.L.J. 1, 4-9.

4. Doc.CE/III, "Protection of the Civilian Population Against Dangers of Hostilities" (ICRC, Geneva, 1971), p.46. The document was part of the preliminary material for the first session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts ("the Conference of Government Experts") convened by the ICRC in 1971.

same time that the question of regulating this problem "has not even been studied up to now".<sup>5</sup>

The objective of this paper is to examine, some fifteen years after the ICRC began the process of dealing with this issue, the current state of international law as it relates to the participation of children in armed conflicts, both as combatants and civilians.<sup>6</sup> Present State and non-State practice concerning the use of children in armed conflict, and the international reaction to it, will also be considered. With as many as half a million children under the age of fifteen killed in combat in the past two decades,<sup>7</sup> the picture to emerge is not a very encouraging one.

## II. THE STATUS OF CHILDREN IN HUMANITARIAN LAW PRIOR TO THE GENEVA PROTOCOLS

CUSTOMARY international humanitarian law as it traditionally related to children centred on the two notions of the general protection of civilians in time of armed conflict, and the special protection of those groups regarded as being particularly vulnerable to the effects of war. Both concepts have received considerable attention in the literature on humanitarian law and need not be reviewed in detail.<sup>8</sup> In broad terms, how-

### 5. *Ibid.*

6. In looking at this issue, we will not be concerned with the question of privileged and non-privileged combatants, although any such distinction in customary international law or as reformulated in the Geneva Protocols (*infra* n.11) would apply to children as well. The aim of attempts to deal with the issue of child combatants has been to cover both possibilities equally. The classic work on this division in customary law is R. R. Baxter, "So-called 'Unprivileged' Belligerency: Spies, Guerrillas, and Saboteurs" (1951) 28 B.Y.B.I.L. 323. See also W. Thomas Mallinson and Sally V. Mallinson, "The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict" (1977) 9 Case W.Res.I.J.L. 39. On the developments under the Geneva Protocols see, *inter alia*, Stanislaw Nahlik, "L'extension du statut de combattant à la lumière du Protocol I de Genève de 1977" (1979) 164 *Hague Rec.* 171; George Aldrich, "New Life for the Laws of War" (1981) 75 A.J.I.L. 764; Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977; Part I: Combatants and Civilians" (1977) 8 Neth.Y.B.I.L. 107; Antonio Cassese, "The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts" (1981) 30 I.C.L.Q. 416.

A related question concerns the distinction between participation in the hostilities as a combatant, whether privileged or unprivileged, and the participation of civilians in the armed conflict. This latter issue will receive attention below.

7. See text Part V. Precise or official figures on the number of children killed or wounded in combat are not available.

8. For a general review of the notions of general and special protection of civilians in time of armed conflict, see Esbjorn Rosenblad, *International Humanitarian Law of Armed Conflict* (1979); Jean Pictet, *op. cit. infra* n.10; Konstantin Obradovic, "La protection de la population civile dans les conflits armes internationaux", in Antonio Cassese (Ed.), *The New Humanitarian Law of Armed Conflict* (1979), pp.128-160; Yougindra Khushalani, *Dignity and Honour of Women as Basic and Fundamental Human Rights* (1982); and Frits Kalshoven, "Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977; Part II" (1978) 9 Neth.Y.B.I.L. 107. Khushalani provides the most complete analysis of the development of the concept of special protection.

ever, the general protection of the civilian population may be seen as encompassing the notions of not attacking them, of preventing the effects of war from harming them to the greatest extent possible, and of not using them as hostages against attack. The special protection of specific groups in the population was intended to benefit those persons likely to suffer the most from the effects of an armed conflict. These groups included the sick, the elderly, the infirm, children, and mothers of young children. The obligations could include the removal of these groups to specially designated safe areas or camps, the provision of extra supplies for food or shelter, etc. In general, the intent was to reduce the impact of the conflict as far as possible for those least able to cope with its effects.

Although these concepts were well recognised in humanitarian law, they remained largely uncoded until the adoption of the Fourth Geneva Convention in 1949.<sup>9</sup> Following World War II it became apparent that children, “. . . in violation of one of the most sacred of human laws—the law that children must be protected since they represent humanity’s future”,<sup>10</sup> had been victimised by the war to a greater extent than ever before. It is therefore a strange lacuna of the Fourth Convention that, while it set out to remedy this problem, children are not specifically included in the only provision stating the principle of special protection.<sup>11</sup> Nonetheless, the continuous reference to children in the provisions designed to assist in the implementation of the principle<sup>12</sup> makes it clear that this omission was not intended to detract from the customary international law on this point.

Our topic does not require a review of the details of these provisions. It must be pointed out, however, that the question of children partici-

9. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, commonly referred to as the Fourth Geneva Convention, reprinted in A. Roberts and R. Guelff (Eds), *Documents on the Laws of War* (1982), p.272.

10. Jean Pictet, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, 1958), p.284.

11. Art.16 of the Fourth Geneva Convention states, *inter alia*, “The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect”. Art.50 comes close to stating the principle for children, but its scope is more restricted. The principle of general protection, while pervading the Convention, was not specifically enunciated until the adoption of the Geneva Protocols in 1977. See 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; and 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, both signed on 12 December 1977. Reprinted in *op. cit. supra* n.9, at pp.387 and 447 respectively. See *infra* n.61.

12. See Arts.14, 15, 17, 23, 24, 38, 50, 51, 82, 89. The content of these articles is examined in Pictet, *op. cit. supra* n.10, and are summarised by Denise Plattner, “Protection of Children in International Humanitarian Law” (1984) 240 Int’l Review of the Red Cross, 140, May. And generally, see *supra* n.8.

pating in armed conflicts was not directly addressed. The basis on which the principles of general and special protection were reaffirmed must, therefore, be understood. On this point, the commentary of Jean Pictet is most instructive. He states that the provisions are designed to protect civilians "who *by definition* take no part in the fighting".<sup>13</sup> Subsequently he elaborates on the point:

These various categories among the civilian population are based on a very simple criterion: they are persons *who are taking no part in the hostilities* and whose weakness makes them incapable of contributing to the war potential of their country; they thus appear to be particularly deserving of protection.<sup>14</sup>

These assertions are indeed well borne out by the content of the provisions themselves. Indeed, this assumption reflected the traditional basis on which the principles were built.<sup>15</sup> It is apparent that the use of children in the army of the Third Reich at the end of World War II, and the participation of children in some of the partisan campaigns against the Nazis, were seen as aberrations which did not disturb the pre-existing assumption.

### III. THE CHANGING LEGAL AND MILITARY ENVIRONMENT

By the end of the 1960s, however, this basic assumption was no longer being made. The wars in Indo-China and elsewhere had seen a growing number of children used in a variety of capacities. Any assumption that children could not contribute to the war effort was no longer sustainable.

Other changes were also occurring on the legal front which affected the status of children in times of armed conflict and, therefore, would have to be considered in the development of any new legal instruments. In particular, there was a growing call for the recognition of wars of

13. Pictet, *op. cit. supra* n.10, at p.119, emphasis added.

14. *Idem*, p.126, emphasis added.

15. The presumption on the non-participation of children is not unique to western or Judeo-Christian thought. Traditional African customary law and Islamic religious law also required that children be spared from the effects of war, and that they not be allowed to participate in it. See Yolande Diallo, "African Traditions and Humanitarian Law II" (ICRC, 1978); Emmanuel Bello, "African Customary Humanitarian Law" (ICRC, 1980); Hamed Sultan, "La Conception Islamique de Droit Humanitaire dans les Conflits Armes" (1978) 34 Rev.Eg.D.I. 1, 17; and Marcel Boisard, "De certaines règles islamiques concernant la conduite des hostilités et la protection des victimes de conflits armés" (1977) 8 Ann. Etudes I. 145, 150, 152. The ancient Chinese also appear to have had such a prohibition in their codes of war, dating back to the eighth century, BC, including the most complete code, the "Code of Si Ma Rang Ju": see Zhu Li-Sun, "Traditional Asian Approaches to the Protection of Victims of Armed Conflict—The Chinese View" (1985) 9 Aust.Y.B.I.L. 143.

national liberation and self-determination as international armed conflicts.<sup>16</sup> For this to be achieved, substantive changes would have to be made that took cognisance of the tactics of guerrilla warfare, the manner in which most of these wars were fought. Thus, the general imbalance of parties in such conflicts and the often seen recourse by guerrilla movements to the civilian populations for support and assistance would have to be considered. Anti-guerrilla warfare, usually aimed at destroying the guerrilla infrastructures, also raised new dangers for the traditional concept of distinction between combatants and non-combatants.<sup>17</sup> Yet, as the ICRC recognised in its preliminary documentation to the 1971 Conference of Government Experts, it could not be possible from either the legal or humanitarian viewpoints to consider all the civilians involved even indirectly in the hostilities as combatants.<sup>18</sup> These concerns reflected not only on the direct use of children as soldiers, but also their use in various auxiliary capacities in such conflicts, most notably by the guerrilla groups. With the adoption of a draft provision at the first session of the Diplomatic Conference, declaring that wars of national liberation and self-determination were to be considered as international armed conflicts,<sup>19</sup> these concerns took on a great practical, not just theoretical, relevance in the continuing negotiations.

A second area of legal concern was the growing desire on the part of some States, supported by the ICRC, to strengthen the role of international law in internal armed conflicts. In particular, the incorporation

16. See, for example, General Assembly Res. 2674(XXV), para.4 (19 Dec. 1970). And see Antonio Cassese, "Wars of National Liberation and Humanitarian Law", in Christophe Swinarski (Ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in honour of Jean Pictet* (ICRC, 1984), pp.313 *et seq.*

17. The challenges posed by guerrilla warfare to the traditional concepts of international humanitarian law are discussed in detail in Michel Veuthey's excellent study, *Guerrilla et Droit Humanitaire*, (2nd edn, 1983), pp.24-48, 65-68, 194-196, 280-290. See also Philippe Bretton, "L'incidence des guerres contemporaines sur la réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés internationaux et non-internationaux" (1978) 105 J.D.I. 208; Jean J. A. Salmon, "La conférence diplomatique sur la réaffirmation et le développement du droit international humanitaire et les guerres de libération nationale: Le statut de combattant légitime dans les guerres de libération nationale" (1977) 13 Rev.Belg.D.I. 353; and "Irregular Warfare: Legal Implications of the Facts, Policies, and Law from World War II to Vietnam", particularly the remarks of Major R. W. Gehring (1976) 70 Proc.A.S.I.L. 154.

18. See Doc.VI, "Rules Applicable in Guerrilla Warfare" (ICRC, 1971), p.25. This document was part of the preliminary material for the Conference of Government Experts. See also the 1970 Report of the Secretary General on human rights in armed conflicts, *op. cit. supra* n.1, at pp.53 *et seq.* See also the discussion of the Institute of International Law (1969—II) 53 Ann.I.D.I. 48-126, especially 55-61.

19. The draft provision was adopted as Art.1(4) of Protocol I. For an analysis of the article, its drafting history, and its effect, see Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules For Victims of Armed Conflicts* (1982), pp.38-43, 45-52; Georges Abi-Saab, "Wars of National Liberation in the Geneva Conventions and Protocols", 165 *Hague Rec.* 353; Cassese, *op. cit. supra* n.16.

of the concepts of civilian protection and special protection were seen by those so disposed as important objectives for the Diplomatic Conference. It was also recognised, however, that a wholesale incorporation of the law applicable to international conflicts into internal conflict situations was not possible at that time.<sup>20</sup> The creation of a new instrument for internal conflicts was therefore seen as a necessary step.

These new concerns were reflected in the General Assembly's 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict.<sup>21</sup> Although the principle of special protection was reaffirmed, the problem of who was entitled to it was not specifically dealt with. In fact, the preamble to the Declaration obscured this whole issue by referring, *inter alia*, to "... the need to provide special protection of women and children belonging to the civilian population". This choice of language appears to have acknowledged the fact that an assumption of non-participation in hostilities by these groups could no longer be made.<sup>22</sup>

Although some representatives at the first Conference of Government Experts, convened by the ICRC in 1971, felt that the notion of special protection for children in time of armed conflict was no longer acceptable in view of their increased involvement in the conflicts, the great majority felt that this principle had to be reaffirmed.<sup>23</sup> At the same time, it was felt that this could not be done effectively unless the problem of children participating in the armed conflicts, whether as combatants or civilians, was also effectively dealt with. Indeed, the ICRC and

20. See Doc.V, "Protection of Victims of Non-International Armed Conflicts" (ICRC, 1971), especially pp.37 *et seq.* This document was also part of the preliminary material for the Conference of Government Experts. See also the Conference of Government Experts, 1972 Report on the Work of The Conference (ICRC, 1972), Vol.1, pp.61-125. For a historical review of the development of the role of international law in internal armed conflicts through to the Protocols see G.I.A.D. Draper, "Humanitarian Law and Internal Armed Conflicts" (1983) 13 Ga.J.I.C.L. 253. It should be noted however that this desire for an increased role of international law in internal armed conflict was very far from universal. Indeed, virtually the entire group of developing States was opposed to any significant increase in this area. For the differing views of the participating States on this issue, see *infra* n.70.

21. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, UNGA Res.3318(XXIX), 14 Dec. 1984.

22. This contention also gains support from the preliminary work done on the Declaration in the UN Commission on the Status of Women, and the two reports prepared by the Secretary General on this topic, "Report of the Secretary General on Protection of Women and Children in Emergency or Wartime, Fighting for Peace, Self-Determination, National Liberation and Independence", UN Doc.E/CN.6/561 (1972), and E/CN.6/586 (1973). These reports and the resulting debates are reviewed in Khushalani, *op. cit. supra* n.8, at pp.109-115.

23. See the Commentary of the International Union of Child Welfare in the 1972 Report on the Work of the Conference of Government Experts, *op. cit. supra* n.20, Vol.2, at pp.86-87.

the State representatives at the Conference of Government Experts appear clearly to have recognised that continued growth in the number of children participating in armed conflicts would seriously affect the future applicability of the principle to children.<sup>24</sup> The Diplomatic Conference was therefore required to deal with the issue with the aim of ensuring that both general and special protections should be maintained. It is in relation to this objective that the final provisions of the two Protocols on this issue will be tested as one measure of their success.

#### IV. THE ICRC DRAFT PROVISIONS AND THEIR NEGOTIATING HISTORY

IN the draft articles for discussion originally presented to the Diplomatic Conference, the ICRC made similar proposals in relation to both international and internal armed conflict. Moreover, the two provisions were developed along the same lines right up to, but not including, the final plenary session of the Conference in 1977. It is, therefore, convenient to consider their history up to this final stage together. Subsequently, we will examine the final changes made in the draft article of Protocol II on this issue. The original ICRC draft article 68(2) for Protocol I reads:

2. The parties to the conflict shall take all necessary measures in order that children aged under fifteen years shall not take any part in hostilities and, in particular they shall refrain from recruiting them in their armed forces or accepting their voluntary enrolment.<sup>25</sup>

Draft article 32(2)(e) of Protocol II dealt with the same issue, but used a different format which, due to the almost identical wording, had no effect on the content.<sup>26</sup> The primary difference between these two draft articles was the desire to develop more completely the concept and details of the principle of special protection for internal conflicts. Draft article 32 *in toto*, therefore, included many of the provisions already found in the Fourth Geneva Convention.

The prohibitions contained in the proposals were seen by the ICRC as complete. The most obvious form of participation in hostilities—as a member of the armed forces—is totally prohibited for children under fif-

24. *Ibid.* This is also evident in the large number of draft proposals from different States which linked these two issues (see *idem*, Vol.2, pp.34, 38, 40, 66 and 82) and in the whole tone and structure of the debates as they are presented in the Report. See also Veuthey, *op. cit. supra* n.17.

25. Draft art.68(2), Protocol I, "Draft Additional Protocols to the Geneva Conventions of 12 August 1949: Commentary" (ICRC, 1973), p.86. (Hereinafter referred to as the 1973 Draft Commentary.)

26. Draft art.32(2)(e), Protocol II, *idem*, p.163.

teen years of age. The ICRC commentary also maintains that the drafts prohibit all other forms of participation by civilians, such as transmission of military information, transport of arms, ammunition and war material, sabotage, etc.<sup>27</sup>

This interpretation of the drafts was contested by some, owing to a lack of precision for the word “hostilities”. In attempting to define this term in its preliminary documentation for the Conference of Government Experts, the ICRC put “hostilities” in the middle of a continuum of three terms—military effort, hostilities, and military operations.<sup>28</sup> The first term included all the activities of civilians that are objectively useful to the military, and was therefore considered too broad to serve any humanitarian function. “Military operation”, by contrast, was seen as excluding many of the activities required for the success of an operation, but not immediately connected to it in time and space. “Hostilities” was defined as covering this middle ground, although precisely where the line between “hostilities” and “military effort” should be drawn was not made clear by the ICRC. It was made clear, however, that the notion incorporates a concept of causing military harm to the enemy. The principle of humanity, however, requires that the activity have a close relation to the causing of such harm to be seen as a part of the “hostilities”. It is reasonable to suggest, therefore, that “hostilities” is an inherently flexible term, whose precise meaning could vary from conflict to conflict, and possibly even from situation to situation within a conflict. The term was not defined in the draft articles.

A second area of concern was the ICRC’s choice of an age limit of fifteen for participation in hostilities. This was in marked contrast to the proposals that enunciated the principle of special protection for children in both international and internal conflict, and did not specify any age restrictions.<sup>29</sup> The age chosen, fifteen, was not new to humanitarian law as it relates to children. It had been seen sufficiently often in the provisions of the Fourth Geneva Convention dealing with children<sup>30</sup> to allow Dr Pictet to suggest that “. . . international usage has now settled on an age limit of fifteen years as defining what is meant by ‘children’ when no further description is given”.<sup>31</sup> This stems from the view that, as a general rule, the faculties of a child over fifteen have reached a

27. See the commentary on the draft articles, *idem*, p.163.

28. Doc.CE/III, *op. cit. supra* n.4, at pp.27–28.

29. See draft art.68(1), Protocol I and draft art.32(1), Protocol II, 1973 Draft Protocol.

30. See Arts.14, 23, 24, 38, 50 and 89, Fourth Geneva Convention.

31. Pictet, *op. cit. supra* n.10, at p.395. He notes that it had formerly been considered as 12 by some commentators, but that the International Labour Organisation had raised the minimum age for heavy labour from 14 to 15 after World War II. Dr Pictet also cautions that this is not a formal rule, and can therefore vary according to particular circumstances: *idem*, p.284.

stage of development at which there is no longer the same necessity for special protections.<sup>32</sup>

The choice of a limit of fifteen also reflected concerns voiced by a number of delegates at the Conference of Government Experts that any provision should be applicable against the military practices in the types of war in which children were most frequently involved. These concerns were best summed up, perhaps somewhat ironically, by the International Union for Child Welfare:

Today, they tend to be participants in armed conflicts where one of the parties is in a situation of military inferiority, particularly in what are considered by the parties to be wars of liberation or self-determination where guerrilla type fighting is prevalent. In view of what might unfortunately be considered the military necessity of using children in such types of conflicts it is important not to put the age limit on their use at an unreasonably high level lest we invite wholesale disregard for the provision.<sup>33</sup>

The choice of the age of fifteen can therefore be seen as combining two elements of humanitarian law. The first covers the traditional usage of fifteen as a limitation on "children" when no other limit is specified. The second element concerns the role of the concept of military necessity in the development and implementation of humanitarian law.<sup>34</sup> The impact of this concept on the final draft will be discussed below.

The ICRC commentary also makes it clear that the draft articles were intended to benefit all children in the whole of the territory of the par-

32. *Idem*, p.186. By contrast, in relation to execution of the death penalty for offences committed by civilian children in relation to the armed conflict, an age limit of 18 was proposed and adopted. See Art.77(5), Protocol I, and Art.6(4), Protocol II. Thus, a differentiation is made between the physical and developmental needs catered to under the concept of special protection, and the more legal concern of being able to comprehend fully and assume responsibility for one's criminal acts. The fact that children might die in combat without being fully capable of understanding the reasons for their participation in the conflict did not prevent the adoption of an age limit of 15 on this issue, as will be seen below. This age does, however, compare with the age at which criminal responsibility for serious crimes is assumed in many jurisdictions. See, e.g. Glanville Williams, *Textbook of Criminal Law* (2nd ed., 1983).

33. Commentary of the International Union of Child Welfare, *op. cit. supra* n.23, at p.87.

34. The concept of military necessity is difficult to define with any precision. Jean Pictet has attempted such a definition: "Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy." Quoted in Asbjorn Eide, "The Laws of War and Human Rights—Differences and Convergences", in Swinarski, *op. cit. supra* n.16, at pp.675, 681. Eide notes that what is politically sought by the parties to the conflict will greatly affect the definition of necessity. This is particularly so when the military options are perceived to range from weakening to destroying the enemy. It is also worth noting that some authors have rejected the application of this concept to humanitarian law on the grounds that there is no basis on which to compare military advantages and the losses to the civilian populations. See Géza Herczegh, *Development of International Humanitarian Law* (1984), pp.154–155, and the sources quoted therein.

ties to the conflict.<sup>35</sup> This would mean a wider scope than that normally envisaged for humanitarian law. In fact, the content and context of both draft articles indicate an intended approximation to human rights law or, perhaps more correctly, a blending of some aspects of human rights and humanitarian law.<sup>36</sup> The need for such a scope was obvious, however, and did not incur any debate at the Diplomatic Conference.<sup>37</sup> Indeed, as the recruitment of all persons into the armed forces of an occupying power was already banned under the Fourth Geneva Convention,<sup>38</sup> any lesser scope would have made the draft articles redundant.

It is perhaps beneficial to note at this time that the subjects of the proposed restrictions would be the States or other parties to the conflicts and not the children themselves. Thus, the true nature of the proposals was in the form of negative obligations on the States or other parties—they may not allow children to participate in the hostilities in any manner which breaches the provision, thereby ensuring that the general and special protections are maintained.

Debate on these draft articles did not begin until the third session of the Diplomatic Conference. A small number of amendments were suggested earlier, most of which dealt with the notion of child participation itself. Among these was a proposal from the Democratic Republic of Vietnam concerning draft article 68(2) of Protocol I.

Persons under eighteen who have been arrested for their patriotism or for their political non-submission shall be set free as soon as possible and before other civilians.<sup>39</sup>

The essence of this proposal was reflected in the short speech made by

35. See *supra* n.27.

36. See the 1973 Draft Commentary, *op. cit. supra* n.25, at pp.79–88, Protocol I, and pp.155–164, Protocol II, respectively. In both cases, the international one being more relevant for comparison purposes, the draft articles were placed in sections dealing with fundamental rights of all civilians in time of armed conflict. These entire sections were intended to apply to a party's own nationals or those in its control, and to reinforce and extend the concepts of civilian and special protection.

37. By contrast, the same intended scope for other fundamental rights was not so easily accepted by all the delegates. See, for example, D. F. J. J. de Stoop, "New Guarantees for Human Rights in Armed Conflicts—a Major Result of the Geneva Conference 1974–1977" (1978) 6 *Austl.Y.B.I.L.* 52, 75; and Remigiusz Bierzanek, "Some Remarks on The Application of Article 75 of the Protocol I of 1977 to a State's Own Nationals" (1982) 33 *Osterr.Z.O.R.V.* 47.

38. Art.51, Fourth Geneva Convention.

39. *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva, 1974–1977* (1978), Doc.CDDH/III/304. These records are hereinafter cited as CDDH/, followed by a committee number in Roman numerals, if applicable, and the document or meeting (summary record) number. Much of the material relating to Protocol I is reprinted in Howard S. Levie, *Protection of War Victims: Protocol I to the Geneva Convention*, Vol.4 (1981).

the representative of the Democratic Republic of Vietnam on the introduction of the draft article to the Conference.

All men and women would be happy to see a child do something to show his love for his country. Since patriotism could only be demonstrated in war, there could be no question but that humanitarian law should be applicable to it.<sup>40</sup>

These sentiments were explicitly or implicitly supported by a number of delegations.<sup>41</sup> Despite the expressed opposition of the UK and Switzerland,<sup>42</sup> they were to exert a great influence on the final outcome of the draft article even though the proposed amendment was not officially adopted.<sup>43</sup>

The delegate from Brazil proposed an amendment to both Protocols raising the age for participation in hostilities to eighteen "as a condemnation of the policy of using minors for military purposes".<sup>44</sup> This proposal received the support of Uruguay, the Holy See and Venezuela.<sup>45</sup> The representatives of Japan, Canada, the UK and the Federal Republic of Germany spoke against the amendment.<sup>46</sup> The essence of their contention was that many States allowed recruitment at an age of fifteen, especially in time of war. It was also noted that persons of fifteen or sixteen were often better equipped to fight than were their fathers. It was therefore suggested that an age limit of eighteen would be unacceptable to a large number of States.

One final suggestion emerged at the initial Committee debate. The Swiss delegate proposed the consideration of an additional paragraph to provide for special protection for those children who, despite the prohibitions, may have participated in the hostilities in one manner or another.<sup>47</sup> This proposal did not engender much debate at this time, but was reflected in the final draft.

Draft article 32(2)(e) of Protocol II was introduced to the Third Committee at a separate meeting. At that time, the ICRC representative

40. See CDDH/III/SR.45, para.39.

41. Most prominent among the supporters were the USSR, Yugoslavia and Greece. See CDDH/III/SR.45.

42. *Idem*, paras.35 and 16 respectively.

43. It is worth noting the self-congratulations accepted by the delegation from the Democratic Republic of Vietnam for the influence their proposal exerted on the final outcome of draft art.68, even though it was not formally accepted. CDDH/III/SR.59. And see *infra* nn.67-73, and accompanying text.

44. CDDH/III/SR.45, para.11. The proposed amendment for Protocol I is in CDDH/III/325, and for Protocol II in CDDH/III/328.

45. The delegate from Venezuela suggested 18 struck the right balance between the legal concerns of an age of majority, which was 21 in most Latin American states, and the more important biological concerns of physical and mental maturity: CDDH/III/SR.45, para.31.

46. *Idem*, paras.18, 23, 34 and 36.

47. *Idem*, para.17.

stated that it was of even greater importance for internal conflicts than international conflicts to adopt such a rule.<sup>48</sup> This article was not, however, the subject of any significant debate when initially presented.

In both cases, the draft articles were passed on to the working group of the Third Committee for detailed study and revision. Unfortunately, there are no records available of the debates in the working group. Only its report to the Third Committee can be used to further an understanding of the final results of its efforts.<sup>49</sup> Draft article 68(2), as revised by the working group, reads:

2. Parties to the conflict shall take all feasible measures in order that children who have not reached fifteen years of age do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them in their armed forces. In recruiting from among those persons who have not reached eighteen years of age, the parties to the conflict shall endeavour to give priority to those who are the oldest.<sup>50</sup>

Draft article 68(3), following up the Swiss suggestion, provided for special protection to be accorded to those children who, exceptionally, participated in hostilities in violation of paragraph (2).<sup>51</sup> Both these draft articles were adopted in substantially the same form in the final draft of Protocol I as Articles 77(2) and (3), and without any further official debate.<sup>52</sup> The report of the working group is therefore the final interpretive aid available from the *travaux préparatoires*.

Draft articles 32(2)(f) and (g) of Protocol II, as revised by the working group, corresponded to the above draft provisions of Protocol I, with one exception. In this case, the second sentence of draft article 68(2) was not included for internal armed conflicts.<sup>53</sup> No explanation for this is given in the report. These draft provisions were altered prior to their final adoption to become Articles 4(3)(c) and (d) of Protocol II. However, as will be seen below, there are no explanations given for the substantive changes made in the final drafting. Thus, the working group's report remains the final official source of assistance.

A comparison of these new versions of draft articles 68(2) and

48. CDDH/III/SR.46, para.8.

49. "Report to Committee III on the Work of The Working Group", CDDH/III/391, Vol.XV, p.517.

50. CDDH/III/376.

51. *Ibid.* The final text of this article, 77(3), reads: "3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war." See also *infra* n.65.

52. The only change made was the substitution of the word "attained" for the word "reached".

53. See CDDH/III/380.

32(2)(f) to the ICRC's original proposals reveals many changes. Indeed, virtually the only remaining similarity is the prohibition on recruitment into the armed forces of children under fifteen, although even this has been challenged. One author has suggested that such recruitment is not expressly forbidden, but that the final draft only "tends to prohibit the recruitment of children under fifteen into the armed forces in so far as possible".<sup>54</sup> This interpretation appears to be based on a misconstruction of the article brought about by incorporating the modifying phrase "all feasible measures" into the second half of the sentence. Such a construction is grammatically unnecessary and incorrect, as the second half of the sentence is clearly capable of being read as containing its own, unmodified obligation. It would also be contrary to the report of the working group which maintained that a flat ban on recruitment was incorporated into this new draft.<sup>55</sup> The achievement of the ban on recruitment for both international and internal conflicts was a great step forward for humanitarian law.

A second similarity between the new drafts and the original proposals lies in their scope. It is clear that all parties accepted the need for these articles to apply to their own nationals, despite whatever juridical difficulties this may have created for the more traditional views of humanitarian law.<sup>56</sup>

The magnitude of these additions to humanitarian law is, unfortunately, considerably reduced when one considers the changes that were made to the balance of the original ICRC proposals. First, one no longer finds any reference to the voluntary enrolment of children under fifteen into the armed forces. This immediately raises the possibility that some form or forms of voluntary participation in the hostilities would be permissible under the revised drafts. We must therefore carefully consider the critical phrase, "The parties to the conflict *shall take all feasible measures* in order that children who have not reached fifteen years of age do not take *a direct part in hostilities* . . ."

Two differences are apparent when comparing this to the original drafts. First, "necessary" has been changed to "feasible", a word capable of very subjective interpretations, particularly since no guidance is given by the draftsmen. The word is, however, also used in the provisions designed to assist in the implementation of the principle of general civilian protections in Protocol I.<sup>57</sup> In relation to these articles, Bothe, Partsch and Solf, in their review of the drafting of the Geneva

54. Sibylle Pastré-Burros, "The Protection of Children in Armed Conflicts" (1980) 46 Int. Child Welf. Rev., Sept. 33, 35.

55. *Op. cit. supra* n.49, at p.522.

56. See Bothe, Partsch, Solf, *op. cit. supra* n.19, at p.476, and also the sources in *supra* n.37.

57. See Arts.57, 58, Protocol I.

Protocols, found that “feasible” was used to modify the extent of the obligations assumed, and to heighten the role of the principle of military necessity. They define the word, based on their perception of the delegates’ understanding of it, as meaning “that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations”.<sup>58</sup> This is clearly a much lesser and more flexible obligation than that proposed by the ICRC.

The second major difference results from changing “shall not take any part” to “do not take a direct part” in hostilities. We have already noted that the object of the word “hostilities” is not capable of being fully defined in today’s world. The original draft, therefore, had the merit of at least providing a clear statement that no part should be played by children in them, however they be defined. The drafts produced by the working group remove this clarity and replace it with a second undefined term. The ICRC, in its preliminary materials for the Conference of Government Experts, suggested that “directly” “establishes the relationship of adequate causality between the act of participation and its immediate result in military operations”, and incorporates the notion of resulting in military harm in the normal course of events.<sup>59</sup> Thus, as in attempting to define “hostilities”, concepts of time and space become important in delimiting “direct”. Once again, therefore, it can only be concluded that the word cannot be clearly defined, but that its use may vary from situation to situation and conflict to conflict.

It might well be asked whether the combination of these two words into one phrase creates a new term capable of bearing a more separate, more concrete meaning. Some analysis of this possibility has been made, though not by the Diplomatic Conference.<sup>60</sup> Neither have such efforts been made in connection with the articles under discussion. Rather, it has been done in the context of the provisions dealing with the loss of general civilian protections, where the same phrase is used. It is therefore worthwhile at this time to recall that one of the objectives of the Diplomatic Conference was to ensure that the rights of children to special and general protections were maintained by ensuring that they did not lose their non-combatant status, or otherwise participate in armed conflicts. The fact that the same phrase is used in relation to both issues provides not only the opportunity to look at its meaning in so far

58. Bothe, Partsch, Solf, *op. cit. supra* n.19, at pp.372–373. This definition is well documented by the authors from the official records of the Conference. It is also found, in the same terms, in the declaration made by the UK on signing the Protocols. This declaration is reprinted in *idem*, p.721. See also the Swiss declaration on signature: *idem*, p.720.

59. Doc.CE/III, *op. cit. supra* n.4, at p.28.

60. See Bothe, Partsch, Solf, *op. cit. supra* n.19, at p.302.

as it may be deduced, but also to compare how it is used in the two contexts, and thereby establish one basis on which to assess the success of the Conference on this issue.

Article 51 of Protocol I and Article 13 of Protocol II as finally adopted were the first to codify the principle of general protection for civilians in time of armed conflict. In both cases, paragraph (3) of these Articles specifies under what conditions a person is entitled to this protection:

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.<sup>61</sup>

Robert Gehring, in an article dealing with the loss of civilian protections, provides some examples of the operation of the phrase “a direct part in hostilities” without attempting to define it *per se*.<sup>62</sup> He suggests that a narrow definition of the concept of “hostilities” is in order and, therefore, a narrow application of “a direct part in hostilities” as it relates to the loss of civilian protections. Thus, supporting one’s own military forces through the manufacture or transporting of supplies is not sufficient, according to Gehring, to lose one’s protection. Unfortunately, his analysis on this point does not make any distinctions based on the proximity in time and space of the acts to the actual military operations. It is submitted that this aspect of the individual words cannot be ignored when attempting to define an operational framework for the phrase as a whole. Gehring does note, however, that such activities as spying or sabotage would not be acceptable for the maintenance of civilian status.

A more acceptable view of “a direct part in hostilities” is found in Bothe, Partsch and Solf.<sup>63</sup> Again, they do not attempt to define the phrase, but provide illustrations for its possible application. They suggest, as a minimum, that the phrase includes attempting to kill, injure, or capture enemy persons or to damage material, artillery spotting, ground observation, logistic support both in preparation for and return from combat, and the delivery of arms. The criterion they base their list on is the immediate threat of the activity to the adversary. As the list is a minimalist position, it is clear on the basis of their criterion that such acts as spying and sabotage would be included. The example and criterion of Bothe, Partsch and Solf reflect the concept of proximity in time and space that is at the root of the component elements of the phrase.

A consequence of developing the notion of direct participation is the possibility of a concept of indirect participation also developing. Such a

61. Art. 51(3), Protocol I. Art. 13(3), Protocol II reads precisely the same except for the substitution of “part” for “section”.

62. Lt. Col. R. W. Gehring, “Loss of Civilian Protection Under the Fourth Geneva Convention and Protocol I” (1980) 90 Military L.Rev. 49, 70–83.

63. Bothe, Partsch, Solf, *op. cit. supra* n.19, at pp.302–303.

concept may well reflect the customary law view that participation in the larger war effort, in locations often far removed from the area of combat, did not result in the loss of protections, but did subject the civilian to dangers from attack due to his or her working in a legitimate military target site. Such an example is provided in the two texts discussed above. In both cases, the authors refer to working in a munitions factory as not violating the prescription against direct participation. At the same time, they recognise that those who work there are not protected from attack while on the job.<sup>64</sup> This customary rule may well be the counterpart for a modern concept of indirect participation in hostilities.

What then of the comparison of the way in which the phrases are used in the different articles? First, it should be noted that in the context of the loss of civilian protections, the obligation is on the civilian not to do the prohibited act on penalty of forfeiting his or her protections. In the context of the protection of children, as has been noted, the obligation lies on the party to the conflict to ensure that children do not do the prohibited acts.<sup>65</sup>

Second, in order for civilians to maintain their status and the resulting general protections and, *ipso facto*, any special protections they may be entitled to, there is a complete prohibition on direct participation. In relation to children, the obligation on States is only that of taking all feasible measures to ensure no direct participation. Thus, in this area, the obligations on the party to the conflict resulting from the draft articles fall short of what is demanded of civilians to maintain their status.

This is also true in another area. The articles on civilian protection require, by definition, that the object of the protections be a civilian.<sup>66</sup> The drafts prepared by the working group deleted the original proposal for a ban on accepting the voluntary enrolment of children under fifteen into the armed forces. As a consequence, the parties are permitted to

64. *Idem*, p.303; Gehring, *op. cit. supra* n.62, at p.72.

65. Bothe, Partsch, Solf, *op. cit. supra* n.19, at p.477, point out that this is the essential purpose of Art.77(3), Protocol I, and Art.4(3)(d), Protocol II—that the children who participate in hostilities in violation of the prohibitions should not suffer unduly for the failures of the party under whose control they are.

66. In Protocol I, this definition is found in Art.50(1). It contains a negative definition covering all persons not part of the armed forces of a party to the conflict as per Arts.43, 44 of the Protocol and Arts.4(a)(1), (2), (3), (6) of the Third Geneva Convention of 1949 (Geneva Convention Relative to The Treatment of Prisoners of War of 12 August 1949). These articles deal primarily with the concepts of privileged and non-privileged combatants. See *supra* n.6 for references. In relation to Protocol II, the definition of civilians is not made as clear, due to the changes made to the original draft text. Bothe, Partsch, and Solf, *op. cit. supra* n.19, at pp.671–672, suggest that it can nonetheless be derived from the references to armed forces in Art.1 of the Protocol. See also the references in *supra* n.6, and Asbjorn Eide, “The New Humanitarian Law in Non-International Armed Conflict”, in Cassese, *op. cit. supra* n.8, at pp.287–290.

allow children to volunteer and thereby forfeit their right to both general and special protection.

One final concern is relevant in assessing the success of the draft articles against their original objective. The essence of special protection for children, indeed its very root, is in the notion that their blood should not be spilled during armed conflicts. The original ICRC proposals provided that children not be allowed to take any part in hostilities, thereby preserving this intent to the maximum extent possible. The working group reduced this obligation not only by incorporating the modifying phrase "all feasible measures", but also by specifying "a direct part". This may legitimise the indirect use of children during hostilities, along the lines described above. The result would be an increased risk of exposure to attack for those present in legitimate military target sites, and a consequent reduction in the quality of their special protection.

A starting point of this paper was the contention that one of the original objectives of the Diplomatic Conference was to draft provisions ensuring that children would not lose their status as civilians and the right to general and special protections flowing from it. If this contention is correct, or partly correct, then why did the working group put forward draft articles which fell so far short of the mark? George Aldrich, the *rapporteur* of the working group, noted in its report that the final product was a compromise not completely satisfactory to all.<sup>67</sup> This is inevitable in most multilateral treaty negotiations. Elsewhere, however, Aldrich assesses the reasons for this.<sup>68</sup> He states:

In the negotiations on the laws of war, there are at least three major precepts that are widely shared. One may call them the precepts of humanity, military necessity, and sovereignty.

He goes on to note that military necessity is a subjective concept, meaning different things to different people,

but there is a general acceptance that it limits the effects of the humanitarian precept in that the rules cannot be accepted and applied if they would reduce the military effectiveness *too much*.<sup>69</sup>

Aldrich then contends that the concept of military necessity, with its subjective quality, is not very helpful in the development of broadly acceptable rules of warfare restricting the use of force. Finally, he refers to the strength of the concept of sovereign equality—the equality of

67. Report of the Working Group, *op. cit. supra* n.49, at p.522.

68. George Aldrich, "Establishing Legal Norms Through Multilateral Negotiation—The Laws of War" (1977) 9 Case W.R.J.I.L. 9, 13–14.

69. Author's emphasis.

States and the inequality of anything else. This, he states, has prevailed over the concept of humanity, particularly in relation to Protocol II.<sup>70</sup>

These opinions appear, on the basis of the drafting records that are available, to be incontrovertible. In short, it is an example of the classic schism of international law—*raison d'état contre raison d'humanité*.<sup>71</sup> It is eminently clear which side prevailed on this occasion.<sup>72</sup>

#### V. THE FINAL TEXT: PROTOCOL II

As noted earlier, draft article 68(2) was adopted virtually unchanged as Article 77(2) of Protocol I. Draft article 32(2)(f) was, by contrast, altered significantly before its final adoption as Article 4(2)(c) of Protocol II. This final version reads:

(c) 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.

While the original prohibition against voluntary enrolment is still absent, this text is far closer to the original ICRC proposal than to the working group draft. The key modifying phrases of “all feasible measures” and “a direct part” are removed, thereby returning the prohibition closer to its original comprehensiveness. Permitting voluntary enrolment of children under fifteen would also appear to violate the prescription on any participation in the hostilities, as all members of the

70. It is clear from the commentaries on the Diplomatic Conference that many of the States present, particularly among the developing States, were more concerned with not weakening their hand in dealing with internal difficulties. This attitude prevailed in large measure over the Western and Eastern bloc desires for a more humanitarian content to Protocol II, and almost led to the Protocol being dropped completely. It is also apparent that the work done in the committee phase of the Diplomatic Conference was unreflective of the views of these States on the Protocol in general, largely due to their smaller representation during this phase. The final draft, organised by Judge Hussain of Pakistan, with support from the Canadian and other delegations, was seen as the only way in which to salvage any content for Protocol II. For the political views of States participating in the Conference, both on Protocol II and more generally, the following are instructive: Bothe, Partsch, and Solf, *op. cit. supra* n.19, at pp.604–608; Sylvie Junod, “Additional Protocol II: History and Scope” (1983) 33 Am.U.L.Rev. 29; David Forsythe, “Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts” (1978) 72 A.J.I.L. 272; Michel Bothe, “Conflicts armés internes et droit international humanitaire” 82 R.G.D.I.P. 82; Samuel Suckow, “The Development of International Humanitarian Law—Concluded” (1977) 19 Rev.Int.Com.Jur. 46; Cassese, *op. cit. supra* n.6; Eide, *op. cit. supra* n.66; Phillippe Bretton, “Remarques générales sur les travaux de la Conférence de Genève sur le réaffirmation et le développement du droit international humanitaire applicable dans les conflits armés” (1977) 23 A.F.D.I. 197; and the series of articles relating to views of States in Cassese, *op. cit. supra* n.8.

71. An elegant reflection on this division as it relates to humanitarian law may be found in Henri Meyrowitz, “Réflexions sur le fondement du droit de la guerre”, in Swinarski, *op. cit. supra* n.16, at p.419.

72. The comment in *supra* n.43 is perhaps worth reiterating here.

armed forces are today seen as participants. The explanation for these changes is, unfortunately, impossible to discover in the official records of the Diplomatic Conference.<sup>73</sup> Informed sources indicate, however, that their motivation was perfectly in keeping with the attitudes reflected in Aldrich's statements.

While the provision as finally adopted is clearly applicable to government forces as well as those of dissident groups, it was widely presumed during the Conference that local "rebel" groups were better placed to recruit young children to participate in the conflict for extended periods of time. In returning to a stronger prohibition for internal armed conflicts in comparison with that adopted for international conflicts, the participating States were intending to make it more difficult (both legally and politically) for the dissident groups within their territory to achieve this perceived military advantage. To use Chairman Mao's analogy of a guerrilla being like a fish in the waters of the civilian population, one might suggest that Article 4(2)(c) of Protocol II was an attempt to force the guerrilla leadership to throw the younger ones back into the water. Considering that the Protocol was negotiated by States often more concerned with security and sovereignty than the dictates of humanity, this appears to be a fair appraisal of the reasons for the final redrafting of this article.

#### VI. THE CURRENT SITUATION: THE PARTICIPATION OF CHILDREN IN ARMED CONFLICTS AND THE INTERNATIONAL RESPONSE

The participation of children in armed conflicts is not an entirely new phenomenon. Histories and novels of old wars are replete with stories of heroic young drummer boys and stowaways faithfully serving their masters on board ship. As noted earlier, the use of children during World War II was also well known at the time of the signing of the 1949 Geneva Convention. But the practice, even during that war, was different from today both as to the numbers involved and the approach taken. Where once it was a very rare occurrence, it is now almost commonplace to see children bearing arms in many parts of the world—no longer as a last resort, but as a first resort.

Within the last few years, the international press has reported on the large numbers of children being used by the Islamic Republic of Iran in

73. In proposing the new version of Protocol II, Judge Hussain stated that the new article corresponded to that proposed by the working group. There was no indication for the record that a different text was being adopted: CDDH/SR.53, paras. 18, 19. The reference here is to CDDH/402. This was the code assigned for all draft articles referred by the committees to the Drafting Committee. Draft art.32(2)(f) was received by the Drafting Committee but not adopted prior to its being amended by the acceptance of the Pakistani proposal: CDDH/CR/RD/135.

the Gulf War, with estimates ranging into hundreds of thousands. The numbers of dead have been counted in tens of thousands, as a minimum, although it is unlikely the actual numbers will ever be known.<sup>74</sup> Parental opposition to the recruiting appeared to have had little effect on the practice as it reached its peak in 1984.

While probably the worst case in the last five years, Iran is certainly not the only one.<sup>75</sup> Children have been observed fighting in the Ethiopia-Eritrea conflict, where hunger has not been a bar to the ongoing hostilities. In Indo-China, children have participated in the hostilities since at least the 1960s. This pattern has, if anything, worsened since that time. The ongoing battle for over seven years between the Kampuchean resistance fighters and the Vietnamese forces has led to increased recourse to children for "manpower". In 1984, reports began to circulate that the Socialist Republic of Vietnam had set up special camps for some 75,000 "orphans", large numbers of whom had been used in the fighting.

In the Middle East, where no solution of the long-standing conflict is yet in sight, the use of children in the conflict has increased steadily, perhaps being outstripped only by the frequency with which they have become its prime victims.<sup>76</sup> The sectarian battles within the Lebanon have also produced a growing participation of children.<sup>77</sup>

In Nicaragua, children played an active role in the fight against the Somosa regime, and were liable to be shot on sight by the National Guard as a result. Today, they can be found fighting on both sides of the continuing struggle between the Sandinista Government and the US-backed Contras. There are also indications that the Contras have resorted to the kidnapping of children for this purpose.<sup>78</sup> Similar reports have emerged from El Salvador.

The same experience has also been repeated in other parts of the

74. See, for example, Flora Lewis, "No Outcry for the Children of War", *International Herald Tribune*, 27 April 1984, 6; Caroline Moorehead, "The Boys of War", *The Times* (London), 9 May 1984, 11; perhaps the most horrific account of the events is found in Terrence Smith, "Iran—Five Years of Fanaticism", *New York Times Magazine*, 12 Feb. 1984, 21.

75. Caroline Moorehead, *ibid*, indicates a number of areas where children continue to be involved in armed conflicts.

76. See Roger Rosenblatt's moving account, *Children of War* (1984), Chap.4.

77. One particularly telling photograph in the *Sunday Times* (London), 31 March 1985, 22, shows three young Shi'ite girls, two of whom are carrying toy grenade launchers, the third of whom "is carrying an all too real Kalashnikov rifle".

78. On 25 November 1985, the ITV Television Network in London televised a programme concerning the use of children in the armed forces of both sides in the conflict in Nicaragua. The programme included interviews with many of the children, some as young as 11. Several of them told of being kidnapped by the Contras for this purpose, and of being threatened with death if they were not prepared to fight: "World in Action", 25 November 1985, Granada Television Productions for ITV.

world.<sup>79</sup> The pattern appears to indicate an increase in the numbers involved. As one observer caustically noted:

What is clear, from Iran, when young boys were sent across the mine-fields, is that boys are more malleable, cheaper and can be wound up to pitches of emotional fervour for long periods in the way no adult soldiers can be. As with all abuses of children it seems all too likely to increase.<sup>80</sup>

If this represents the current international situation as regards the participation of children in armed conflicts, what has the international response been? The ICRC, the traditional guardian not only of the conventional humanitarian law, but also of the principles behind it, has been fairly restrained in its public statements. In its bulletin of June 1984, it was noted that children as young as eleven and twelve were fighting in many parts of the world, including the Gulf War, Central America, Asia and Africa. While stating that such situations were "contrary to all existing principles of international humanitarian law", the ICRC did not name any of the offending States or armed groups.<sup>81</sup> As one senior journalist noted, "The Red Cross is afraid of being accused of partisanship and having its work placed in jeopardy".<sup>82</sup> The reaction of the ICRC is in keeping with its general policy on making public statements about humanitarian issues it is currently dealing with, and it would be improper for outsiders to be critical of this policy when it comes to one particular issue of immediate concern to them. The widespread and growing nature of the problem may, however, cause them to be more outspoken on this issue in the near future.<sup>83</sup>

A number of non-governmental relief agencies have become active, but their real impact is, of necessity, limited to dealing with the prob-

79. A recent report in the *Sunday Times Magazine*, 27 April 1986, details the participation of at least five thousand children under fifteen years of age, some as young as eight, in the recent internal armed conflict in Uganda. See "The Boys' Own Army", *idem*, pp.42-45. A recent UNICEF report states that "A study has listed 20 countries in which children from 10-18 years old, occasionally even younger, are reported to be involved in military training and informal activities linked with various civil wars, armies of liberation and even international war". The report also notes that the trend of recruiting children as combatants is growing in many conflict zones of Africa, Asia and Latin America: see "Children in Situations of Armed Conflict" E/ICEF/1986/CRP.2, 10 March 1986, paras.62 and 64. The original study, Dorothea Woods, "Children bearing Military Arms" (1984) *General Information*, May, also notes the international aspect of training children for armed conflicts, including both American and Cuban involvement in Central America.

80. An unnamed human rights agency chairman, quoted in Caroline Moorehead, *op. cit. supra* n.74.

81. ICRC Bulletin No.101, June 1984, p.2.

82. Flora Lewis, *op. cit. supra* n.74.

83. The ICRC policy on dealing with humanitarian issues is stated in "Action by The International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law" (1981) 221 International Review of the Red Cross 76, March-April. More generally, see David P. Forsythe, *Humanitarian Politics: The International Committee of the Red Cross* (1977), especially Chap.2.

lems that arise for those children who are captured or detained as a result of their participation in or proximity to the hostilities.

The most important international forum of our day, the United Nations, has been remarkably circumspect in dealing with this issue. A search through the UN records of the last six years (to July 1986) has turned up only three occasions where any serious consideration of the problem has taken place.<sup>84</sup> In none of these cases did the debate reach the General Assembly or the Security Council. One of these three situations concerns the current state of affairs in El Salvador. In his 1985 report on human rights in that country, Professor Ridruejo documents a number of cases of forced recruitment by the guerrilla forces of people as young as fourteen. He also notes the accusations of the guerrilla groups that the government is engaging in the same tactics.<sup>85</sup> The General Assembly resolution commending this report mentioned only the growing number of civilian victims of the guerrilla hostilities. It made no explicit or direct reference to the use of children in the hostilities.<sup>86</sup>

The second situation debated in the UN concerned the recruitment of children into their armed forces by the Islamic Republic of Iran, and their subsequent use in the Gulf War. The issue appears to have been initially brought up in August 1983. This was done by a representative of the Anti-Slavery Society in the Working Group on Slavery of the Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>87</sup> At a meeting of the Sub-Commission itself, the representative from Iran made a statement on the issue. He stated, *inter alia*, that the question of children participating in the war had to be seen in the overall context presented by the war. He then went on to admit such participation had occurred.

It was an honour for their country that these young people had become sufficiently mature to understand the seriousness of their country's situ-

84. I hope it may be shown by others that one of the reasons for this low number was a lack of proper diligence during this search. If this does not turn out to be the case, however, the reader must draw his or her own conclusions as to the appropriateness of the present response. I would also like to thank Ms Pat Farquhar, Librarian at the United Nations Information Centre in London for her invaluable assistance in the research for this project.

85. Commission on Human Rights, "Final Report on the situation of human rights in El Salvador, submitted by Professor José Antonio Pastor Ridruejo in fulfilment of the mandate conferred under Commission resolution 1984/52" E/CN.4/1985/18, 1 Feb. 1985, pp.41-42. The report did include some independent corroborative evidence. The follow-up report by Prof. Ridruejo in 1986 contained no fresh references to these occurrences, but does comment on the growing number of children falling victim to the internal armed conflict: E/CN.4/1986/22, 3 Feb. 1986.

86. UNGA Res.39/119, 14 Dec. 1984.

87. See "Report of the Working Group on Slavery on its Ninth Session" E/CN.4/Sub.2/1983/27, 17 Aug. 1983, para.42.

ation. Their heroism and enthusiasm were based on the notion of martyrdom, which materialists were unable to understand . . .<sup>88</sup>

This speech was immediately condemned by two other delegates as contrary to the principles of the UN Charter and humanitarian law.<sup>89</sup>

Following this, a draft resolution was introduced into the Sub-Commission which referred to several human rights and humanitarian law documents and conventions, up to and including the 1977 Geneva Protocols. This draft resolution called

. . . upon the Government of the Islamic Republic of Iran to conform to the provisions of the said Declarations, Covenant and Conventions and to cease immediately the use of children in the Armed Forces of the Islamic Republic of Iran especially in time of war.<sup>90</sup>

In a letter to the Secretariat of the Sub-Commission, the Permanent Mission of the Islamic Republic of Iran rejected the contention that the use of children in Iran's armed forces was an established practice or one that was encouraged by the government, and continued by stating that no evidence of this practice had been documented by reliable sources, including the ICRC, and that such information as was being put forward was incorrect. Finally, it was suggested that no single issue should be considered in isolation from the other factors surrounding the Gulf War. Hence, the Permanent Mission concluded that an affirmative vote on the draft resolution "can only be considered as a hostile political stance against the Islamic Republic of Iran".<sup>91</sup>

At the Sub-Commission, these charges were rejected by the majority of delegates, and the draft resolution was adopted and passed on to the full Commission by a vote of 12-0, with six abstentions.<sup>92</sup> The Commission then adopted the proposed resolution, without a vote, at the 51st meeting of the 1984 session.<sup>93</sup> Several States did, however, make statements after the adoption of the resolution. That of Argentina reflected the concerns voiced by other delegations as well. It indicated that the Commission did not have sufficient evidence to pinpoint just one side as offenders. Thus, while they were fully opposed to any children being used as combatants, they would have preferred a more

88. See E/CN.4/Sub.2/1983/SR.12, 25 Aug. 1983, paras.27, 28.

89. *Idem*, paras. 29, 30. These speakers were Erica-Irene Daes and Asbjorn Eide.

90. E/CN.4/Sub.2/1983/L.20, 29 Aug. 1983.

91. E/CN.4/Sub.2/1983/44, 30 Dec. 1983. The letter was initially circulated on 6 Sept. 1983.

92. See E/CN.4/Sub.2/1983/SR.30, 20 Sept. 1983, paras.39-42. See also "The Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities" E/CN.4/Sub.2/1983/43 (E/CN.4/1983/3), 20 Oct. 1983, pp.6, 7, 40, 79.

93. E/CN.4/1984/SR.51, 12 Mar. 1984, pp.19-20. This became Res. 1984/39. See also the Commission on Human Rights, "Report on the Fortieth Session" E/CN.4/1984/77 (E/1984/14), pp.72, 73, 183.

general resolution to that effect. They also noted the fact that Argentina had good relations with both sides, as did many other States. Therefore, if a vote had been called, they would have abstained.<sup>94</sup> Unfortunately, the Commission on Human Rights did not submit this resolution to either the Economic and Social Council or the General Assembly for adoption. Except for a brief mention in two unrelated documents, the issue does not appear to have been raised in any significant manner elsewhere.<sup>95</sup>

The third occasion on which the issue of the participation of children in armed conflict has come up is in relation to the negotiations of a new Convention on the Rights of the Child in a Working Group of the Commission on Human Rights. While it is clear that existing human rights instruments as they relate to children tend to support the principle of special protection, it is also clear that they do not prohibit the use of children in armed conflicts.<sup>96</sup> In essence, the same division that applies to humanitarian law must also be seen as applying to human rights law. Although the negotiations began in 1978, it was not until 1985 that a specific proposal was jointly made on this question by the Netherlands, Belgium, Sweden, Finland, Peru and Senegal. This followed an exchange largely for propaganda purposes of proposals by Iran and Iraq, and was in turn followed by a compromise proposal by Poland. It was this last proposal which became the basis for negotiation at the working group's 1986 session.<sup>97</sup> Following both formal and informal discussions which, lamentably, reflected the same types of concerns seen at the Diplomatic Conference, the working group did adopt a draft article for inclusion in the proposed Convention. It seeks first to ensure a

94. E/CN.4/1984/SR.51, 12 Mar. 1984, pp.19–20. The other States to support Argentina's view were Bangladesh, Senegal, Pakistan, China, Libya, India, Nicaragua and Tanzania. 43 States participated in the debate.

95. The "Report of the Secretary General prepared pursuant to paragraph 4 of Commission on Human Rights Resolution 1983/34 of 8 March 1983" reiterated the original allegations and response discussed above: E/CN.4/1984/28, pp.4–5. The report to the Secretary General on "Prisoners of War in Iran and Iraq" confirmed the presence of children in prisoner of war camps in Iraq: S/16962, 19 Feb. 1985, pp.18, 33.

96. This was acknowledged several times during the negotiations in the Diplomatic Conference. For a review of human rights law in relation to this question see Khushalani, *op. cit. supra* n.8; Harvey Schweitzer, "A Children's Rights Convention—What is The United Nations Accomplishing?", in Richard Lillich (Ed.), *The Family in International Law: Some Emerging Problems* (1981), pp.120 *et seq*; D. Kelly Weisberg, "Evolution of the Concept of the Rights of the Child in the Western World" (1978) 21 *Rev. Int. Com. Jur.* 43; Eliska Chanlett and G. M. Morier, "Declaration of the Rights of the Child" (1968) 12 *Int. Child Wel. Rev.*, Dec., 4–8; Cynthia Price Cohen, "The Human Rights of Children" (1982–83) 12 *Cap.Univ.L.Rev.* 369; and Dr. Béla Vitányi, "La protection des mineurs dans le droit international" (1960) 7 *Neth.I.L.Rev.* 361.

97. Commission on Human Rights, "Report of the Working Group on a draft Convention on the rights of the child" E/CN.4/1986/39, pp.26–28. The draft amendments once again recognised the close connection between the special protection of children in time of armed conflict and the need to prohibit their participation in them.

general respect for humanitarian law as it relates to children. It goes on to state:

States parties to the present Convention shall take all feasible measures to ensure that no child takes a direct part in hostilities and they shall refrain in particular from recruiting any child who has not attained the age of fifteen years into their armed forces.<sup>98</sup>

This draft article is an approximation of Article 77(2) of Protocol I. Considering the diminished nature of the prohibitions it contains, one must ask whether it is truly suitable for inclusion in a draft Convention on children's rights. It is not. The result has simply made the draft article redundant or, perhaps even worse, helped to reinforce the existing law. It is unfortunate that a Working Group of the Human Rights Commission dealing with a Convention on the Rights of the Child has not seen fit to put more emphasis on the principle of humanity, and less on military necessity.

In short, the UN's response to this growing problem can only be categorised as wholly inadequate. Regardless of the precise character and content one gives to the existing law, if the UN is not prepared to use its authority and influence to ensure its implementation, there is little reason to expect a turnabout in the present trend towards an increased use of children in armed conflicts.

## VII. CONCLUSION

TRADITIONALLY, international law presumed the child to be a non-combatant. By the end of the 1960s, that presumption was no longer being made. The delegates at the Diplomatic Conference were invited by the ICRC to draft provisions which would have helped to restore and implement that presumption. Despite the best efforts of many people, they failed to meet that challenge. The silence that is greeting the rapid growth of this problem in the major organs of the UN does not give great optimism for a better result in any draft Convention on children's rights that may be achieved. The effort, however, truly to prohibit the use of children in armed conflicts must continue to be made in that context.

Henri Meyrowitz, in an elegant article on the foundations of humanitarian law,<sup>99</sup> notes two separate meanings for the term "humanity".

98. *Idem*, Annex I, draft art.20(2). A summary of the debates is found at *idem*, pp.28–30. It is worth noting that a possible conflict in terms of age may result from the provision as drafted. The Draft Convention as a whole defines child as anyone under 18 (draft art.1). This particular draft article contains two references to children, but modifies the general definition for only one of them.

99. See *op. cit. supra* n.71, especially at pp.428–430.

Writing in French, Meyrowitz equates one meaning to the German word “*menschkeir*”, or mankind. The second meaning he equates to “*menschlichkeit*”, or the motivations of compassion, empathy and sympathy that cause us to shown concern for others. He concludes:

Le droit de la guerre peut donc être vu comme une stratégie pour la sauvegarde de l’humanité—*menschkeit*, par le moyen de l’humanité—*menschlichkeit*, stratégie contre la déshumanisation, la regression vers une société, des sociétés et un monde barbarisé.<sup>100</sup>

Where, traditionally, international society and international law made an assumption on the status of children during armed conflicts, we are today faced with a clear choice. In few circumstances could Meyrowitz’s words be more applicable. We must heed these words, and make our choice wisely.

100. Translation: The laws of war may therefore be seen as a strategy for the survival of humanity—*menschkeit*, by recourse to humanity—*menschlichkeit*, as a strategy against dehumanisation, against regression towards a society, a civilisation and a world of barbarism.